The New Comity Abstention

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In the past ten years, lower federal courts have quietly but regularly abstained from hearing federal claims challenging state court procedures, citing concerns of comity and federalism. Federal courts have dismissed a broad range of substantive challenges tasked to them by Congress, including those under the Americans with Disabilities Act and the Indian Child Welfare Act. Other examples include constitutional claims involving state court eviction proceedings, foster care determinations, bail and criminal justice policies, COVID-era safety practices, and other instances where state courts impact state policy.

This paper is the first to argue that these decisions constitute a new abstention doctrine, unmoored from precedent, which I label "the new comity abstention." The new comity abstention doctrine, currently percolating in the lower federal courts, would bar enforcement of federal rights any time the action could cause a downstream effect on state court proceedings or require a federal court to review state court procedures. If fully adopted, however, the doctrine would amount to a severe threat to federal jurisdiction and a categorical abdication of the federal courts' role in enforcing fundamental federal rights against a large swath of state action.

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I proceed in three parts. In Part I, I define the new doctrine and demonstrate how it deviates from its antecedents in scale and scope. In Part II, I argue that the new doctrine lacks coherence, at least when comity and federalism concerns function as a quasi-jurisdictional bar at the threshold of litigation in federal court. Instead, as addressed in Part III, comity and federalism concerns are better understood as informing which remedies the federal court should adopt after adjudication on the merits, not whether to hear the case in the first place. Doing so acknowledges the federalism and comity concerns at play, mitigates the potential harms of federal court review, and still allows federal courts to safeguard access to federal rights.

INTRODUCTION

Between 2010 and 2014, then-Presiding Judge Jeff Davis of South Dakota's Seventh Judicial Circuit sided with the state in *every* emergency custody hearing that came before him involving an American Indian child.[1] The hearings were parents' first opportunities to challenge the state's removal of their children from their home. But each hearing lasted less than five minutes.[2] Parents were neither presented with any evidence as to the necessity of state custody[3] nor allowed to testify or put on any evidence refuting the need for state custody.[4] The state courts also undertook no inquiry into whether the emergency situation that initially justified state action had abated.[5] Once initiated, state custody then dragged on for months in the majority of cases.[6]

The Oglala Sioux and Rosebud Sioux Tribes, along with several individual parents, brought a class action under 42 U.S.C. § 1983, alleging the state court's procedures violated both the Indian Child Welfare Act (ICWA) and the Fourteenth Amendment's Due Process Clause.[7] The district court agreed with the plaintiffs and granted summary judgment, but held off on announcing remedies until additional briefing.[8] One year after the summary judgment ruling, however, the state defendants had still refused to make any corrections to their procedures. As a result, the district court issued a final declaratory judgment, along with a permanent injunction against the State's Attorney and the Department of Social Services.[9]

To the casual legal observer, the tribes' case appears to be a standard federal-law challenge to state policymaking and a due process challenge to the deprivation of a fundamental right.[10] The tribes' case is the type of lawsuit that federal courts have been deciding on the merits for decades: a question of prospective relief as to the policies and procedure, but not the outcome, of state court proceedings.

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1. *See* Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749, 757–58 (D.S.D. 2015).
2. *Id.* at 753.
3. *Id.* at 758.
4. *Id.* at 761.
5. *Id.* at 768.
6. *Id.* at 757–58.
7. *See* Class Action Complaint for Declaratory and Injunctive Relief, Oglala Sioux Tribe v. Van Hunnik, No. 5:13-cv-05020-JVL (D.S.D. Mar. 21, 2013).
8. *Oglala*, 100 F. Supp. 3d at 754, 773.
9. *See* Oglala Sioux Tribe v. Van Hunnik, No. 5:13-cv-05020-JVL, 2016 WL 7324077, at *11 (D.S.D. Dec. 15, 2016). The court noted that it had "repeatedly invited defendants to propose a plan for compliance" but defendants had refused. *Id.* at *1.
10. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80–82 (1972); Connecticut v. Doehr, 501 U.S. 1, 9–10 (1991).

And yet, on appeal, the U.S. Court of Appeals for the Eighth Circuit refused to reach the merits in this case, *Oglala Sioux Tribe v. Fleming*.[11] Instead, the circuit ordered the district court to abstain, expressing concern for the comity between federal and state courts grounded in generic notions of federalism.[12]

The Eighth Circuit is not alone. Lower federal courts throughout the country have recently declined jurisdiction over federal statutory and constitutional challenges to state policies and court procedure.[13] Courts usually recognize that their decisions to abstain are not required within the contours of existing abstention doctrines. Instead, by invoking comity and federalism concerns, courts have begun to articulate the first new abstention doctrine in decades.

These decisions exemplify what this paper labels the *new comity abstention*. This new form of abstention requires federal courts to abstain from hearing litigation challenging state court procedures or granting remedies that would affect state court proceedings. According to these circuits, abstention is required in these cases because of comity, i.e., an equal respect for state institutions, and "Our Federalism," which requires properly balancing state and federal institutions and interests in a federal system.[14] However, even as they invoke the words of *Younger v. Harris*, these circuits generally acknowledge that their opinions are not controlled by *Younger* and instead turn to the Supreme Court's alternative holding in *O'Shea v. Littleton*.[15] The courts chart a new form of abstention, adopting an expansive logic which, if strictly enforced, would result in a categorical abdication from any challenge that could implicate a state court or its procedure. Such an abdication applies even where Congress has expressly directed federal courts to intervene and ensure state and local institutions comply with their constitutional obligations or minimum federal standards.

This paper offers the first description of this new doctrine and how it might threaten Our Federalism. The stakes of this discussion are high. For most people in the United States, their primary interaction with any court system will be in state or local courts. Some people experience the impact of state legislative or

11. 904 F.3d 603, 604 (8th Cir. 2018).

12. *Id.* at 607.

13. For just a sample of these cases, see *Disability Rights New York v. New York*, 916 F.3d 129 (2d Cir. 2019) (abstaining from challenge to guardianship proceeding); *Courthouse News Service v. Brown*, 908 F.3d 1063 (7th Cir. 2018) (abstaining from First Amendment litigation seeking access to courthouse records); *Miles v. Wesley*, 801 F.3d 1060 (9th Cir. 2015) (abstaining from challenge to Los Angeles's courthouse consolidation plan); *Bice v. Louisiana Public Defender Board*, 677 F.3d 712 (5th Cir. 2012) (abstaining from challenge to fees charged to criminal defendants for public defense); and *SKS & Associates, Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010) (abstaining from challenge to housing court policy delaying evictions).

14. Younger v. Harris, 401 U.S. 37, 44–45 (1971). As addressed below, *Younger* required abstention from federal court challenges to state criminal prosecutions barring certain exceptions. It also provides the closest analogue to the newer form of abstention described in this paper.

15. 414 U.S. 488, 500–02 (1974).

executive policy through state court proceedings. And state and local courts are policymaking institutions in their own right. The new comity abstention threatens federal rights claiming by plaintiffs challenging each of these categories of state action, with federal courts preferencing abstract federalism concerns over the real harm experienced by would-be plaintiffs. An overly robust, new comity abstention doctrine will also threaten Congress's ability to pass remedial statutes and to effectively enforce federal law across a wide range of substantive contexts.

Recognizing these stakes, I have three goals in the following discussion. First, my primary goal is to describe what I have termed the *new comity abstention* in the lower federal courts and the new doctrine's potential to categorically preclude federal rights enforcement against both state courts and state policymaking involving state courts. I acknowledge the risk of naming something and, in so doing, reifying it. But I hope to show through its description that this is indeed something new, building upon—yet stretching beyond—the limited applications of federal restraint previously endorsed by the Supreme Court.

Second, I will demonstrate how the developing doctrine lacks coherence and justification, at least when it is deployed as a threshold determination that bars any adjudication of the federal claims. The new comity caselaw and the litigation underlying it offers particularly fertile ground to examine the assumptions of judicial federalism. Abstaining courts are undervaluing the importance of a federal forum for adjudicating these claims—a forum legislated by Congress and rendered necessary given the risk of bias inherent when state courts review the lawfulness of their own actions. Abstaining courts are also overvaluing or misunderstanding any putative interference with state court procedures, in light of both the systemic nature of many of these challenges and the role of state court judges as policymakers rather than adjudicators.

Finally, I argue that any valid comity and federalism concerns are properly considered at the remedial stage of litigation challenging state court procedure. This timing fits with traditional equitable practice. Where comity and federalism concerns are present, a district court might avoid issuing a broad injunction that would place it in a monitoring role. However, a district court should not refrain from issuing a declaratory judgment or a more targeted injunction merely because a state court-as-policymaker would be a defendant, because state courts or judges might attempt to ignore the district court's order, or because an order might have some follow-on effects in state court. This reframing would mitigate comity and federalism concerns, be consistent with equity, and preserve the federal courts' voice in debates about federal rights enforcement.

I.
COMITY, FEDERALISM, AND ABSTENTION

To properly understand the disjuncture represented by the new comity abstention doctrine, it is necessary to start by describing extant abstention doctrines. One of the defining features of the federal system is the existence of concurrent state and federal courts with broad areas of overlapping jurisdiction. The various abstention doctrines are attempts to work around and solve the problems of concurrent jurisdiction. As the Supreme Court has often noted, the "various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases" but instead "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."[16]

Despite the Court's admonition to avoid "rigid pigeonholes,'" both the courts and commentators have frequently framed each line of cases as discrete doctrinal tools for use in particular situations.[17] The various species of abstention doctrines include abstaining in certain "exceptional circumstances" involving parallel proceedings in state and federal court with the same parties and issues.[18] Other examples include restraining federal courts from adjudicating the validity of a state's administrative orders or comprehensive administrative schemes,[19] and the constitutionality of a state statute where the state courts might choose a different, permissible interpretation of state law.[20]

The most widespread and far-reaching abstention doctrine—and the most controversial—is the doctrine first articulated in 1971 in *Younger v. Harris*. *Younger* abstention dictates that federal courts must abstain from issuing injunctive relief addressing ongoing state proceedings that are criminal or quasi-criminal in nature.[21]

Younger's history exemplifies one common path courts take in articulating a given abstention doctrine. First, the Supreme Court approves of a new species of abstention dealing with a particular problem. In *Younger,* that problem was balancing the Court's stated concerns of comity and federalism with the

16. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987).

17. *See, e.g.*, New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350, 359–60 (1989) (concluding that "the policy considerations supporting *Burford* and *Younger* are sufficiently distinct to justify independent analyses"); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1053 n.10 (1994).

18. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). *See generally* Owen W. Gallogly, Note, *Colorado River Abstention: A Practical Reassessment*, 106 VA. L. REV. 199 (2020) (describing divergent responses to *Colorado River* abstention in Second and Seventh Circuits).

19. Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943) (abstaining from federal court challenge to "part of the general regulatory system devised for the conservation of oil and gas in Texas").

20. R.R. Comm'n v. Pullman, 312 U.S. 496, 498 (1941) (abstaining from challenge to discrimination against the train company's Black porters because it "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open").

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

availability of federal injunctive relief against state court criminal prosecutions. Second, once announced, the logic of the new abstention doctrine is often broad and applied to an expanding set of circumstances. So too with *Younger*, whose use expanded in the decades following the decision. Third, doctrines that started as a meaningful tool to deal with a particular set of concerns become over-expanded by the lower courts and threatening broader swaths of federal court jurisdiction. Facing this issue, a later Supreme Court seeks to cabin the circumstances in which a given abstention doctrine would apply. For *Younger*, that cabining came with the Supreme Court's unanimous 2013 decision in *Sprint Communications, Inc. v. Jacobs*, which emphasized federal courts' "unflagging" obligation to exercise jurisdiction and limited *Younger*'s application to three categories of federal lawsuits.[22]

Lower federal courts, however, continue to deal with particular instances of intersystemic litigation. Faced with these new challenges, yet uncomfortable with the cabining of past doctrines, lower courts have struck out again on their own. That further exemption is what I have labeled the new comity abstention.

A. Younger *Abstention from* Younger *to* Sprint

Younger claimed ancient roots, but the opinion was primarily a reaction to the Civil Rights Movement and the Supreme Court's 1965 decision in *Dombrowski v. Pfister*.[23] Under the guise of anti-Communist fervor, Louisiana criminalized a wide range of protest activities and then prosecuted civil rights activists.[24] Prosecution was continually threatened, even after state courts dismissed initial charges.[25]

Addressing the law, the Warren Court enjoined the prosecutions in a decision initially seen as something of a watershed in challenges to state criminal prosecutions on federal constitutional grounds.[26] The Court had a history, dating back at least to 1908's *Ex parte Young*, of enjoining state officials.[27] But while it cited *Ex parte Young*, the *Dombrowski* opinion treated the opening as a novel exception that proved the traditional equity rule that courts would not enjoin criminal prosecutions.[28] Instead, the Warren Court justified its intervention in primary part because of the egregious conduct of the state prosecutors, finding an exception when similar conduct would result in irreparable injury.[29] But

22. 571 U.S. 69, 77 (2013).

23. 380 U.S. 479 (1965).

24. The law required registration of any alleged subversive or Communist associations. *Id.* at 488–89.

25. *Id.* at 483.

26. *See, e.g.*, Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1103 (1977) (noting that the *Dombrowski* Court "opened the doors of the federal trial courts" to civil rights challenges to state court prosecutions).

27. *See* 209 U.S. 123 (1908); *see also* Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 641–59 (1979).

28. *Dombrowski*, 380 U.S. at 483–85.

29. *Id.* at 490.

Dombrowski, in treating injunctive relief against state criminal prosecutions as novel and exceptional, left the decision vulnerable.[30] Six years later, *Younger* would exploit that vulnerability and cabin *Dombrowski* to its facts.

Like *Dombrowski*, *Younger* grew out of a First Amendment overbreadth challenge to state criminal proceedings.[31] John Harris, Jr., a member of the socialist Progressive Labor Party, had been prosecuted under the California Criminal Syndicalism Act.[32] Harris then challenged his prosecution in federal court, which, because the lawsuit sought an injunction against state actors, proceeded before a three-judge district court.[33] The district court held that the Act was overbroad and void for vagueness, and it enjoined the prosecutions. Evelle J. Younger, then the District Attorney for Los Angeles, appealed as of right to the Supreme Court.

Justice Black began the opinion at "the beginning of this country's history," claiming that Congress had long expected that states would generally be free of federal intervention and injunctions.[34] The opinion stated that "Our Federalism" was built on "notions of comity," which the Court 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."[35]

But in addition to the comity concerns, the Court noted that equitable relief was only appropriate where a plaintiff could demonstrate irreparable injury.[36] According to the Court, state court defendants normally could not demonstrate injury if they had an adequate remedy at law.[37] That is, state court defendants were not injured if they could raise their constitutional claims in a state criminal proceeding.[38] *Dombrowski* offered one such circumstance: there, according to the *Younger* Court, the plaintiffs alleged that the state officials were operating in bad faith with no expectation of a valid conviction.[39] Harris had not alleged bad faith or challenged a series of repeated prosecutions.[40] The Court ordered abstention.

Several questions remained about the scope of this new *Younger* abstention. The first question would be resolved quickly. The *Younger* intervenors, whom

30. Laycock, *supra* note 27, at 660–63.

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

32. *Id.* at 39. Harris was later joined by two fellow party members who argued their speech would be chilled, but had not been prosecuted, as well as a professor at Los Angeles Valley College who felt the Harris prosecution made him unsure if he could discuss Marx in class. *Id.* at 39–40. The Court held that all three lacked standing. *Id.* at 42–43.

33. Harris v. Younger, 281 F. Supp. 507, 508 (C.D. Cal. 1968).

34. *Younger*, 401 U.S. at 43.

35. *Id.* at 44.

36. *Id.* at 43.

37. *Id.* at 43–44.

38. *Id.*

39. *Id.* at 48.

40. *Id.* at 50.

the Court said did not have standing, had not sought a declaratory judgment.[41] But in *Samuels v. Mackell*, decided the same day as *Younger*, the Court held that *Younger*'s doctrine applies equally to declaratory judgments sought against pending state criminal proceedings where the federal judgment "result[s] in precisely the same interference with and disruption of state proceedings" as an injunction.[42]

The next question that needed resolution, explicitly left open by the *Younger* decision, was whether abstention was required when no state proceedings were pending.[43] This question did not stay open for long.

In *Steffel v. Thompson*, the Court held that abstention was inappropriate absent pending proceedings.[44] Like other abstention cases, *Steffel* originated in a First Amendment challenge. The federal plaintiffs tried to distribute anti-war leaflets at a Georgia shopping mall on several occasions. On one occasion, they were warned that they were likely to be arrested under Georgia's criminal trespass statute if they went back to the mall.[45] One plaintiff, Mr. Becker, later returned and was arrested. Mr. Steffel left and did not return again because he testified he did not "want to be arrested that badly."[46] But Mr. Steffel's reluctance would ultimately make all the difference.[47]

Writing for the Court, Justice Brennan concluded that the prosecution threatened against Mr. Steffel was not merely speculative—the plaintiff had been threatened with prosecution twice—and rejected the Fifth Circuit's requirement that plaintiffs demonstrate bad faith before a finding of irreparable injury.[48] Steffel had abandoned his request for an injunction, but Justice Brennan noted that when a state prosecution is not pending, "considerations of equity, comity, and federalism have little vitality."[49]

Much of Justice Brennan's opinion, however, focused on the availability of declaratory relief, which the Fifth Circuit had rejected out of hand when it denied Steffel's request for an injunction. Justice Brennan located the origin of the Declaratory Judgment Act in the ferment of the post-Civil War push toward a more robust federal jurisdiction.[50]

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41. *Id.* at 41 n.2.

42. 401 U.S. 66, 72 (1971).

43. *See Younger*, 401 U.S. at 41 ("We express no view about the circumstances in which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.").

44. Steffel v. Thompson, 415 U.S. 452, 475 (1974).

45. Becker v. Thompson, 334 F. Supp. 1386, 1387–88 (N.D. Ga. 1971). The plaintiffs' action in *Steffel* predated *Younger*, but the district court stayed proceedings to await the *Younger* decision.

46. Becker v. Thompson, 459 F.2d 919, 921 (5th Cir. 1972).

47. The district court abstained from Becker's claims because of *Younger* but recognized that Steffel posed a different issue. Ultimately, however, the district court reasoned that precedent counseled against "hypothesiz[ing] as to what the consequences of a future arrest might be" and concluded Steffel and the putative class could not show irreparable injury. *Becker*, 334 F. Supp. at 1389.

48. *Steffel*, 415 U.S. at 459.

49. *Id.* at 462.

50. *Id.* at 463–64.

Under the Declaratory Judgment Act, enacted in 1934, federal courts "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[51] For Justice Brennan, the Declaratory Judgment Act took its place alongside legislation like the Three-Judge Court Act and the Tax Injunction Act of 1937 as demonstrating congressional concern over *Ex parte Young* and injunctions against state officials.[52] The Declaratory Judgment Act was intended to provide an alternative to injunctive relief specifically against state officials. Requiring that federal court plaintiffs demonstrate "all of the traditional equitable perquisites" for an injunction would "defy Congress'[s] intent to make declaratory relief available in cases where an injunction would be inappropriate."[53] So, even if *Younger* could be properly applied to Becker's request for injunctive relief, Steffel's request for a declaratory judgment was proper "when no state prosecution [wa]s pending and a federal plaintiff demonstrate[d] a genuine threat of enforcement."[54]

With several basic questions about the scope of *Younger* settled, the Court proceeded to expand *Younger* beyond the confines of its criminal-law origins. The expansion came in the 1975 decision in *Huffman v. Pursue, Ltd.*, which applied *Younger* to federal civil challenges to state public nuisance laws' enforcement.[55] Two years later, in *Juidice v. Vail*, then-Justice Rehnquist reasoned states had an "important interest" in a pending civil contempt proceeding because contempt "vindicates the regular operation [of a state's] judicial system, so long as that system affords the opportunity to pursue federal claims within it."[56] In 1982, the Court required abstention from a challenge to pending state bar disciplinary proceedings.[57] The state's interest was clear because "an agency of the Supreme Court of New Jersey [was] the named defendant" in the federal suit, and the federal plaintiff, a civil rights lawyer who had criticized the state courts, could have raised any federal objections in the proceedings and had them reviewed by the Supreme Court of New Jersey.[58] Finally, the Court seemed to suggest that *Younger* extended to state administrative proceedings, abstaining from a religious school's First

51. 28 U.S.C. § 2201(a).

52. *Steffel*, 415 U.S. at 467–68.

53. *Id.* at 467–68, 471. *But see* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1095 (2014) (arguing that injunctions and declaratory judgments may be "rough substitutes, and in many cases they have the same effect," but "[t]he most important difference is their capacity for management, in the sense of judicial direction and control of the parties").

54. *Steffel*, 415 U.S. at 475.

55. 420 U.S. 592 (1975).

56. 430 U.S. 327, 335 (1977).

57. Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 423 (1982).

58. *Id.* at 433–35, 437. As Justice Marshall noted in a concurrence, it was significantly less clear whether there was an adequate forum to raise constitutional objections at the time the federal case was first filed. *Id.* at 438 (Marshall, J., concurring). By the time the case reached the Supreme Court, however, New Jersey had modified its procedures to clarify that constitutional claims could be considered. *Id.* at 439; *see also id.* at 436.

Amendment challenge to a sex discrimination claim pending before the Ohio Civil Rights Commission.[59]

Unlike the initial decision in *Younger*, which was decided 8-1, the subsequent opinions expanding the reach of the doctrine were often hotly contested and not entirely consistent with each other. As former federal prosecutor James Rehnquist has noted, the Court's focus on the pending case requirement meant that any extension of *Younger* would not address whether the federal litigation was duplicative of state litigation. Rather, it would concern whether the state's interest was important enough to implicate comity concerns inherent in Our Federalism.[60] The methodology was one of analogy: asking how similar was the case at hand, and the state's interest in a given issue, to *Younger*'s heartland of injunctive relief against pending state criminal proceedings.[61] In drawing that analogy, the Court would be largely focused on the "importance of the generic proceedings to the State,"[62] rather than the outcome of any particular case, therefore preferencing the state's interest in the litigation and its forum choice over any would-be federal plaintiff seeking to assert their constitutional rights.[63]

The Court's methodology also risked offering no meaningful limitation to what could constitute a weighty state interest.[64] Were it a meaningful limitation, any federal court deciding whether to abstain would first have to pass on whether the state really had an important interest in a given issue. But it is difficult to see how a court could meaningfully question a state's interest without running directly into the type of comity concerns that *Younger* purports to guard against. Either a federal court would have to hold that the state passes unserious laws, or the fact that the state undertook any regulation in a given area—whether through criminal sanction or an administrative or legislative scheme—could be enough to find a compelling state interest.[65]

Perhaps based on these concerns, the Court moved to cabin *Younger*. In 1989's *New Orleans Public Services, Inc. v. Council of the City of New Orleans*, the Court considered whether to abstain in a dispute between a state and a utility over the state's ratemaking authority.[66] Writing for the Court, Justice Scalia located the federal courts' authority to abstain as "part of the common-law background against which the statutes conferring jurisdiction were enacted."[67] There was room to abstain, Justice Scalia wrote, but only for "carefully defined"

59. Ohio C.R. Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 619 (1986).
60. *See* Rehnquist, *supra* note 17, at 1090.
61. *Id.*
62. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 365 (1989).
63. *Cf.* Rehnquist, *supra* note 17, at 1092.
64. *Id.* at 1091–92.
65. *Id.* at 1092 n.236.
66. 491 U.S. 350 (1989).
67. *Id.* at 359.

situations—including the "far-from-novel" *Younger*.[68] After cataloguing *Younger*'s expansion, Scalia rejected any further expansion "in deference to a state judicial proceeding reviewing legislative or executive action."[69] Indeed, "such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."[70]

The Court's most recent (and perhaps final) word on *Younger* came with 2013's unanimous decision in *Sprint Communications, Inc. v. Jacobs*.[71] The origin of *Sprint* lay in administrative proceedings before the Iowa Utilities Board (IUB) between Sprint, the national provider, and Windstream Iowa Communications, Inc.[72] While Sprint regularly paid Windstream for long-distance calls received by Windstream's Iowa customers, Sprint concluded that the federal Telecommunications Act of 1996 preempted state regulation of Voice over Internet Protocol (VOIP) calls.[73] Sprint thus withheld certain charges, Windstream threatened to block calls, and Sprint sought to clarify its liability from the IUB.[74]

Before IUB could decide the issue, the parties settled. Sprint sought to withdraw the administrative complaint, but the IUB thought that the legal question—whether VOIP calls are subject to intrastate regulation and charges—would reoccur. It proceeded to decide that question against Sprint, over Sprint's objections that the state's regulation of the issue was preempted by the Telecommunications Act of 1996.[75]

Sprint filed state and federal cases challenging the IUB's interpretation, but the district court abstained, citing *Younger*.[76] The district court thought Sprint's requested declaratory relief would interfere with the state court proceedings, because it would effectively enjoin the IUB from enforcing its decision and therefore be "tantamount to an injunction against the state court proceeding."[77] The district court also concluded that the state had a significant interest in regulating utilities and that the state could vindicate those interests in the state proceeding even though it was Sprint, not the IUB, that had initiated the state

68. *Id.* at 359, 364. In *New Orleans Public Service Inc.*, the Court also rejected the utility's argument that *Burford* abstention applied.

69. *Id.* at 368.

70. *Id.* (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

71. 571 U.S. 69 (2013).

72. *Id.* at 72.

73. *Id.*

74. *Id.*

75. *Id.* at 74.

76. Sprint Commc'ns Co. v. Berntsen, No. 4:11-CV-00183-JAJ, 2011 WL 13193313, at *3 (S.D. Iowa Aug. 1, 2011), *aff'd in part, vacated in part, remanded sub nom.* Sprint Commc'ns Co. v. Jacobs, 690 F.3d 864 (8th Cir. 2012), *rev'd sub nom.* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69 (2013), *vacated*, 746 F.3d 850 (8th Cir. 2014).

77. *Sprint*, 2011 WL 13193313, at *4.

court action.[78] The Eighth Circuit substantially affirmed the lower court's decision.[79]

The Supreme Court reversed, with Justice Ginsburg writing for a unanimous court.[80] *Younger* defined one class of cases with "a parallel pending state criminal proceeding" as requiring courts to abstain.[81] The *Sprint* Court acknowledged that the Court had extended *Younger* to two other settings: "particular state civil proceedings that are akin to criminal proceedings . . . [and] those that implicate a State's interest in enforcing the orders and judgments of its courts."[82] The Court recognized that these settings were the same categories articulated in *New Orleans Public Services, Inc.* and that they were "exceptional."[83] The Court had not applied *Younger* outside them, nor would it: according to the Court in *Sprint*, the three categories "define[d] *Younger*'s scope."[84]

Importantly, the *Sprint* Court also rejected the IUB's argument that *Middlesex County Ethics Committee v. Garden State Bar Association*'s additional factors—(a) a pending proceeding that (b) implicates an important state interest and (c) provides an adequate opportunity to raise federal challenges—were meant to exist outside *Younger*'s framework.[85] For Justice Ginsburg, these additional factors only applied if a case fell within *Younger*'s remit, as limited by *New Orleans Public Services, Inc.* and, ultimately, *Sprint.* To decide the other way, and to focus on the *Middlesex* factors, "would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest."[86]

In other words, the *Sprint* court returned *Younger* to its exceptional status, regardless of the broad language of the Court in its initial formulation and the doctrine's subsequent expansion. As Professor Maggie Gardner has noted, the *Sprint* Court ultimately "made clear its disinterest in further expanding abstention principles," with abstention representing "not a blunt instrument to be invoked broadly, but a scalpel to be used rarely, if at all."[87] Before taking the federal bench, then-Professor Anne Rachel Traum likewise has argued that *Younger* is now a "doctrine in transition," with federal courts increasingly adjudicating civil rights challenges to state criminal court behavior.[88]

78. *Id.* at *6.
79. *Sprint*, 690 F.3d at 869.
80. *Sprint*, 571 U.S. at 72.
81. *Id.*
82. *Id.* at 72, 78.
83. *Id.* at 78.
84. *Id.*
85. *Id.* at 80–82.
86. *Id.* at 81.
87. Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 77–79 (2019).
88. *See* Anne Rachel Traum, *Distributed Federalism: The Transformation of* Younger, 106 CORNELL L. REV. 1759, 1762 (2021).

But focusing primarily on *Younger* and *Sprint* has risked leaving out a larger landscape of opinions interpreting comity and federalism's boundaries, including those this Article identifies as the new comity abstention cases. To fully ground that discussion, though, we must first turn to the Supreme Court's decision in *O'Shea v. Littleton*, originally decided the same term as *Steffel*.

B. O'Shea v. Littleton

O'Shea dealt with events in Cairo, Illinois, a town that sits at the confluence of the Mississippi and Ohio rivers. In fiction, Cairo is Huck and Jim's destination in their attempt to get Jim to freedom.[89] In fact, however, Cairo has had a long and troubled history with White supremacy and violence against its Black residents. By the time one piece of that history was presented to the Court, Justice Douglas recognized that the town and the surrounding Alexander County possessed a "more pervasive scheme for suppression" of Black residents' civil rights than he had ever seen.[90]

Whatever benefit sitting at the confluence of two major American rivers conferred had long dried up by the early 1960s.[91] The economic effects were not borne equally. Black residents earned a fraction of what White residents earned and experienced a significantly higher unemployment rate because White businessowners refused to hire Black employees.[92]

Black residents organized an economic boycott of White-owned businesses in Cairo to combat the discrimination, and the backlash to the boycotts was swift and fierce.[93] White residents organized a vigilante group called the White Hats, which the local police department then deputized to harass the boycotters. Black residents were continually hurt and threatened by White residents, yet the police department refused to hear their complaints.[94] The White Hats were eventually disbanded but remained an influential informal group, with several leaders elected to the town council.[95]

By 1970, civil rights activists had identified what they saw as a pattern of intentional discrimination centered on state court criminal prosecutions.[96] Activists claimed that the state's attorney refused to prosecute White residents who had threatened, physically assaulted, or shot at the predominantly Black

89. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1885). I am grateful to my friend Marian Messing who called my attention to this bit of Cairo's literary history.

90. O'Shea v. Littleton, 414 U.S. 488, 510 (1974) (Douglas, J., dissenting).

91. *See* U.S. COMM'N ON C.R., CAIRO, ILLINOIS: A SYMBOL OF RACIAL POLARIZATION 1 (1973).

92. *Id.* at 1–2.

93. *Id.* at 3.

94. *Id.* at 5–6.

95. *Id.* at 4–5.

96. *See* Complaint ¶ 30, Littleton v. Berbling, Civ. No. 70-103 (E.D. Ill. July 23, 1970); Appendix at 2–13, O'Shea v. Littleton, 414 U.S. 488 (1974) (No. 72-953).

protestors.[97] But they also claimed that the state court's judges gave harsher bail terms to Black residents than White residents.[98]

Several residents filed a putative class action civil rights complaint.[99] The suit named Dorothy Spomer and Michael O'Shea, two county judges, and W.C. Spomer, the state's attorney, as defendants.[100] The district court dismissed the case, holding that plaintiffs were requesting the court to override the state courts' judgment and discretion in hearing state criminal matters.[101]

The Seventh Circuit reversed, finding no judicial immunity for injunctive relief and that the district court should have exercised jurisdiction. The court instead held that, at a minimum, the lawsuit could proceed beyond the motion to dismiss. In its discussion of judicial immunity, the Seventh Circuit turned to the newly decided *Younger v. Harris* in order to distinguish the case.[102] The court noted that the plaintiffs were merely seeking to enjoin the arbitrary bail and sentencing policies, and that such relief was not within *Younger*'s scope.[103] The court thought that the plaintiffs' burden to show intentional discrimination was high. Nonetheless, even if the plaintiffs were unlikely to meet the burden, it was possible that they could show such discrimination.[104]

The Seventh Circuit recognized that it had entered somewhat unchartered territory by ordering the lawsuit to proceed and therefore, as the dissent framed it, requiring the prosecution of additional White defendants.[105] Normally the Circuit would not have discussed remedy at this stage but, with the perceived novelty of the case, the majority stated it was necessary to give some guidance to the district court for remand.[106] It did not mean that an injunction would "require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney," but it expected that the district court could fashion an initial order to "set out the general tone of rights to be protected" and require some basic reporting mechanism.[107] The court claimed it understood the

97. *See, e.g.*, Appendix, *supra* note 96, at 19. In one instance, a White resident struck Morris Garrett, a thirteen-year-old boy, while Garrett was protesting, but when the case was presented to the grand jury the prosecutor merely questioned Garrett and his motives, apparently suggesting Garrett had been paid to protest. *See* Brief of Respondents at 7, O'Shea v. Littleton, 414 U.S. 488 (1974) (No. 72-953), 1972 WL 136519, at *7. In another instance, White resident Jack Guetterman, Jr., fired at protesters and, as the protestors appealed for help from the police on the scene. Guetterman's father punched one man in the assembled crowd in the face and knocked him to the ground. *Id*. Once before a grand jury, however, the prosecutors refused to call witnesses or question the man who had been punched. *Id.*

98. Appendix, *supra* note 96, at 2.

99. *Id.*

100. *Id.* at 2, 16–17. The original state's attorney was Peyton Berbling.

101. *See* Littleton v. Berbling, 468 F.2d 389, 394–95 (7th Cir. 1972).

102. *Id.* at 408–09.

103. *Id.* at 408.

104. *Id.*

105. *Id.* at 417.

106. *Id.* at 414.

107. *Id.* at 414–15.

difficulty of crafting an appropriate and effective remedy, but concluded that the difficulty of the remedy could not be a reason to dismiss the case outright.

The Seventh Circuit's remedial discussion would prove a fateful choice after the Supreme Court granted certiorari. The case reached the Court well after the high-water mark of the Court's willingness to enforce federal rights. Just a few years removed from its decision in *Younger*—and in the same term as *Steffel*—the Court reversed 6-3.

The majority opinion, written by Justice Byron White, largely glossed over the underlying racial animus driving the lawsuit.[108] The primary holding of *O'Shea* addressed justiciability, not abstention. The plaintiffs had not challenged any particular criminal statute, but rather argued that the state's attorney and the judicial defendants would enforce the state's laws in an unconstitutional manner. The Court concluded that the plaintiffs had alleged a general pattern or practice of discrimination that lacked specificity about past harms and was too speculative as to any future harms.[109] Several plaintiffs had previously been prosecuted and thus came directly into contact with the alleged offending conduct. But, the Court held that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding relief" without "continuing, present adverse effects."[110]

To the extent that *O'Shea* has continued to be cited by or remembered by academics over the last several decades, its justiciability holding remains front and center.[111] The primary holding thus reflects standing principles that would reach fuller expression in *City of Los Angeles v. Lyons*.[112]

The Court only reached abstention as an alternative holding. Even if there were a justiciable controversy, the Court reasoned equitable restraint would be required because "[w]hat they seek is an injunction aimed at controlling or preventing the occurrence of specific events in the course of future state criminal trials."[113] The Court expressed concern that any injunction would allow criminal defendants to seek compliance with the injunction in federal court while their proceedings were pending in state court. This, according to the majority, was "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent."[114] Federal courts would have to maintain "continuous supervision" and a "form of monitoring of the operation of state

108. O'Shea v. Littleton, 414 U.S. 488, 497 (1974).

109. *Id.* at 493.

110. *Id.* at 495–96.

111. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 372–73 (1976); City of Los Angeles v. Lyons, 461 U.S. 95, 102–04 (1983); *see also* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID J. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 125, 232 (7th ed. 2015).

112. *See* 461 U.S. at 105–13.

113. *O'Shea*, 414 U.S. at 500.

114. *Id.*

court functions."[115] Federalism, and in particular federalism's animating concern of comity, would not permit "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings."[116] Abstention might be appropriate in those settings.

It is important to note that the abstention holding in *O'Shea* is best understood as *dicta*. Once the Court decided there was no standing, there was no constitutionally justiciable conflict. And of course, once there was no justiciable conflict, the Court would be delivering an advisory opinion.

Furthermore, the Court's expansive abstention language, read by many courts recently as a blanket prohibition against similar forms of oversight-through-injunction, had little bearing on what had actually happened below. Again, the Seventh Circuit had not upheld any specific factfinding, nor had it required specific injunctive relief; it only suggested the types of relief that might be available to the plaintiffs depending on what injuries they later proved at the district court.[117]

Nonetheless, as I will address in the next section, federal courts have used *O'Shea*'s expansive language in the wake of *Sprint* to abstain from a rapidly expanding set of challenges to state court procedure. I will turn to this new comity abstention for the rest of this paper.

C. Defining the New Comity Abstention

Enter, then, the new comity abstention.[118] Despite *Younger*'s cabining in *Sprint*, circuit courts have continued to face cases seeking to enjoin state actors, both in and adjacent to state courts and their proceedings. Courts presented with these challenges have generally agreed that *Younger* does not actually control their decisions, but these courts nonetheless look for a convenient way to dodge the merits of each controversy.[119] And so, instead, the courts have taken *O'Shea*'s expansive *dicta* literally, and then expanded it beyond its terms.[120]

115. *Id.* at 501.

116. *Id.* at 502.

117. *See* Littleton v. Berbling, 468 F.2d 389, 414 (7th Cir. 1972).

118. The normal convention is to name abstention doctrines after their founding opinion. But I have resisted that trend here for two reasons. First, as I argue here, *O'Shea* itself does not require the results reached by the abstaining courts, nor does that decision even attempt to claim it announces a new species of abstention. Second, and perhaps more importantly, by choosing a descriptive label—the new comity abstention—I intend to highlight the way the new doctrine works in practice, its primary concerns, and its (dis)continuity with other forms of abstention grounded in comity and federalism.

119. *See, e.g.*, Courthouse News Serv. v. Brown, 908 F.3d 1063, 1071 (7th Cir. 2018) ("*Younger*, with its extension in *O'Shea* and *Rizzo*, is most closely applicable to the present case; however, it is not a perfect fit, and we ultimately base our decision on the more general principles of federalism that underlie all of the abstention doctrines.").

120. *See, e.g.*, Kaufman v. Kaye, 466 F.3d 83, 86 (2d Cir. 2006) (referring to *O'Shea* as a "controlling decision of the Supreme Court" and abstaining from challenge).

1. The Definition and Scope of the New Comity Abstention

The new comity abstention bars federal courts from hearing litigation that would alter state court proceedings or state court procedure. According to abstaining courts, restraint is required wherever:

- "Plaintiffs seek an injunction to control conduct that might occur" in a future state court proceeding;[121] or "have a federal court tell state courts how to manage and when to decide a category of cases pending in the state courts;"[122] or,
- relief would be "intrusive in the administration of the [state] court system;"[123] or would "occasion 'an ongoing federal audit of' the state . . . hearings;"[124] or,
- litigation would require federal courts to review the "internal procedures" of state courts;[125] or to force state courts "to comply with numerous procedural requirements."[126]

In practice, the new comity abstention doctrine represents an expansive vision of abstention—a blunt instrument rather than the scalpel, cleaving large parts of federal constitutional and statutory law from the remit of the federal courts vested with jurisdiction. If fully accepted, the doctrine would function as a categorical bar on enforcing federal rights on a large portion of state policymaking: anytime enforcement could affect state court proceedings or procedure, no matter how attenuated the risk or the degree of potential interference.[127]

In keeping with that broad categorical bar, the new comity abstention is remarkably transubstantive. Consider, for instance, the range of cases where this new comity abstention has been invoked, particularly in challenges to court systems like housing court,[128] family court,[129] and even parking court,[130] that affect millions of individuals every year. The emerging doctrine has also justified federal courts' dismissals of lawsuits challenging COVID-era safety protocols[131]

121. Hall v. Valeska, 509 F. App'x 834, 836 (11th Cir. 2012).

122. SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 679 (7th Cir. 2010).

123. *Kaufman*, 466 F.3d at 86.

124. Jonathan R. v. Justice, 41 F.4th 316, 334 (4th Cir. 2022) (quoting O'Shea v. Littleton, 414 U.S. 488, 500 (1974); *see also* Disability Rts N.Y. v. New York, 916 F.3d 129, 134 (2d Cir. 2019).

125. *See, e.g.*, Courthouse News Serv. v. Brown, 908 F.3d 1063, 1070 (7th Cir. 2018) ("We conclude that the state courts deserve the first opportunity to hear such a constitutional challenge to their internal procedures.").

126. Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 612 (8th Cir. 2018).

127. *But see* Courthouse News Serv. v. Gilmer, 48 F.4th 908, 914 (8th Cir. 2022) (rejecting state court officials' argument that "even the mere *threat* of interference with state proceedings is enough").

128. *See, e.g.*, Miles v. Wesley, 801 F.3d 1060 (9th Cir. 2015).

129. *See, e.g.*, 31 Foster Child. v. Bush, 329 F.3d 1255 (11th Cir. 2003); *Oglala*, 904 F.3d 603.

130. *See, e.g.*, Ballard v. Wilson, 856 F.2d 1568 (5th Cir. 1988) (abstaining from challenge to municipal parking law based, in part, on failure of courts to provide advance notice of allegations, changing the presumption or burden).

131. *Compare* Bronx Defs. v. Off. of Ct. Admin., 475 F. Supp. 3d 278, 285–86 (S.D.N.Y. 2020), *with* McPherson v. Lamont, 457 F. Supp. 3d 67, 85 n.11 (D. Conn. 2020).

and litigation over foster care placements that do not address court proceedings at all.[132]

The new comity abstention is regularly raised in a range of matters collateral to states' criminal justice systems. In 1975, the Supreme Court held in *Gerstein v. Pugh* that collateral challenges to bail proceedings could go forward, holding that *Younger* did not apply.[133] Yet courts continue to reject bail challenges on abstention grounds by relying on *O'Shea.*[134] Courts have also addressed comity abstention in cases involving criminal justice debt, fines and fees,[135] and challenges to the funding structures of public defenders' offices raised collaterally to criminal prosecutions.[136]

The doctrine's application is not limited to constitutional challenges. Courts have abstained from challenges under the Americans with Disabilities Act (ADA),[137] despite *Tennessee v. Lane*'s holding that the ADA applied to state courts in addition to other state agencies.[138] And, as addressed above, the Eighth Circuit abstained in *Oglala*, which was brought under the Indian Child Welfare Act.[139]

The new comity abstention caselaw is often messy, and defendants do not always succeed in convincing the federal courts to abstain.[140] Circuits are split over specific contexts: litigation over Courthouse News Service's First Amendment claims to access court records have been allowed to proceed in the Fourth, Eighth and the Ninth Circuits, yet were dismissed in the Seventh.[141]

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132. *31 Foster Child.*, 329 F.3d at 1278–79 ("Even though any remedial order would run against the Department, state law makes it a duty of state courts to decide whether to approve a case plan, and to monitor the plan to ensure it is followed.").

133. *See* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

134. *Cf.* Daves v. Dallas County (*Daves I*), 22 F.4th 522, 547–48 (5th Cir. 2022) (remanding to district court to consider abstention in bail case, noting *O'Shea* and *Gerstein*, and claiming 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"). The roots of this debate between *Gerstein* and *O'Shea* date back to the time the cases were decided and have been carried forward since. *See* Wallace v. Kern, 520 F.2d 400, 405–06 (2d Cir. 1975).

135. *See, e.g.*, Disability Rts. N.Y. v. New York, 916 F.3d 129, 132 (2d Cir. 2019).

136. *See* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 712 (5th Cir. 2012).

137. *See* Bronx Defs. v. Off. of Ct. Admin., 475 F. Supp. 3d 278, 281 (S.D.N.Y. 2020).

138. Tennessee v. Lane, 541 U.S. 509, 527 (2004).

139. Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 606 (8th Cir. 2018).

140. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1255 (11th Cir. 2018); Arevalo v. Hennessy, 882 F.3d 763, 766 n.2 (9th Cir. 2018).

141. *Compare* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1063 (7th Cir. 2018) (dismissing Courthouse News Service's First Amendment claim and focusing on states' interest in "running their own clerk's office"), *with* Courthouse News Serv. v. Planet, 750 F.3d 776, 786, 781 (9th Cir. 2014) (rejecting abstention because inter alia, bright-line injunction was possible and in determining compliance with an injunction, "federal court would not need to engage in the sort of intensive, context-specific legal inquiry"), *and* Courthouse News Serv. v. Schaefer, 2 F.4th 318, 325 n.2 (4th Cir. 2021) (rejecting abstention because there was no pending case and chiding the decision in *Brown* as "inconsistent with our precedent and Supreme Court guidance"), *and* Courthouse News Serv. v. Gilmer, 48 F.4th 908, 914 (8th Cir. 2022) (noting decision would not interfere with "any state-court proceeding, despite the significant administrative burden it might place on court staff").

Likewise, both Indiana and West Virginia argued versions of comity abstention in recent systemic challenges to the states' foster care system.[142] The Seventh Circuit agreed with Indiana that abstention was appropriate in a cursory opinion;[143] the Fourth rejected West Virginia's arguments.[144]

Circuits that have addressed new comity abstention issues vary in the degree and scope of the doctrine's adoption. The Second,[145] Seventh,[146] and Eighth[147] Circuits have most expansively used the new comity abstention. In line with its decision in *Jonathan R. v. Justice*, the Fourth Circuit is least likely to abstain.[148] The Ninth[149] and Eleventh[150] are in-between, accepting the doctrine's premises in certain contexts but rejecting them in others.

Presently, Fifth Circuit precedent appears in transition. The Fifth Circuit has abstained on comity grounds, exemplified by in 2015's *Bice v. Louisiana Public Defender Board* opinion challenging Louisiana's public defender funding scheme.[151] But in 2018 in *ODonnell v. Harris County*, the Circuit rejected

142. *See* Brief and Required Short Appendix of Appellants at 23–24, Ashley W. v. Holcomb, 34 F.4th 588 (7th Cir. 2022) (No. 21-3028), 2021 WL 6199416, at *23–24; Response Brief of Appellees at 49–51, Jonathan R. v. Justice, 41 F.4th 316 (4th Cir. 2022) (No. 21-01868), 2021 WL 5889403, at *49–51.

143. *See Ashley W.*, 34 F.4th at 594. The decision is muddled and lightly reasoned. But the court appears to be saying that because at some point children have been or will be involved in a state family court proceeding—a Children in Need of Services (CHINS) proceeding—they must present all their claims there, even though plaintiffs were challenging the behavior of the state foster agency and not the procedures of the state court. *Id.*

144. *See Jonathan R.*, 41 F.4th at 333–35. The Fourth Circuit relied heavily on *Sprint*. *Id.* at 331–32. Also, the Fourth Circuit highlighted that plaintiffs asked the federal court to enjoin only West Virginia's Department of Health and Human Resources, not anything regarding the state courts. *Id.* at 331.

145. Disability Rts. N.Y. v. New York, 916 F.3d 129, 136 (2d Cir. 2019) (relying on *O'Shea* to urge abstention wherever plaintiffs might be construed to request relief that would "control or prevent the occurrence of specific events that might take place in the court of future state" proceedings) (cleaned up).

146. *See, e.g.*, SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 677 (7th Cir. 2010) (stating that federal courts "may, and often must, decline to exercise [their] jurisdiction where doing so would intrude upon the independence of the state courts and their ability to resolve the cases before them").

147. Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 611 (8th Cir. 2018) (finding abstention was necessary where federal court would be "dictating what procedures must be used in an ongoing state proceeding").

148. *See, e.g.*, *Jonathan R.*, 41 F.4th at 334 (declining to abstain from challenge to state foster care agency's placement procedures).

149. *See, e.g.*, Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014) (declining to abstain in a First Amendment challenge to clerk's office procedures); Arevalo v. Hennessy, 882 F.3d 763, 766 n.2 (9th Cir. 2018) (refusing to abstain in habeas litigation over conditions of pretrial detention); Miles v. Wesley, 801 F.3d 1060 (9th Cir. 2015) (finding *O'Shea* mandated abstention to class action challenging Los Angeles County Superior Court's restructuring and consolidation plan).

150. *Compare* 31 Foster Child. v. Bush, 329 F.3d 1255, 1276 (11th Cir. 2003), *and* Luckey v. Miller, 976 F.2d 673, 676 (11th Cir. 1992) (abstaining from a suit challenging the adequacy of Georgia's indigent criminal defense system where challenge would "restrain[] every" prosecution "until the systemic improvements they wanted are in place"), *with* Walker v. City of Calhoun, 901 F.3d 1245, 1255 (11th Cir. 2018) (declining to abstain from challenge to bail policies because it would not interfere with state criminal prosecutions).

151. Bice v. La. Pub. Def. Bd., 677 F.3d 712, 712 (5th Cir. 2012).

abstention arguments in a case challenging the ways in which Houston's bail policies criminalized poverty.[152] Commentators have generally celebrated that decision for what it said about the retreat from *Younger* after *Sprint* and for providing an opportunity for civil rights claims challenging state criminal procedure to move forward on the merits.[153] Yet the Fifth Circuit is now in retreat.

In *Daves v. Dallas County*, a case challenging Dallas's bail procedures on similar grounds to *ODonnell*, an *en banc* Fifth Circuit addressed comity abstention *sua sponte*.[154] It remanded to the district court with explicit instructions for the lower court to consider *O'Shea* alongside *Younger*, and for the lower court to decide the issue as if *ODonnell* did not bind it.[155]

The *en banc* court then went out of its way to overrule *ODonnell*, holding that federal courts must abstain from hearing challenges to state bail procedures.[156] The precise contours of *Younger* were less important than *O'Shea*'s, according to the majority. Requiring Dallas's criminal courts to comply with a bright-line injunction detailing a basic set of due process considerations "plainly show[ed] federal court involvement to the point of ongoing interference and 'audit' of state criminal procedures."[157] Instead, bail challenges had to be channeled into state courts, with individual defendants challenging their bail through state habeas.[158]

It might seem easy to explain the Fifth Circuit's recent pivot toward a renewed, more vigorous comity abstention doctrine as a result of that court's increasingly rightward turn. But elsewhere, the new comity caselaw defies a simple ideological explanation. Both Republican and Democratic judicial appointees have adopted expansive versions, usually without dissent. Indeed, the new comity abstention increasingly provides the justification for closing the courthouse door to federal plaintiffs seeking to challenge the deficiencies of state policy or procedure and looking to assert their federal rights in a federal forum.

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152. ODonnell v. Harris County, 892 F.3d 147, 156–57 (5th Cir. 2018).

153. *See, e.g.*, Traum, *supra* note 88, at 1762 (citing *ODonnell* and other cases to argue that "*Younger* is a doctrine in transition" and claiming that these decisions are "forcing a new dialogue on the role of federal courts in enforcing constitutional rights in state courts").

154. Daves v. Dallas County (*Daves I*), 22 F.4th 522, 548–49 (5th Cir. 2022).

155. *Id.*

156. Daves v. Dallas County (*Daves II*), 64 F.4th 616, 627–28 (5th Cir. 2023). As noted in several concurrences and dissents, the majority went out of its way to reach abstention; the case was, everyone agreed, moot. *Id.*

157. *Id.* at 631.

158. *Id.* According to the majority, "[a]ll that *Younger* and its progeny mandate, however, is an opportunity to raise federal claims in the course of state proceedings." *Id.* at 629. That is, of course, not the law, at least not as *Sprint* articulated it. But the majority barely addressed *Sprint* and ignored its statement that it is not enough merely to have an opportunity, somewhere, to raise a claim in state courts. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 82 (2013).

2. On Novelty and Limiting Factors

A word before I proceed further about whether the form of abstention I am describing is actually "new." One justification for my claim comes from the courts' own language. These courts regularly note that they are charting territory that, if not entirely new, at best exists between the seams of *Younger* and *Sprint*'s three categories and at worst directly contradicts *Younger*'s exceptional nature. Indeed, defendants in these cases regularly attempt to place themselves within the *Younger/Sprint* framework, usually by arguing that they fit within the third category: "[C]ivil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions."[159] But the abstaining courts often do not take defendants up on their offer, in part because these courts recognize the impossibility of squaring abstaining in the presented circumstances with *Younger*'s and *Sprint*'s limits on abstention.

Instead, the abstaining courts move to chart the new territory detailed in this paper. Courts usually use *O'Shea* as their starting point.[160] Some courts claim *O'Shea* is part of the *Younger/Sprint* framework. Other courts reject the need to harmonize *O'Shea* and subsequent Supreme Court caselaw at all, instead reading *O'Shea* as outside the *Younger* framework.

The abstaining courts are simply wrong on the law and they are not bound by *O'Shea*. The expansive abstention language was *dicta*. It was an alternative holding after a finding of no jurisdiction. Also, it was an advisory opinion rejecting the circuit court's discussion of what types of injunctions would be available to the district court, after further proceedings, when the circuit court remanded the case.[161] And regardless of its original weight, the case was a straight application of *Younger* and has little value in a post-*Sprint* world. *Sprint should* have informed these courts that the concerns underlying *Younger* (and thus *O'Shea*) were exceptional, only to be invoked in the three *Sprint* scenarios.

And yet, circuit courts continue to refuse to exercise their jurisdiction. *O'Shea* offers abstaining courts two openings. First, it allows them to avoid *Sprint* and claim that case is not the rule of decision. Second, it enables them to launder their older, pre-*Sprint* caselaw. Many of those older decisions are inconsistent with *Sprint*, yet the post-*Sprint* comity caselaw continues to cite older precedent as good law.[162] The result is a newer, more vigorous form of

159. Disability Rts. N.Y. v. New York, 916 F.3d 129, 133 (2d Cir. 2019).

160. *Id.* at 135 n.3 ("While the Supreme Court in *Sprint* made clear that *Younger*'s scope should be limited to the three specified categories, the Court did not suggest that abstention under *O'Shea* should be circumscribed. Indeed, courts have continued to apply *O'Shea* even after *Sprint*.").

161. *See* O'Shea v. Littleton, 414 U.S. 488, 499–504 (1974).

162. *See, e.g.*, Courthouse News Serv. v. Brown, 908 F.3d 1063, 1066 (7th Cir. 2018) (relying on SKS & Assocs., Inc. v. Dart, 619 F.3d 674, 678–80 (7th Cir. 2010)); *Disability Rights*, 916 F.3d at 135 (holding that, because the case "falls squarely within *O'Shea*'s abstention framework," the court could ignore *Sprint*). *But see* Jonathan R. v. Justice, 41 F.4th 316, 332 n.7 (4th Cir. 2022) (rejecting cases as irrelevant because they were decided pre-*Sprint*).

comity abstention that would likely extend "to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest," as rejected by *Sprint*.[163]

Additionally, the new comity abstention is an opportunity to abstain without any of the limiting factors built into *Younger* doctrine and whose faithful application would require the courts to reject abstention.[164] One obvious limiting factor is *Sprint*'s cabining into three discrete categories.[165] But fuller examination of other limiting factors from *Younger*—and the ways in which the new comity abstention doctrine rejects them—further demonstrates both the newer doctrine's novelty and the risks it poses to federal jurisdiction.

a. The Pending Case Requirement

First, the traditional understanding of *Younger* and *Steffel* is that abstention is only appropriate in situations where a case is pending in state court when the federal court is ready to begin moving on to the merits.[166] This makes sense if one reads *Younger* as fundamentally about irreparable harm; a state court criminal defendant, the argument goes, cannot show irreparable harm if they can raise their constitutional challenges in state court. It is reasonable, under this narrative, to expect the individual defendant to seek redress in their state criminal proceeding if we assume that state courts are competent forums and states independent sovereigns. At the same time, the main concern in *Younger* is not necessarily the dignity of state courts in general. Instead, the concern is implicated only when located in specific cases already initiated, which can thus provide the necessary forum for a party to raise the defenses they would seek to assert proactively in federal court.[167] Without a pending case, there is no adequate forum to raise a constitutional challenge.

In contrast, the new comity cases either reject or redefine *Steffel*'s pending case requirement. The Seventh Circuit rejected the pending case requirement altogether, arguing that *O'Shea*, unlike *Younger*, did not require a pending case to warrant abstention.[168] Other new comity abstention courts redefine what it

163. *Sprint*, 571 U.S. at 81.

164. *See, e.g.*, *Disability Rights*, 916 F.3d at 133; *Brown*, 908 F.3d at 1072.

165. *See supra* notes 80–84 and accompanying text.

166. *See, e.g.*, 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, DAVID AMAR, JEFFREY BELLIN, DANIEL D. BLINKA, EDWARD H. COOPER, HOWARD M. ERICHSON, RICHARD D. FREER, KENNETH W. GRAHAM, JR., VICTOR J. GOLD, PETER J. HENNING, HELEN HERSHKOFF, MARY KAY KANE, ROBERT H. KLONOFF, CHARLES H. KOCH, JR., ALEXANDRA LAHAV, ANDREW D. LEIPOLD, CORTNEY E. LOLLAR, RICHARD L. MARCUS, ANN MURPHY, RICHARD MURLPHY, A. BENJAMIN SPENCER, ALLAN STEIN, ADAM N. STEINMAN, CATHERINE T. STRUVE & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE § 4253 (3d ed. 1998).

167. *See* Rehnquist, *supra* note 17, at 1086–89. Rehnquist argues that the pending-case requirement served two purposes in the decision: (1) to distinguish *Dombrowski* and (2) to draw on traditional rules of equity and the *Ex parte Young* doctrine. *Id.* at 1069, 1085.

168. *See, e.g.*, *Brown*, 908 F.3d at 1072. The district court declined to abstain because the case challenged the court clerk's policies, not any pending proceeding in state court. *Id.* at 1068. But the

means to have a case pending. In *Bice*, for instance, the Fifth Circuit abstained in a challenge to Louisiana's indigent defense fee structure. The court acknowledged that the plaintiff sought only to challenge a conflict of interest between the funding scheme and his public defender, not anything having to do with his pending criminal prosecution.[169] Nonetheless, granting Mr. Bice relief would, according to the court, undermine the ability of the public defenders' office to fund itself.[170] The budget shortfall would in turn affect the office's ability to provide representation and, therefore, affect numerous pending proceedings.[171]

Instead, the new comity abstention would not require that the federal plaintiff be actively involved in a pending matter in state court. The doctrine would apply even without a *direct* effect on a state court proceeding.[172] It has been enough for abstaining courts that at some point, somewhere, there *may* be a state court proceeding affected by the outcome of the federal litigation.[173] The result would be a broad view of what "pending" means, easily applying to any challenge that could involve state courts, regardless of whether the actual plaintiffs had any meaningful opportunity for redress.

b. The Source of the Challenged Conduct

Second, parties have often sought to avoid abstention in federal court by framing their challenges as ones to state policymaking or legislation, rather than the operation of those policies in any individual adjudication.[174] Constitutional challenges to state legislation have been the day-to-day work of the federal courts

Seventh Circuit reversed, holding that *O'Shea* did not require pending state court proceedings as long as the injunction would interfere with state courts' management. *Id.* at 1072.

169. Bice v. La. Pub. Def. Bd., 677 F.3d 712, 717–18 (5th Cir. 2012).

170. *Id.*

171. *Id.*

172. *See, e.g.*, *id.* at 718 ("Even if an order from this court does not directly require Bice's public defender to withdraw from a proceeding, relief that is likely to produce that result constitutes interference with Bice's proceeding."); Joseph A. *ex rel.* Wolfe v. Ingram, 275 F.3d 1253, 1272 (10th Cir. 2002).

173. *See* Disability Rts. N.Y. v. New York, 916 F.3d 129, 134–35 (2d Cir. 2019). The Second Circuit rejected the plaintiff's argument that *Younger* did not apply "because there is no pending, parallel state court action" since the plaintiff "is not seeking to enjoin any specific pending action, but it is instead seeking to affect the manner in which all Article 17A proceedings—present and future—are conducted." *Id.* Therefore, regardless of whether *Younger* applied, *O'Shea* did. *Id.*; *see also* 31 Foster Child. v. Bush, 329 F.3d 1255, 1276 (11th Cir. 2003); Luckey v. Miller, 976 F.2d 673, 676 (11th Cir. 1992).

174. To give one New York-centric example, for instance, the public defenders services framed their challenge to New York's return-to-court plan in summer of 2020 as a question of the *policy memo* that required a return to in-person, rather than virtual, hearings. *See* Bronx Defs. v. Off. of Ct. Admin., 475 F. Supp. 3d 278, 287 (S.D.N.Y. 2020). The organizations claimed they sought an injunction only to the policy and argued that such an injunction would be easy to administer as a result. Similarly, in *Disability Rights*, plaintiffs claimed to be focused on a state statutory scheme that they claimed violated their due process rights, which the district court could review without too much incursion into the day-to-day operation of state courts. *See* 916 F.3d at 135–37. Both groups were ultimately unsuccessful. *Id.*; *Bronx Defs.*, 475 F. Supp. 3d at 278.

since at least the passage of Section 1983.[175] A husband challenged state legislation that banned gay marriage and that enforced the ban, at least in part, through family or probate court, or through the state's other judicial or quasi-judicial institutions.[176] A pretrial detainee sued over the operation of a state court's predetermined bail policy, seeking nondiscretionary changes to that policy.[177] Other plaintiffs challenged the procedures state courts provide, pursuant to state law, for pre-judgment attachment.[178] That these challenges proceed in *federal court* is unsurprising.

Yet federal courts that have declined to abstain in new comity cases have done so in situations where the federal court's intervention looks like a facial challenge. Courts can enjoin the policy or declare the legislation unconstitutional without wading into its application in individual cases or engaging in the type of oversight with which *O'Shea* purports to be concerned.[179]

Despite the quotidian nature of facial challenges, the new comity courts have rejected this form of limitation on the new comity abstention doctrine as frequently as they have accepted it. The abstaining courts' focus remains on the "impacts" that would be experienced in state court proceedings.[180] In one COVID-19 policy case, for instance, plaintiffs only sought an injunction against New York's attempt to restart in-person hearings without an adequate accommodations process for high-risk litigants.[181] Despite the facial nature of the challenge, a district court concluded enjoining the policy "would disrupt ongoing and future criminal proceedings by dictating if, when, and how they could take place; by temporarily banning proceedings that have to occur in-person; and by requiring state courts to adopt particular policies and accommodations for future proceedings."[182] This focus on the practical effect, rather than on the nature of the injunctive relief itself, is common for abstaining courts.

175. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); *see* 42 U.S.C. § 1983.

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

177. *See, e.g.*, ODonnell v. Harris County, 892 F.3d 147, 156 (5th Cir. 2018) (declining to abstain because in challenge seeking "improvement of pretrial procedures and practice" that sought only to "impose nondiscretionary procedural safeguards, [the safeguards would] not require federal intrusion into pre-trial decisions on a case-by-case basis") (internal citations and quotations omitted).

178. *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1 (1991).

179. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1255 (11th Cir. 2018); L.A. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992); Arevalo v. Hennessy, 882 F.3d 763, 766 n.2 (9th Cir. 2018); Courthouse News Serv. v. Planet, 750 F.3d 776, 791–92 (9th Cir. 2014).

180. *See, e.g.*, Bronx Defs. v. Off. of Ct. Admin., 475 F. Supp. 3d 278, 288 (S.D.N.Y. 2020).

181. *Id.*

182. *Id.*

c. The Defendants

Finally, the abstaining courts have usually rejected arguments that turn on *who* is being sued in federal court. Many cases, of course, involve an injunction that would run against state judges or court administrators.[183]

But not always. Some courts have abstained from challenges that would control state officials' conduct *outside court* because these officials or their departments might be parties in later state court proceedings.[184] The Tenth Circuit, for instance, refused to enforce a settlement agreement between the New Mexico Children, Youth, and Family Department and a class of foster children in part because the agreement prevented the Department from taking certain positions in future family court proceedings pertaining to a child's placement.[185] Relying on *O'Shea*, the Circuit concluded that requiring the Department to comply with its legal obligations—including the positions it took in state court and the information it presented to state courts under the settlement—would be the same as the federal court tinkering with the *state court's* ability to conduct those hearings.[186] Abstention was required "regardless of whether the relief targets the conduct of a proceeding directly" and regardless of whether the state courts or their judges were themselves party to the suit.[187]

3. Justifications for Comity Abstention

Although *Younger* and *Sprint* do not require abstention in cases like *Oglala* or *Courthouse News v. Brown*, the abstaining courts nevertheless see themselves as guided by the animating concerns invoked in *Younger* and later highlighted in *O'Shea*.

As the emerging doctrine's name suggests, the new comity abstention caselaw contains numerous invocations of "comity." Comity is a type of a mutual respect. It requires that one sovereign respect and recognize the authority of a separate sovereign. Under America's federal system, comity means that the federal government must accord respect for the institutions of state government, and the states with each other. Federal courts must treat their state court

183. *See, e.g.*, Disability Rts. N.Y. v. New York, 916 F.3d 129, 130 (2d Cir. 2019) (describing defendants as State of New York, court system, Chief Judge, and Chief Administrative Judge); Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (describing state judge defendants). Where state court judges are the named defendants, they are usually named in their official capacity and as policymakers. I will address what I see as the importance of the policymaker role below.

184. Joseph A. *ex rel.* Wolfe v. Ingram, 275 F.3d 1253, 1272–74 (10th Cir. 2002) (abstaining from enforcing settlement agreement that, if enforced, would require state agency to take certain positions in family court); Palmer v. City of Chicago, 755 F.2d 560, 574–77 (7th Cir. 1985) (abstaining from ordering prosecutors and police departments to preserve and disclose exculpatory evidence because it might slow state criminal trials). *But see* Google, Inc. v. Hood, 822 F.3d 212, 223 (5th Cir. 2016) (declining to abstain on comity grounds because subpoena that injunction was sought against was an executive subpoena issued by state attorney general rather than grand jury).

185. *Joseph A.*, 275 F.3d at 1268–69.

186. *See id.* at 1272.

187. *Id.* at 1269, 1272.

counterparts with equal respect. And state courts must be allowed to run those affairs within their purview without federal oversight.

Relatedly, abstaining courts generally express concern about the *dignity* of state courts. A constitutional challenge in federal court, for instance, might instead be seen as a suggestion that the state courts were not willing or capable to enforce federal rights.[188] The abstaining courts suggest that the threat of a lawsuit alone might be read as beneath the dignity of the state courts. Under this view, responding to the complaint would require justifying the states' policies and would violate the comity inherent in the federal system. For individual state court administrators and judges, being hauled into federal court and forced to justify their actions and defend themselves from suit—even in their official capacity, even for injunctive relief and not damages—would be unseemly and beneath the trust necessarily placed in these state court officials by the federal system.

Underpinning dignity and comity concerns is an assumption from federal courts that state courts will disobey any remedial plan or injunction that a federal court might issue.[189] The federal court assumes it will issue an injunction and the state actors will ignore the injunction, forcing a contempt order. This is a central motivating concern for abstaining courts because the courts assume that they would then be forced to hold the state courts in contempt. The specter of fining or sanctioning state court judges for their official conduct, even if that conduct violates federal law, is enough for abstaining courts to refuse to consider these cases at the outset.[190]

Nor are the concerns about dignity and comity limited only to cases involving injunctive relief. Instead, abstaining courts have generally addressed declaratory and injunctive relief together, again focusing on the afterlife of the declaratory judgment. Relying on *Samuels v. Mackell*, federal courts assume that

188. *Cf.* Martin H. Redish, *Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 64 CORNELL L. REV. 463, 465–66 (1978). Professor Redish was discussing *Younger*, and the long-running counter critique of state court parity in federal litigation. Of course, as I will address later, I wholeheartedly agree with Professor Redish's suggestion that the putative dignitarian harm rests on a "fallacy: it disregards the important distinction between *allowing* state courts to adjudicate federal rights and *requiring* litigants to adjudicate those rights in state court. Only the former is necessary to avoid belittling the abilities of state judges." *Id.* at 482.

189. *Luckey* is emblematic. There, the court asked, "[i]f a state court judge does not obey a district court's injunction, are we willing to jail the state court judge for contempt? Avoidance of this unseemly conflict between state and federal judges is one reason for *O'Shea* and *Younger*." Luckey v. Miller, 976 F.2d 673, 679 (11th Cir. 1992). "This Court is constrained, therefore, to focus on the likely result of an attempt to enforce an order of the nature sought here. It would certainly create an awkward moment if, at the end of protracted litigation, a compliance problem arose which would force abstention on the same ground that existed prior to trial." *Id.*

190. *See, e.g.*, Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 612 (8th Cir. 2018); *Luckey*, 976 F.2d at 679. *But see* Courthouse News Serv. v. Planet, 750 F.3d 776, 792 (9th Cir. 2014) ("We also trust that the Ventura County Superior Court would comply with any federal injunction requiring it to make unlimited civil complaints available within a specified time period, so further proceedings to enforce an injunction would be unlikely.").

the federal court plaintiffs could merely return, declaratory judgment in hand, for an injunction once the state courts failed to properly respond.[191] The federal court would therefore be back in the same position it feared at the outset: evaluating whether to hold state court judges and administrators in contempt.[192]

When abstaining, federal courts also regularly invoke *Younger*'s definition of "Our Federalism": that having concurrent court systems requires a properly balanced relationship between state and federal institutions, and allowing state institutions to continue to function and experiment in their own ways.[193] That is, even if the federal courts might have chosen a different procedure or result if presented with a blank slate, it is not the federal courts' place to tell a state court how to function. The Seventh Circuit even suggested fulfilling its judicial role and policing state court conduct would be hypocritical.[194]

Likewise, abstaining courts express concern with the ability of state courts to function day-to-day without interference from the federal courts. It is useful here to turn back to *O'Shea*'s language so often invoked by abstaining courts: concern about "*an ongoing federal audit*."[195] Such an audit evokes shifting goalposts for the state court. Many of these cases are class actions and might be applied prospectively to future members of the class. Even assuming the state courts were complying with the remedial orders in good faith—again, an assumption the federal courts regularly reject—individual state court parties could attempt to return to federal court over and over, seeking to enforce their reading of the federal court order.[196] The state courts would be jammed up waiting for the federal courts to resolve each dispute and, according to the abstaining courts, unable to function.[197]

* * *

191. *See, e.g.*, Disability Rts. N.Y. v. New York, 916 F.3d 129, 136 (2d Cir. 2019); E.T. v. Cantil-Sakauye, 682 F.3d 1121, 1125 (9th Cir. 2012). As addressed above, *Samuels v. Mackell*, required abstention in declaratory judgment actions where a federal court's declaration "will result in precisely the same interference with and disruption of state proceedings" as an injunction. 401 U.S. 66, 72 (1971).

192. *See Luckey*, 976 F.2d at 679 (issuing declaratory judgment would be "laying the groundwork for a future request for more detailed relief which would violate the comity principles expressed in *Younger* and *O'Shea* [and] is the precise exercise forbidden under the abstention doctrine").

193. *Cf.* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1539, 1552 (2012) ("Federalism debates are best understood not as disagreements over which model to choose but as disputes over how to strike the right balance between different types of institutional arrangements.").

194. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1063 (7th Cir. 2018).

195. *See* O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (emphasis added).

196. *Cf.* Redish, *supra* note 188, at 472 (1978) (noting justification asserted for *Younger* in that a "state retains an independent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions").

197. *Compare* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 717–18 (5th Cir. 2012) (crediting defendants' argument that enforcement against the public defenders' office would alter funding as whole, require defenders to withdraw from cases, and thus throw state criminal justice into chaos), *with* Courthouse News Serv. v. Planet, 750 F.3d 776, 791–92 (9th Cir. 2014) (drawing distinction, based on past caselaw, between bright-line rule court could follow, which would be permissible, versus ongoing monitoring, which would be a step too far).

What should be clear from the discussion above is that the new comity decisions extend federal restraint well beyond any previously articulated form of abstention. It would bar any federal litigation that affected state court procedures, whether those effects were direct or indirect or addressed pending proceedings. And it functions as a quasi-jurisdictional shield, with defendants invoking it at the outset of litigation as the reason such litigation should be dismissed. I now turn to whether such a broad abdication is normatively desirable.

II.
THE NEW COMITY ABSTENTION AS CATEGORICAL ABDICATION

The new comity abstention functions as a categorical abdication of federal court review of state action and state policymaking, namely, any time that that review might affect the work of state courts. Before evaluating whether such an abdication is normatively desirable, it is worth pausing briefly to describe the work of those state courts and the federal rights captured within them.

State courts are where most citizens will experience the rule of law[198] and the nature of the rights tied up in these state courts are vital and fundamental. For example, state municipal and traffic courts adjudicate what to some may seem to be small-dollar fines, but through the criminalization of poverty, marginalized communities are increasingly caught in a cycle of debt, enforcement, and imprisonment solely based on their financial status.[199] The family regulation system affects parents' "fundamental liberty interest in the care, custody, and management" of their children, "perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court.[200] Housing courts handling evictions can trap individuals within a cycle of control and exploitation by landlords, even well beyond what the courts could enforce within the terms of the lease.[201]

Despite the stakes, however, Professor Justin Weinstein-Tull has noted that "local courts reflect the justice we have, not the justice we aspire to or the justice required by written law."[202] In an insightful Article, he documents the ways these long understudied institutions are wildly diverse. The courts reflect a variety of

198. NAT'L CTR. FOR STATE CTS., THE ROLE OF STATE COURTS IN OUR FEDERAL SYSTEM 6 (2022), https://www.ncsc.org/__data/assets/pdf_file/0020/74207/The-Role-of-State-Courts-in-our-Federal-System.pdf [https://perma.cc/8AWY-BVD9] (noting that "state courts handled 99.09% of civil and criminal cases filed in the United States in 2019").

199. There is an increasing body of scholarly literature on the ability to pay and the criminalization of poverty. *See, e.g.*, Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019); Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 401–02 (2019); *see also* Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112 (2020).

200. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 62, 65 (2000).

201. *See* Nicole Summer, *Civil Probation*, 75 STAN L. REV. 847, 853–55 (2023).

202. Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1098 (2020). Professor Weinstein-Tull uses "local courts" to denote both hyperlocal courts and state-wide courts: "[A]ny non-appellate judicial court authorized or created by state law." *Id.* at 1040.

adjudicative methods and administrative structures. Some are transparent but many do not render the type of reasoned, written decision-making assumed by proponents of state court experimentation. These courts are also under-resourced,[203] or may have lay judges unfamiliar with normal legal practice or procedure.[204] Many of these courts, especially those with limited subject matter jurisdiction, exist outside of formal administrative oversight or appellate review. And, as considered below, state courts are also not just adjudicators; they help to both set and implement state policy objectives as well.[205]

The new comity abstention doctrine would serve as a categorical ban on federal court oversight and federal court enforcement of federal rights against such a vital swath of state and local policymaking.[206] Because the ban kicks in at the threshold of federal litigation, abstention acts as a unidirectional shield. It removes federal courts from the conversation, risking no forum to ensure those caught up in that state and local policymaking can enforce their federal rights. This therefore risks the very federal floor that the federal system rests on. Instead of "furthering principles of comity and our federalism," in the words of Justice Brennan, "forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress . . . ordained should be the primary responsibility of the federal courts."[207]

The new comity abstention doctrine, as it functions currently as a threshold, quasi-jurisdictional issue, is neither coherent nor desirable. In the sections that follow, I detail why keeping federal courts in the picture is particularly important and why I see state courts as inadequate forums to police their own conduct. I then examine why several of the justifications abstaining courts give for the new comity abstention doctrine do not justify a categorical ban on federal court jurisdiction in this context.

A. A Federal Forum for Federal Law

Congressionally enacted statutory provisions are central to debates about abstention generally and, as I detail below, they should also be central to our understanding of the new comity abstention.

The jurisdiction of the lower federal courts is subject first to the limitations placed upon it by Congress. But the canonical statement about *declining* jurisdiction otherwise provided by statute dates to Chief Justice Marshall's pronouncement in *Cohens v. Virginia* that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not

203. *Id.* at 1047–48.

204. *Id.* at 1053.

205. *See, e.g.*, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1521–28 (2022).

206. Weinstein-Tull, *supra* note 202, at 1098.

207. Juidice v. Vail, 430 U.S. 327, 343–44 (1977) (Brennan, J., dissenting).

given."[208] Those lines spawned a scholarly debate about whether courts *can* abstain at all—a chorus that only grew louder in the aftermath of the Supreme Court's decision in *Younger*.

Professor Martin Redish argued, for instance, that abstention was not just wrong, but potentially unconstitutional.[209] Courts were rejecting congressionally enacted statutes vesting jurisdiction, the argument went, and usurping the power to decide not only the merits but *whether to hear a case at all* was an invasion of the legislative function. Courts could not refuse to hear a case, any more than they could refuse to apply a lawfully enacted and constitutional substantive standard, or reject a whole class of cases. Abstention therefore presented separation-of-powers issues.

In rebuttal, Professor David L. Shapiro documented how federal courts regularly use their discretion over which cases they exercise jurisdiction.[210] For Professor Shapiro, "suggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction."[211] Rather, common law recognized the need for discretion over exercising jurisdiction, even where that jurisdiction was properly vested in a court. That such discretion exists was also borne out by federal practice. According to Professor Shapiro, it was a feature of federal jurisdiction and wholly consistent with the Anglo-American legal tradition.[212]

But the Court has ultimately relied on Professor Shapiro's invocation of discretion to claim that the requirement to exercise federal jurisdiction is not "absolute."[213] Professor Shapiro's view won out, as Professor Redish has now recognized.[214] And I similarly will assume, as Professor Redish does, "as a practical matter we must take the world of Supreme Court doctrine as we find it."[215]

But whether courts may abstain in some cases, however, tells us little about the value or underpinning for a categorical abstention from matters touching state

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208. 19 U.S. (6 Wheat.) 264, 404 (1821); *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

209. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74–75 (1984).

210. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing, based on historical practice, that federal courts have discretion to decline to hear certain cases within their jurisdiction).

211. *Id.* at 545.

212. *Id.*

213. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–17 (1996) (describing authority to abstain and citing Shapiro and *New Orleans Pub. Serv. Inc.* for support that such discretion is part of the common law tradition).

214. *See* Martin Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1370 (2000) ("The simplest—if perhaps not the most intellectually satisfying—answer is that whatever the merits of this argument, it is not one which the Supreme Court has ever accepted.").

215. *Id.*

courts and their procedures. In articulating a new comity abstention doctrine, abstaining courts "are declin[ing] the exercise of jurisdiction which is given" under both procedural and substantive laws expressly concerned with state court proceedings.[216] The statutes under which the new comity caselaw arises are not general statutes that plaintiffs have newly sought to apply to state courts. Rather, in enacting the statutes, Congress was expressly trying to address state court proceedings and procedure. In other words, the impacts of federal court review of state court procedure are a feature, not a bug. I will first address two common procedural statutes, Section 1983 and the Declaratory Judgment Act, as well as two of the substantive statutes under which several new comity cases arise.

1. Section 1983

Many of these cases where federal courts abstain arise under Section 1983, which provides a private cause of action against state officials who deprive others of "any rights, privileges, or immunities secured by the Constitution and laws."[217] Section 1983 owes its existence to the tumult of Reconstruction and the recalcitrance of southern states. State courts had been unable or unwilling to properly protect the rights of Black citizens.[218] Congress responded with a civil rights removal statute in 1866, and then a broader Section 1983 after five years of rising Ku Klux Klan violence.[219]

What would become Section 1983's private cause of action was first introduced by Senator Theodore Frelinghuysen of New Jersey.[220] Senator Frelinghuysen proposed providing a broad private civil remedy at law and equity for, among other things, "when the *courts of a State* violate the provisions of the Constitution or the law of the United States," and thought the provision of a civil remedy uncontroversial.[221] His bill stated that federal courts would have power, in light of their jurisdiction, "to issue injunctions and other proper process for enforcing" that jurisdiction.[222] This language was eventually removed before Section 1983 was enacted, but likely only as a matter of style and to make the language more closely track the Civil Rights Act of 1866, which had been upheld by the Supreme Court and also placed state court proceedings directly in its sights.[223]

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216. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

217. 42 U.S.C. § 1983.

218. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 454–55 (2014); *see also* Monroe v. Pape, 365 U.S. 167, 175–76, 180 (1961); Mitchum v. Foster, 407 U.S. 225, 239 (1972).

219. *See* Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2073–74 (2022).

220. *See* David Achtenberg, *A "Milder Measure of Villainy,"* 1999 UTAH L. REV. 1, 49 (1999).

221. CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871) (emphasis added). Frelinghuysen is likely referencing the Civil Rights Act of 1866, today codified at 28 U.S.C. § 1443.

222. *See* Funk, *supra* note 219, at 2075.

223. *Id.* at 2076; Achtenberg, *supra* note 220, at 57–59.

The Supreme Court concluded in *Mitchum v. Foster* that "[i]t is clear from the legislative debates surrounding passage of [Section] 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment against State action, whether that action be executive, legislative, *or judicial*."[224] The decision also quoted legislative history that suggested proponents considered a federal forum necessary because state courts in the South had failed to provide "the full and complete administration of justice."[225]And to the extent that there was any doubt that Section 1983 could apply to prospective relief against judicial officers, the Court held as much in *Pulliam v. Allen*.[226]

After *Pulliam v. Allen*, Congress eventually amended Section 1983.[227] Apparently concerned that *Pulliam v. Allen* might encourage frivolous litigation against state courts, Congress responded by modifying the *procedures* for 1983 suits against judicial officers rather than moving judges and courts outside the scope of the cause of action. Under the current text, plaintiffs may bring an action "against a judicial officer for an act or omission taken in such officer's judicial capacity."[228] They must first seek a declaratory judgment, however, and can only follow up with an injunction if "a declaratory decree was violated or declaratory relief was unavailable."[229]

Section 1983's recent reliance on declaratory relief is unsurprising. The history of the federal declaratory judgment likewise demonstrates a careful balancing of state and federal interests.

2. The Declaratory Judgment Act

First passed in 1934, the federal Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[230] In passing the Act, Congress explicitly drew upon antecedents in state courts and in England.[231] Those authorities made it clear that declaratory judgments were vital to declare the "rights contested under a statute or municipal ordinance, where it was not

224. 407 U.S. 225, 240 (1972) (cleaned up) (emphasis added).

225. *Id.* at 241 (quoting comments of Representative Lowe).

226. 466 U.S. 522, 525 (1983) (holding that judicial immunity did not prevent 1983 suit "seeking declaratory and injunctive relief against [Virginia magistrate's] practice of incarcerating persons waiting trial for nonincarcerable offenses").

For a thorough and thought-provoking discussion of *Pulliam*, as well as the subsequent history briefly mentioned here, see this volume's Article by Alexandra Nickerson and Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1633, 1633 (2023).

227. Federal Court Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996); *see also* S. REP. NO. 104-366, at 37 (1996).

228. 42 U.S.C. § 1983.

229. *Id.*

230. 28 U.S.C. § 2201(a).

231. *See* S. REP. NO. 73-1005, at 4–5 (1934); H.R. REP. NO. 73-1264, at 1 (1934).

possible or necessary to obtain an injunction."[232] Writing contemporaneously with its passage, Professor Edwin Borchard, one of the principal proponents of the Act, noted that it was necessary "in the field of constitutional and administrative law, in the testing of the statutory and administrative powers of officials under federal and *state legislation*, in so far as original federal jurisdiction still extends to such *control over state action*."[233]

As addressed above, in examining the history of the Declaratory Judgment Act against the broader history of judicial federalism, Justice Brennan located the Act's origins in congressional concerns about *Ex parte Young*, the Three-Judge Court Act, and the propriety of federal injunctions against state actors, including state courts.[234] By allowing declaratory judgments, Congress ensured that federal courts could still address the constitutionality of state action, even where an injunction might be seen as an unwarranted intrusion on state court processes.[235] A federal court would therefore issue an order affecting what happened in later state court proceedings, but with those benefits attaining without the coercive nature of an injunction.

3. The ADA

The substantive statutes at issue in the new comity abstention caselaw also suggest a federal forum is vital and that Congress intended to regulate state court procedures. Plaintiffs in *Disability Rights New York v. New York*, for instance, raised claims under the Constitution and the Americans with Disabilities Act (ADA), with the Second Circuit forcing the plaintiffs into state court.[236] But as the Court explained in *Tennessee v. Lane*, the ADA was passed to address the fact that "many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities."[237]

232. S. REP. NO. 73-1005, at 2.

233. *See* Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 49–50 (1934) (emphasis added). Professor Borchard testified in favor of the Act and congressional committees relied on his work, including a memorandum he provided, to draft and frame the Act and justify its passage. *See* S. REP. NO. 73-1005, at 2.

234. *See* Steffel v. Thompson, 415 U.S. 452, 467–68 (1974). Professor Bray has argued that Justice Brennan's reading of the federalism history of the Act was inaccurate. *See* Bray, *supra* note 53, at 1099–102. Even assuming Professor Bray is right, subsequent history has only confirmed the use of the Declaratory Judgment Act in the manner Justice Brennan proposed. *See supra* notes 226–227.

235. Perez v. Ledesma, 401 U.S. 82, 112 (1971) ("Of particular significance on the question before us, the Senate report makes it even clearer that the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate."); *see also* S. REP. NO. 73-1005, at 2.

236. Disability Rts. N.Y. v. New York, 916 F.3d 129, 137 (2d Cir. 2019).

237. Tennessee v. Lane, 541 U.S. 509, 527 (2004). In fairness, the meaning of this legislative intent was contested in *Tennessee v. Lane*, with the dissent claiming that the suggestion that *state court procedures* were the object of the legislation was thin.

4. ICWA

Similar congressional concern with state court procedure motivated the passage of the Indian Child Welfare Act.[238] At the time of ICWA's passage, states were disproportionately separating Native children from their families compared with non-Native children.[239] ICWA's legislative history cited surveys demonstrating that between 25 and 35 percent of all Native children had been separated from their families and placed into state custody or foster care.[240] Few separations were based on allegations of abuse, but rather most were due to allegations of neglect raised by non-Native social workers "ignorant of Indian cultural values and social norms."[241] That lack of cultural competency was then compounded by a state family court system that allowed separation to be "carried out without due process of law."[242]

Congress enacted ICWA to address these harsh effects of state family law. ICWA set "minimum federal standards" to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[243] ICWA set preference categories for adoptions aimed at keeping children with family or with other members of their tribes.[244]

ICWA required notice of all involuntary custody proceedings involving a Native child in state court for both the parents *and* the child's tribe.[245] Parents were to be provided counsel, and parties would have the right to examine evidence and put on testimony from experts.[246] ICWA also heightened the state's burden to justify foster care placement to the clear and convincing evidence standard, and it set the burden to justify termination of parental rights at beyond a reasonable doubt.[247] Finally, the child, the child's parent or custodian, or the child's tribe could "petition any court of competent jurisdiction to invalidate"

238. *See* Indian Child Welfare Act of 1978 (ICWA), Pub. L. No. 95-608, 92 Stat. 3069 (1978).
239. *See* H.R. REP. NO. 95-1386, at 9–10 (1978).
240. *See id.*
241. *Id.* at 10.
242. *Id.* at 11.
243. ICWA § 3.
244. ICWA § 105. These provisions have become some of the most controversial parts of the law. In 2019, a group of non-Native individuals and several states challenged the law, and a district court in Texas held that the preferences violated equal protection, among other things. Brackeen v. Zinke, 338 F. Supp. 3d 514, 534 (N.D. Tex. 2018). An *en banc* Fifth Circuit affirmed in part and reversed that holding, ultimately holding parts of ICWA violated equal protection and the Tenth Amendment. *See* Brackeen v. Haaland, 994 F.3d 249, 267–69 (5th Cir. 2021).

In an opinion by Justice Barrett, the Supreme Court held that ICWA was a constitutional exercise of Congress's power. Haaland v. Brackeen, 143 S. Ct. 1609, 1627–30 (2023). It rejected the state petitioners' arguments that the statute commandeered state court officials. *See id.* at 1631–34. The Court also held that no petitioner had standing to assert an equal protection claim challenging ICWA's placement priorities. *Id.* at 1638–39.
245. ICWA § 102(a).
246. *Id.* § 102(c)–(e).
247. *Id.* § 102(e)–(f).

custody determinations that violated ICWA.[248] "Any court" included federal and state courts.[249]

It is no accident that federal courts are being dragged into the contests they then seek to avoid. Congress has expressly contemplated that legislation would impact state court procedures and directed courts to take those cases. There may be limits on congressional authority: we have a range of doctrines and immunities that place substantive limits on what Congress can enact, what constraints it can put on state actions, and what it can empower plaintiffs to do. But those issues have mostly been resolved before the cases where abstention is addressed in favor of the federal court's jurisdiction.[250] Federal courts should not choose to evade those congressional grants of jurisdiction on prudential grounds.

B. The Perception of Bias and an Adequate Forum

Another central consideration in abstention doctrines generally is whether state courts can provide an adequate forum for the claims federal courts refuse to hear. For the new comity abstention doctrine, the perception of bias from the state courts as to the merits of the underlying claims suggests federal plaintiffs should not be forced into state courts.

The bias and localism state courts might exhibit are primary justifications for federal courts' existence. Diversity jurisdiction is one black letter example, with a longstanding understanding that federal courts are more likely than any party's home state court to fairly adjudicate disputes between citizens of different states.[251] Alexander Hamilton also raised bias as one justification for federal courts to decide questions of federal law as opposed to state courts.[252] State law might address the granting of land, for instance, and individual state judges would preference state law answers rather than superseding federal law or at the very least "feel strong predilections to the claims of their own government."[253] Hamilton thought it better to send to federal courts those cases "in which the State tribunals cannot be supposed to be impartial."[254]

248. *Id.* § 104.

249. *Id.* (review provision); *id.* § 111 (noting that where state and federal law is applicable, "State or Federal Court" should apply whichever standard is more protective of the rights of parents or Native custodians). The circuit precedent about whether and how federal court review would proceed under § 104 is mixed. *Compare* Doe v. Mann, 415 F.3d 1038, 1046–47 (9th Cir. 2005) (holding review in federal court was appropriate in ICWA action), *with* Kiowa Tribe of Okla. v. Lewis, 777 F.2d 587, 590–92 (10th Cir. 1985) (holding that the "doctrine of res judicata precludes the Tribe from relitigating its claims").

250. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 527 (2004).

251. *See* THE FEDERALIST NO. 80 (Alexander Hamilton).

252. *See id.*

253. *Id.*

254. *Id.*

Bias also animates the *Younger* doctrine.[255] Typically, a mine-run *Younger* case involves an individual defendant in state court threatened with prosecution under a state law of general applicability. In this idealized *Younger* world, the work that state courts would do within that prosecution is no different than their day-to-day work: evaluating defenses and whether the prosecution could go forward, under state and federal law. *Younger* presumes that state courts have little investment in a criminal statute and the way it applies in a case. The state court can provide an adequate forum unless there is some other consideration or exception that undermines that idealized understanding.

Tellingly, bias *is* one of the exceptions where *Younger* abstention does not apply. In *Gibson v. Berryhill*, for instance, the Court rejected abstention in a federal suit challenging licensing decisions made by Alabama's optometrist licensing board.[256] Alabama had changed its laws to preclude corporations from offering optometry services. An industry group of independently employed optometrists filed a complaint before the licensing board arguing that those corporate optometrists were practicing unlawfully.[257] The corporate optometrists sought an injunction against the board's administrative proceedings in federal court, arguing the proceedings were unconstitutional.

A three-judge district court granted an injunction, finding that the board was biased for two reasons. First, the board members had filed affidavits in state court litigation raising the same arguments against the corporate entity as the ones that the board would have to adjudicate in the individual proceedings, suggesting the board members had prejudged the issue.[258] Second, board members were all optometrists and forcing a corporation that sold seventy-five thousand eyeglasses annually in Alabama out of business could significantly improve board members' practice.[259]

The Supreme Court affirmed the injunction. The board members argued that *Younger* precluded federal court intervention because proceedings were then pending before the board. But according to the Court, *Younger* presumed an opportunity to raise federal issues and have them decided in a timely manner by a competent state tribunal.[260] A biased tribunal was not enough.[261] And even the Board's indirect financial interest was sufficient to render the state

255. Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (rejecting *Younger* abstention because State Board of Optometry was "incompetent by reason of bias to adjudicate the issues pending before it" and challenged in the federal case); *see also* Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2300 (2018).

256. *See* 411 U.S. at 571–72.

257. *See id.* at 569–70.

258. *See id.* at 579; *see also* Berryhill v. Gibson, 331 F. Supp. 122, 123 (M.D. Ala. 1971).

259. *See Gibson*, 411 U.S. at 579; *Berryhill*, 331 F. Supp. at 126.

260. *See Gibson*, 411 U.S. at 576.

261. *Id.* at 579. The Court concluded that the district court was "[a]rguably . . . right on both" grounds, but only affirmed based on the pecuniary interests of the board members. *Id.*

administrative proceeding inadequate, thereby making abstaining inappropriate.[262]

For the new comity caselaw, the whole question on the merits is the lawfulness of the state actors' chosen procedures. Consider the mine-run type of new comity caselaw. In *Oglala*, the ICWA case, the offending conduct complained about was not the legislature's, but rather the South Dakota family courts' duly adopted policy or procedures.[263] The central issue is whether the adjudicators themselves acted lawfully.

I would argue state judges are not disinterested in the new comity abstention cases as they would be in the typical *Younger* claim. When abstaining courts force litigants into state courts, they are forcing litigants to present claims directly to the very individuals the litigants are complaining about, i.e., the judges reviewing the lawfulness of their own actions.

While the perception of bias might play slightly differently depending on the merits of the federal litigation, those perceptions might arise from both pecuniary interests and the prejudgment of the issues. On the pecuniary side, the new comity doctrine is often raised in litigation over money bail or fines and fees.[264] State and local courts have a variety of funding structures, which may affect procedural and administrative uniformity as well as how judges understand their role.[265] Local or state courts may be self funded and draw salaries and resources directly from a cut of the fines and fees they impose.[266] That means that the central issue in the federal court litigation—whether the fines and fees levied on state court participants are constitutional—could immediately impact the state judge's own salary and staffing resources in the same way the optometrist regulations affected board members in *Berryhill*.[267]

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262. *See id.* The Court did, however, vacate the injunction based on a then-recent Alabama Supreme Court case invalidating the prohibition against corporate optometrists. *See id.* at 580–81.

263. Oglala Sioux Tribe v. Fleming, 904 F.3d 603, 606 (8th Cir. 2018).

264. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1253–55 (11th Cir. 2018) (declining to abstain from lawsuit claiming that Georgia's bail policies violated the Fourteenth Amendment by failing to consider an individual's ability to pay); ODonnell v. Harris County, 892 F.3d 147, 159 (5th Cir. 2018) (declining to abstain from challenge to system for setting pretrial bail for indigent arrestees in Harris County, Texas).

265. *See* Weinstein-Tull, *supra* note 202, at 1061.

266. *See id.*

267. Fines and fees often have a direct effect on state court budgets. In Louisiana, for instance, fees from bail bonds help fund a judicial expense fund that directly benefits judges and, while it cannot pay their salaries, can pay the salaries of their clerks and other courthouse personnel. *See* Caliste v. Cantrell, 937 F.3d 525, 531 (5th Cir. 2019) (finding judge had "direct and personal interest" in bail adjudications because of fund); Cain v. White, 937 F.3d 446, 448–49 (5th Cir. 2019) (describing fund). North Carolina funds half of the state's judicial budget through fines and fees; in Allegan County, Michigan, 50 percent of fees collected pay employee salaries and other costs in running the court building. *See* MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FINES AND FEES 6, 8 (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/YT8L-SQJG].

The perception of bias is a risk even where litigation challenges state court policies that do not involve a pecuniary interest. This type of case raises issues of prejudgment. A central presumption underlying the new comity abstention doctrine is that state courts and judges, as state actors, operate in accordance with their responsibility under federal law.[268] This presumption is usually deployed to suggest that the federal court can force plaintiffs into state court, where the plaintiffs experience an adequate and unbiased forum.

That position, however, misses the real import of the presumption and the way that presumption interacts with prejudgment of the issues. For many new comity cases, state courts have already acted and the lawfulness of that action is contested in federal court. But if we are to presume that state courts and judges act in accordance with federal law, then we must assume that they were doing so when they adopted the challenged procedures. In other words, we must assume that the bail policies chosen by the magistrate judges or the emergency hearing procedures in the family court are chosen *because* the judges think those choices are within the bounds of the law. Or that the judges of the family court in South Dakota believed that they do not have to follow ICWA or that their adopted procedures are correct.[269]

That creates a direct tension with the merits of the federal lawsuit, however, where the dispositive question is the lawfulness of the chosen procedure. Abstaining would force the claims to go through state court procedures and allow the "very body charged with a violation of constitutional rights [that] sit[s] as the ultimate arbiter of the constitutionality of its actions."[270]

If cases are sent back from federal to state court, the state judges would have to reverse themselves. It is not unreasonable for plaintiffs to think this unlikely to happen, or to perceive that, by duly adopting any procedure, state and local courts judges have prejudged the merits and cannot provide an unbiased forum to adjudicate the federal question.

That is not to say that plaintiffs should be forced into federal court, only that they should not be forced out of it. Federal civil procedure generally preferences the plaintiffs' choice of venue.[271] It is, of course, something of a truism to suggest that the plaintiff is the "master" of her complaint, deciding what claims to bring and where. But such deference is warranted because the plaintiffs are the ones alleging a violation of law in need of remedying; it is important that

268. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074 (7th Cir. 2018) (noting "the assumption that state courts are co-equal to the federal courts and are fully capable of respecting and protecting [Courthouse News Service]'s substantial First Amendment rights").

269. And, of course, a state court judge who acknowledged their federal law obligations yet refused to change procedures evidences bad faith, another exception under *Younger*. *See* Younger v. Harris, 401 U.S. 37, 49–50 (1971).

270. Redish, *supra* note 188, at 479.

271. *See* 14D WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 3828.2 (4th ed. 2013); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

the plaintiffs be able to choose the venue they feel will most clearly and fairly adjudicate their claims.

In the abstention context, both state courts and federal courts have jurisdiction; plaintiffs chose to proceed in federal court. Plaintiffs chose federal court for a reason—likely because they reasoned that the state court would provide a biased, and therefore inadequate, forum to litigate their federal law challenge. Federal courts should not substitute their judgment for that of the plaintiffs', especially where the state court's actions themselves are going to be a substantial part of the federal litigation.

C. State Court Judges as State Policy-Makers

The concern about bias also raises another question: What is the character of the state action that the new comity caselaw plaintiffs seek to challenge? Answering this question helps to clarify the nature of the federalism and comity concerns at play in the new comity abstention doctrine.

Again, it is useful to draw distinctions between the new comity abstention and its antecedent abstention doctrines. *Younger*, for instance, protects the ability of a state court to adjudicate a federal law defense and the constitutionality of a prosecution. *Rooker v. Fidelity Trust Co.* and *D.C. Circuit Court of Appeals v. Feldman* (hereinafter "*Rooker-Feldman*") protects against relitigation of the state court decisions in federal court, where the federal court would sit in a form of appellate review.[272] Federalism or comity concerns are tethered to this adjudicative function: a federal court, wading in *contra* to *Younger*, is saying that the state court cannot be trusted to fairly adjudicate and apply federal law, its sovereign function within the federal system. Federal litigation at best questions—and at worst undermines—the capacity of state judges *qua* judges to fulfill their judicial function.[273]

The new comity caselaw is different. State courts are not only adjudicators, they are also administrative agencies that set and create state policy.[274] This policymaking capacity is at the center of the federal dispute in the new comity abstention doctrine: in setting out policy or procedure, state courts have created a system that violates federal statutory or constitutional rights.

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272. *See* Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983). The Rooker-Feldman doctrine, in a nutshell, prevents federal courts from being used as a collateral appellate review of state court orders. *See* 18B WRIGHT & MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 4469.1 (3d ed. 1998).

273. *Cf.* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 634–35 (1981).

274. *See, e.g.*, Shanahan et al., *supra* note 205, at 1521–28 (arguing that state courts may act as policymakers "in the void created by the failure of the executive and legislative branches to meet people's social needs"). This policymaking may include: "attempting to provide services to meet litigant needs" and "develop[ing] a patchy, underresourced role as a provider of social services;" creating ad hoc procedure and developing the law in a manner that is "collectively shaping law and policy;" or "creating new government institutions" as if they were the executive or legislative branches. *Id.* at 1521.

There is little justification for treating policymaking by state courts any differently than their executive or legislative counterparts. As an initial matter, many of the new comity cases, especially those challenging foster care placement, address a state's foster care agency—i.e., part of the state's executive branch, not its courts.[275] Federal law constrains all sorts of state executive decision-making by nature of the Supremacy Clause; it does not violate federalism or comity merely because some of that decision-making conditions what position a state family regulation agency might take in state court.

Federal courts are as competent to weigh in on state court policymaking as they are on executive or legislative policymaking. State defendants in federal ADA lawsuits may argue that courts are ill suited to be "elevator-repair watchdog[s]," for instance, or to be running the subway.[276] Yet federal courts reject these types of arguments, because "[f]ederal courts can properly identify conditions that violate federal law."[277] That is the central role of federal courts: to determine whether and how federal law has been violated.

Unlike the subway, however, or the running of local elections, federal courts are experts at defining court procedures and what is meant by due process. Compare the constitutional claims in *Oglala*, for instance, with those at issue in *Connecticut v. Doehr*.[278] In *Doehr*, the dispute centered on what process was due, not whether a federal court could hear a Section 1983 action in the first place.[279] The new comity abstention doctrine would require the federal courts to refuse jurisdiction over the whole case.

Federal courts are also adept at ensuring their adjudication of federal rights addresses only the systemic policy or procedures while leaving adjudicatory bodies' individualized determinations intact. Federal courts regularly distinguish between challenges to an underlying order or decision and broader systemic challenges that attack the procedures by which a court or agency comes by that order or opinion. One example is *Gerstein v. Pugh*, which distinguished between the criminal proceeding itself and the bail proceedings, allowing a challenge to the bail proceedings to move forward even where the challenge to the criminal proceeding, framed differently, might have required abstention.[280] Another example is *Tennessee v. Lane*, where plaintiffs sought damages and equitable

275. *See* Jonathan R. v. Justice, 41 F.4th 316 (4th Cir. 2022); Ashley W. v. Holcomb, 34 F.4th 588 (7th Cir. 2022); 31 Foster Child. v. Bush, 329 F.3d 1255 (11th Cir. 2003); Joseph A. *ex rel.* Wolfe v. Ingram, 275 F.3d 1253, 1272 (10th Cir. 2002).

276. Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 11 F.4th 55, 62 (2d Cir. 2021).

277. *Id.*

278. *See* 501 U.S. 1 (1991).

279. *Id.*

280. 420 U.S. 103 (1975). Anne Rachel Traum has argued that *Gerstein* represents a "distributed federalism approach" that allows federalism concerns to be invoked later on in a case rather than at its outset, "exemplif[ying] a preference for hands-off injunctive relief that relies on state actors to achieve compliance, leaving open the possibility of more hands-on enforcement and oversight, if needed." Traum, *supra* note 88, at 1772.

relief under the ADA after they were prevented from accessing state courts as wheelchair users.[281] There, the courts were able to separate the underlying criminal prosecution for George Lane from his separate, freestanding federal court challenge under the ADA. The same logic also applies where, for instance, federal courts lack jurisdiction to overturn the outcome of an agency decision, but can still address the procedures or due process concerns underlying the adjudicatory structure as a whole.[282]

This is not to say that institutional competence and deference to state policymaking does not come into play, or that federalism and comity concerns are absent from litigation over state policymaking in other contexts. But these concerns are better understood as questions of remedy.

Along with other forms of rights retrenchment, the Supreme Court has expressed growing reluctance to implement large-scale structural injunctions in institutional reform cases over the past several decades.[283] This is one of the afterlives of the decision in *O'Shea*, with lower courts picking up on the Court's reluctance to adopt the large-scale, systemic relief requested by the plaintiffs.[284] This is even more of a central concern in cases like *Rizzo v. Goode*[285] and *City of Los Angeles v. Lyons*.[286] As *Rizzo* explains, "appropriate consideration must be given to principles of federalism in determining the availability and scope of

281. *See* Tennessee v. Lane, 541 U.S. 509, 513–14 (2004).

282. *See, e.g.*, R.F.M. v. Nielsen, 365 F. Supp. 3d 350, 373 (S.D.N.Y. 2019) (allowing the case to proceed, where Congress stripped jurisdiction, because "[t]he plaintiffs in this case do not seek review of such individual decisions. Rather, they contest the agency policy on which the revocation decisions rest.").

283. *See, e.g.*, Horne v. Flores, 557 U.S. 433, 448 (2009) (stating that "institutional reform injunctions often raise sensitive federalism concerns" that are heightened when "federal court decree has the effect of dictating state or local budget priorities"); Brown v. Plata, 563 U.S. 493, 555 (2011) (Scalia, J., dissenting) (arguing that "[s]tructural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments"); *see also* Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 183–87 (2017) (collecting cases and commentaries); Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 884 (2022) (noting structural reform litigation "is controversial because it often pushes a trial judge into a proactive, long-term, managerial role that differs from the traditional image of the judge as a passive umpire presiding over a bipolar, adversarial dispute").

284. *See, e.g.*, Wallace v. Kern, 520 F.2d 400, 404 (2d Cir. 1975) (rejecting injunction that defendants had argued "in effect mandates a wholesale reform of the New York State bail system which constitutes an untoward interference with the state judicial system and violates established principles of comity and federalism" and citing *O'Shea*); *see also* Fiss, *supra* note 26, at 1153 ("For the new majority, committed to the 'Our Federalism' of *Younger* and to limitation of federal intervention in state court proceedings, the administrative injunction sought in *O'Shea v. Littleton* was a monstrosity: plaintiffs sought, as Justice White fairly described it, 'an ongoing federal audit of state criminal proceedings,' an intrusion into the state judicial sphere so massive as to dwarf the mere enjoining of a prosecution proscribed by *Younger*.").

285. 423 U.S. 362 (1976).

286. 461 U.S. 95 (1983).

equitable relief."[287] Those concerns, however, are *remedial* in nature, and do not warrant abstaining at the threshold.[288]

In other words, federalism and comity concerns are not unique to challenges to state court policymaking. Just as in those contexts, comity and federalism concerns are more appropriately understood as limiting *which* injunctions are issued, but they do not counsel in favor of refusing jurisdiction over a federal case at its outset. There is no reason that we should treat state policymaking as exceptional merely because it passes through state courts or may, at some point, affect state court proceedings.

D. Interference with State Court Proceedings

One common feature throughout the new comity caselaw is a concern with interference with state court proceedings. We might differentiate, however, between the interference in one proceeding and the interference in a category or class of proceedings.

1. Individual Proceedings

To begin with, it is useful to examine the new comity doctrine in conversation with *Younger*, its closest analogue. The mine-run *Younger* case is a challenge to an individual prosecution, and abstention therefore protects the state court's ability to proceed on that prosecution. Again, that is the effect of the pending case requirement. The harm to federalism is the interference with a specific, individual, pending case, rather than interference with a state court's ability to adjudicate writ large or across a category of cases.[289]

Interference with state court functioning also helps to clarify the role that a federal declaratory judgment plays. Again, in *Samuels v. Mackell*, the Supreme Court extended *Younger*'s holding to cover both injunctive relief and declaratory judgments.[290] In the context of an individual pending criminal prosecution, that makes sense because the practical effect of federal court's intervention in both scenarios is to decide the merits of the individual pending prosecution.

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287. *Rizzo*, 423 U.S. at 379.

288. *See, e.g.*, Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth., 11 F.4th 55, 62 (2d Cir. 2021) (noting courts lack expertise "in curing unlawful conditions where federal courts own restraint and initial deference to state institutional authorities" but may still "conceive of remedies that do not embroil the court in the running of elevators or the subway") (cleaned up).

289. *Cf.* Rehnquist, *supra* note 17, at 1086–89 (arguing that "federal courts should not be required to abstain because of a perceived 'state interest' in permitting a state's own courts to decide issues of state law or to adjudicate certain types of cases" and that "[f]ederal courts are equally competent to decide cases involving state law and should act upon such cases within their jurisdiction").

290. 401 U.S. 66, 68–69 (1971).

Some new comity abstention decisions are closer to the mine-run *Younger* case.[291] *Kaufman v. Kaye*, for instance, dealt with a serial state litigant in a land dispute. The federal case raised arguments about the manner in which state court judges were assigned to his cases.[292] And the court in *Disability Rights* relied on *Falco v. Justices of the Matrimonial Parts of the Supreme Court*, where the Second Circuit abstained from a father's attempt to use the federal courts to avoid a contempt finding in his state divorce and custody proceedings.[293] In these cases, abstaining prevented relitigation or a federal collateral challenge to the state court's proceeding.

Abstaining courts are therefore on their firmest ground where, like *Younger*, the merits of the federal case attempts to undermine an individual state court proceeding. But a new doctrine based on those concerns is also unnecessary. *Younger*'s might apply even with *Sprint*'s current limiting functions.[294] For cases outside of *Younger*'s and *Sprint's* scope, but where addressing parallel proceedings, *Colorado River Water Conservation District v. United States* might apply.[295] And where the merits of the federal claim seek to relitigate prior decisions of the state court, preclusion[296] or the *Rooker-Feldman* doctrine would prevent federal court review.[297] In other words, there is little need or justification for creating a new categorical abdication.

2. Systemic Challenges

The mine-run new comity case, however, is not concerned with the outcome of an individual proceeding. Instead, it is about a systemic policy or procedure—fees incentivizing certain actions by public defenders, for instance,[298] access to courthouse records,[299] or foster care capacity[300]—that run collaterally to those individual proceedings.

In *Abstention in the Time of Ferguson*, Professor Fred O. Smith, Jr. highlights the ways in which *Younger* has obstructed attempts to remedy cycles

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291. *See, e.g.*, Falco v. Justs. of the Matrimonial Parts of the Sup. Ct., 805 F.3d 425, 426 (2d Cir. 2015); Kaufman v. Kaye, 466 F.3d 83, 84 (2d Cir. 2006); *see also* J.B. v. Woodard, 997 F.3d 714, 717 (7th Cir. 2021) (abstaining from individual father's challenge to state custody proceeding).

292. *Kaufman*, 466 F.3d at 85–86.

293. *See Falco*, 805 F.3d at 426. *Disability Rights* read the case as applying to the whole category of child custody "cases." Disability Rts. N. Y. v. New York, 916 F.3d 129, 134 (2d Cir. 2019).

294. *Falco* is, after all, a straight application of *Younger*. *See* 805 F.3d at 426.

295. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (articulating principles which "govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts").

296. *See* Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315, 1352, 1356 (2022).

297. *See* Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

298. *See* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 712 (5th Cir. 2012).

299. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1066 (7th Cir. 2018).

300. *See* Jonathan R. v. Justice, 41 F.4th 316, 333–34 (4th Cir. 2022).

of criminal justice debt and the marginalization that comes with that debt.[301] He also highlights what he labels as two emerging exceptions to *Younger* that should be deployed by federal courts in that context: a systemic exception and a structural one.[302] A structural exception is one that bears on the framework within which a case or trial proceeds.[303] Structural issues include, but are not limited to, the deprivation of counsel or a decisionmaker with a pecuniary interest in the outcome of a proceeding. Systemic issues are system-wide errors.[304] The harms created by structural and systemic issues are irreparable because they cut across the state criminal justice system.[305] Because the harms are irreparable, they cannot be left to the state criminal proceeding to address. State proceedings therefore do not provide an adequate forum.[306] As a result, Professor Smith argues, federal courts hearing systemic and structural challenges should refuse to abstain when state officials ask them to do so.[307]

Similar structural and systemic considerations are equally viable in the new comity abstention space. Plaintiffs in cases that raise new comity abstention issues generally "assert wide-reaching, intertwined, and 'systemic' failures that cannot be remedied through piecemeal orders."[308]

The systemic nature of this harm clarifies that individual proceedings will not provide an adequate remedial forum. Abstaining courts often repeat, with little inspection, that state courts are courts of general jurisdiction and therefore must be capable of hearing the federal claims.[309] That assumption is often wrong.[310] Regardless, in the Fourth Circuit's evocative metaphor, seeking reform "case-by-case would be like patching up holes in a sinking ship by tearing off the floorboards."[311] The ultimate remedial concern might involve funding structures or state statutory schemes outside the jurisdiction of the state court, or require relief that is not within the power of a state tribunal to issue within the

301. *See* Fred O. Smith, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305–17 (2018).

302. *Id.*

303. *See id.*

304. *See id.* at 2343–44. The precise definition of a "systemic" issue is less easily defined, although Professor Smith offers three potential frameworks: *Monell v. Department of Social Service*'s policy-or-custom, the Civil Rights Act of 1964's "pattern or practice," or Federal Rule of Civil Procedure 23(a)'s numerosity, typicality, commonality, and adequacy considerations.

305. *See id.* at 2323.

306. *Id.*

307. *Id.* at 2287.

308. Jonathan R. v. Justice, 41 F.4th 316, 336 (4th Cir. 2022).

309. *See, e.g.*, Bice v. La. Pub. Def. Bd., 677 F.3d 712, 717–18 (5th Cir. 2012); Disability Rts. N.Y. v. New York, 916 F.3d 129, 136 (2d Cir. 2019) (claiming, without further analysis, that plaintiffs will be able to present their claims to state courts).

310. *See, e.g., Limited Jurisdiction Courts Resource Guide*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/limitedjurisdiction [https://perma.cc/75KM-YB3J] ("Of the 83.2 million cases filed in state trial courts in 2017, an estimated 70 to 75 percent were of a limited jurisdiction nature.").

311. *Id.*

context of an individual proceeding. That is, for an adequate forum, one needs a forum that can consider the systemic nature of the harm.

Second, much of the caselaw discussed in this paper has involved class actions,[312] and the systemic nature of the harm helps clarify the inquiry. It makes clear that what matters are remedies for the *class*, beyond the individual plaintiffs. But it also demonstrates that the abstaining courts' weaponization of a class or category of cases to escape *Younger*'s pending case requirement is misguided. Under the abstaining court's definition of pending cases, federal courts would be barred from ever deciding a federal constitutional claim touching on court proceedings just by the very nature of there being state court proceedings at all. That is wrong, in part because the interests of the named plaintiff in the class action do not necessarily overlap with the interests of that same individual in the state proceedings.[313]

Third, as addressed above, some courts have declined to abstain where the issue is a challenge to a state legislative enactment.[314] But the difference between a legislative enactment that enacts the procedures and procedures adopted by the state courts themselves through rulemaking or judicial gap filling is less clear.[315] State legislatures abdicate lawmaking responsibilities to state institutions or local governments.[316] The state legislature may adopt substantive statutes that function

312. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1252 (11th Cir. 2018) (challenging bail policies on "behalf of himself and a class of similarly situated indigent arrestees"); ODonnell v. Harris County, 892 F.3d 147, 152 (5th Cir. 2018) (same).

313. *See* M.D. *ex rel.* Stukenberg v. Perry, 799 F. Supp. 2d 712, 720–21 (S.D. Tex. 2011); *see also* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 814 n.227 (2015) (noting that abstention may be inappropriate where "[t]he state proceedings do not involve the same interests as the federal class action, with the former centered on the individual child's concerns and the latter on the group's" and citing *M.D. v. Perry*).

Courts have regularly recognized this principle in challenges to state family court procedures prior to the advent of the new comity abstention. *See* LaShawn A. v. Kelly, 990 F.2d 1319, 1323–25 (D.C. Cir. 1993) (declining to abstain because individual family court proceedings would not be an adequate forum "for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law"); People United for Child., Inc. v. City of New York, 108 F. Supp. 2d 275, 291 (S.D.N.Y. 2000) (declining to abstain on *Younger* grounds because while content of individual's claim could be adjudicated by state family courts, district court did note "that the Family Court can adequately consider plaintiffs' claims in the context of a multi-faceted lawsuit challenging a system-wide policy rather than [Administration for Children's Services]'s actions in individual cases").

314. L.A. Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992) ("The Bar Association has chosen to frame its challenge as, in effect, a facial one, citing average court delays [due to California statute prescribing number of judges on Los Angeles County Superior Court] rather than the delay in any specific case as unconstitutional."); C.R. Corps v. Pestana, No. 21 CIV. 9128 (VM), 2022 WL 1422852, at *6 (S.D.N.Y. May 5, 2022) (rejecting abstention because "Plaintiffs are asking the Court to determine the constitutionality of a state statute, not to oversee internal judicial procedures or ongoing proceedings, and requesting appropriate relief in the event the Court finds the statute unconstitutional").

315. *Cf. Eu*, 979 F.2d at 704 (treating systemic delay as facial challenge, rather than as "delay in any specific case").

316. To take one example from Justin Weinstein-Tull's work, states may pawn off their responsibilities to provide counsel to indigent criminal defendants on towns or cities. *See* Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 855–56 (2017). This abdication

in similar ways to the Rules Enabling Act,[317] allowing their state or local courts to fill in the procedural gaps through the courts' own policy-making. The systemic issue is tied to the legislation itself and the way that legislation empowers the courts to enact the procedure at issue. But, it is less clear that a facial challenge to the statute is the meaningful limiting principle. A systemic challenge often may be the only way to understand the impact of multiple decisions across a wider caseload, and that impact is greater than the sum of its parts.

Fourth, federal courts are adept at ensuring that they can address collateral matters that do not directly attack any individual adjudication. The court can, say, issue a class declaratory judgment that does not decide any individual case and merely states what the federal-law floor is. The nature of the relief and the interference that granting that relief would cause is fundamentally different, and significantly less intrusive, than that considered by *Younger* or *Samuels v. Mackell* in that it does not decide the individual proceeding.

The abstaining courts largely fail to wrestle with the nature of systemic relief. Instead, the concern about interference is voiced in two ways. First, the courts simply assume that because comity and federalism are concerned with interference in a single case à la *Younger*, those concerns would only be magnified by system-wide issues. But as I argue above, comity and federalism concerns are only squarely presented when there is a specific, individual, pending case whose adjudication is interrupted by federal equitable relief. That is why we have a pending case requirement in the first place, rather than an *any* pending case requirement. "Abstention is not in order simply because a pending state-court proceeding involves the same subject matter."[318]

Second, abstaining courts express concern about federal oversight-through-injunction and the risk that that state court proceedings could grind to a halt while waiting for federal courts to monitor them.[319] Yet abstaining courts rarely reason based on data offered by defendants to demonstrate that the plaintiffs' proposed remedy would actually undermine the state courts' abilities to function.[320] Instead, they assume that injunctive relief would be unworkable without considering (a) the nature of the relief and (b) the ways in which its impact can be limited without resulting in the type of interference defendants argue will occur. The proper way to handle those concerns would be to tailor the form of

allows states to "shelter noncompliance with federal law at the local level," ultimately allowing "states to use the veneer of federalism, and state-protective federalism doctrines, to obscure their failure to comply with federal law." *Id.* at 840–41.

317. 28 U.S.C. §§ 2071–2077.

318. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013).

319. *See, e.g.*, Bice v. La. Pub. Def. Bd., 677 F.3d 712, 717–18 (5th Cir. 2012); Disability Rts. N.Y. v. New York, 916 F.3d 129, 136–37 (2d Cir. 2019); Miles v. Wesley, 801 F.3d 1060, 1064 (9th Cir. 2015).

320. *See Bice*, 677 F.3d at 718 n.4 (presuming it is the *plaintiff's* job to demonstrate that challenge will not wreak havoc on public defenders' representation).

relief granted, consistent with my proposal in Part III, instead of shutting categories of claims out of federal court.

E. Other Considerations

1. State Court Institutional Capacity

Questions of parity between state and federal courts have often animated scholarly discussion about comity. There is extensive debate about the ability of state courts to serve as an appropriate forum for enforcing federal rights, or whether federal courts are superior and better equipped to handle federal constitutional litigation.[321]

One of the strongest proponents of a state-court-centric view is perhaps the late Professor Paul M. Bator, who argued that diversity and experimentation at the local level, in local and state courts, were primary benefits of judicial federalism. There is a "cooperative enterprise" where each citizen and institution "shares in the privilege and duty of principled elaboration."[322] For Bator, "to deny to state court judges the competence to participate in this process" of federal rights elaboration would "deny them *pro tanto* membership in this cooperative moral and legal community."[323] More recently, Professor Diego A. Zambrano has argued that state-to-federal migration of cases undermines state courts as institutional actors, risking further deterioration of state judiciaries.[324]

Yet scholars like Professor Burt Neuborne question state courts' abilities to meaningfully adjudicate federal rights, both because of resource constraints and larger structural considerations that undermine state courts' attentiveness to serious constitutional issues within their state.[325] These concerns remain timely, as Professor Weinstein-Tull points out, because "the idea that our justice system proceeds through 'principled elaboration' is a romantic notion that draws from an unrealistic image of law that we foster in law schools, not the reality of justice as it exists in execution."[326]

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321. *Compare, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that parity between state and federal courts is a myth), *with* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (arguing against federal court superiority and claiming that arguments about parity undermine state court competency and institutional capacity).

322. Bator, *supra* note 321, at 634.

323. *Id.* at 634–35.

324. *See* Diego Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI L. REV. 2101, 2104–05 (2019).

325. Resource constraints might include things like salary and staffing levels, as well as the competence considerations created by being able to better staff and fund work and, therefore, produce higher quality or better-reasoned decisions. *See* Neuborne, *supra* note 321, at 1122–23. The institutional considerations include a putative orientation towards federal law. *Id.* at 1124. Institutional considerations also include appointment and salary protections that Neuborne argues make federal courts better able "to provide sustained enforcement of countermajoritarian constitutional norms." *Id.* at 1127.

326. Weinstein-Tull, *supra* note 202, at 1093.

In full disclosure, I share more with skeptics of the push into state courts than I do with those on the other side of the debate. State courts continue to be under resourced and undervalued, and they decide a great deal higher volume of cases than their federal counterparts.[327] Given these considerations, I understand why, as a practical matter, plaintiffs might seek to file their systemic challenges to state court procedure in federal court. When federal courts reach beyond the threshold legal issues, the new comity abstention cases often demonstrate the difficulties that state courts have in engaging in meaningful, systemic review of their actions.[328]

However, the larger concern derives from the particularities of litigation about court procedures. Regardless of what we think about the general ability of state courts to enforce federal rights, they are particularly ill suited to decide whether their own actions are unconstitutional or unlawful. The question is less about who the decisionmaker is, than who gets to decide who gets to decide.

Plaintiffs have important federal law questions touching on their access to fundamental rights. Even assuming there is an adequate state forum, plaintiffs should be free to choose the federal forum without prudential questioning from the federal judges they turn to in order to vindicate their rights. Building the institutional capacity of state courts is not a compelling enough reason to force plaintiffs into a forum they do not trust.

2. The Dignity of State Court Judges

As addressed above, abstaining courts sometimes treat the act of getting sued itself as below the dignity of state courts. These courts express concern about the very act of hauling state court judges into court.

Again, not every new comity case will present these issues—many proceed against defendants other than state court judges, and Our Federalism has tolerated a long history of dragging state officials into federal court to answer for their sins.

Where plaintiffs do seek to sue state judges, however, it is not too much to ask those judges to respond to the federal rights complaint. First, I would note that the dignitarian concerns share a logic with arguments that are frequently raised in the sovereign or qualified immunity contexts. In a series of decisions beginning in 1993, for instance, the Court imported concerns for state dignity from the foreign sovereign immunity context into the state sovereign immunity context.[329] Rather than locate state sovereign immunity from damages suits in a

327. *See id.* at 1031.

328. In *Oglala*, for instance, the state defendants failed to read the district court's decision or engage with its reasoning. *See, e.g.*, Oglala Sioux Tribe v. Van Hunnik, No. 5:13-cv-05020-JVL, 2016 WL 7324077, at *4 (D.S.D. Dec. 15, 2016). The state court judges refused to follow federal law. *Id.* at *6–7.

329. *See* Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 27 (2003); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002)

need to protect the public fisc, the Court instead sought to "afford the States the dignity and respect due sovereign entities."[330] As a result, immunity attached at the outset of a suit to save states from the indignity of being hauled into the courts of what federalism pretends is a separate sovereign.

Whatever the value of such dignity concerns in the immunities context,[331] abstention is not immunity and it is not about a formal aspect of the state *qua* state. It is also generally applied only when a defendant does not properly invoke a formal immunity.[332] In addition to the immunities doctrines, there are other substantial backstops that can provide for the dismissal of the case at the outset, and a robust abstention doctrine is not necessary.[333]

Most important, though, are the countervailing dignity concerns. Where state court procedure is at issue, the "federal remedy that [federal plaintiffs] seek is protection against being required to participate in an unconstitutional judicial proceeding."[334] I see little reason to separate state judges from other policymakers in this regard.

3. The Necessity of the New Doctrine

It is no accident that *O'Shea* corresponded with the start of the conservative counterrevolution and the federal judiciary's retrenchment on rights enforcement, particularly against state actors.[335] But the federal litigation landscape looks radically different than it did in the 1970s when the Court decided *O'Shea*. The Supreme Court has significantly tightened justiciability and jurisdictional concerns like standing,[336] and it has heightened pleading

("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); Alden v. Maine, 527 U.S. 706, 713–15 (1999) (stating that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity" and that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today").

330. Smith, *supra* note 329, at 4 (citing *Fed. Mar. Comm'n*, 535 U.S. at 760, 769).

331. As Smith notes, even assuming states retained at the Founding full sovereignty akin to a foreign nation—untenable, I think, in light of the federal structure—Congress could *still* abrogate resulting immunity and subject sovereigns to suit in federal court. *Id.* at 7–8. Yet the Rehnquist Court drew ever-larger boundaries around Congress's power to curtail state sovereign immunity. *See generally* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (limiting Congress's authority to abrogate states' immunity from suit).

332. *See* Daves v. Dallas Cnty. (*Daves I*), 22 F.4th 522, 528 (5th Cir. 2022) (resolving multiple "threshold" jurisdictional issues before remanding for district court to consider comity abstention); Courthouse News Serv. v. Gilmer, 48 F.4th 908, 910–11 (8th Cir. 2022) (rejecting sovereign immunity for state-court clerks, then turning to abstention).

333. *See supra* notes 295–297 and accompanying text (discussing other doctrines).

334. Juidice v. Vail, 430 U.S. 327, 340 (1977) (Stevens, J., concurring).

335. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 130–32 (2017).

336. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 106–07 (1983) (finding no standing for a past victim of police chokehold to seek injunctions against future use of chokeholds because he could not show a "real and immediate threat" that he would be choked unconscious again). As noted above, *O'Shea* itself was primarily about standing, rather than abstention.

requirements.[337] In *Monell v. Department of Social Services*, the Court would alter what constituted a "municipal policy" subject to suit in federal court, and the Court made it harder for plaintiffs to assert such a claim under Section 1983.[338] These changes are in addition to longer running doctrines, still in effect, forcing plaintiffs to balance ripeness and mootness concerns,[339] and to navigate preclusion, *Rooker-Feldman*,[340] and immunity doctrines shielding certain prosecutorial and judicial decisions.[341]

Each of these individual pieces of federal courts doctrine places a substantial impediment to any plaintiff seeking to challenge the work of state courts in federal court. But together, the doctrines form an interlocking set of barriers that make federal court challenges in this context nearly impossible. Kicking a case out on prudential abstention grounds in the rare event plaintiffs can navigate all these other hurdles does little except ensure that systemic rights violations continue to go unaddressed.

To conclude, the harm that abstention brings is not that important federal claims will be heard in state court, but rather that these claims will not be heard at all. The ADA, for instance, should require state family courts to consider accommodations for parents with intellectual disabilities before taking their children from them. But a study by Professor Sarah H. Lorr demonstrates that most states do not allow parents to argue defenses under the ADA in family regulation cases, even after a federal policy statement clarified that the statute was supposed to apply in state proceedings.[342] Yet federal courts just assume that their state court counterparts consider the ADA, and then throw out the federal systemic litigation based on preclusion, abstention, or *Rooker-Feldman*.[343]

A strict adherence to the new comity abstention as a threshold bar to federal rights claiming against state courts lacks a coherent justification. It is not that comity and federalism concerns are not without some weight. But shutting off litigation at the threshold undermines the values of the federal system. I will now turn to the ways in which these values can be embraced while mitigating any comity or federalism issues.

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337. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

338. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1976).

339. *See, e.g.*, Google, Inc. v. Hood, 822 F.3d 212, 224 (5th Cir. 2016) (declining to abstain under *Younger* in lawsuit challenge a state attorney general subpoena, but finding that the claims were not yet ripe).

340. *See* Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

341. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 362 (1978) (affording absolute immunity to grant of sterilization petition because the judge had "performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge"); Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976) (holding prosecutors enjoyed the same absolute immunity for 1983 claims as under common law).

342. *See* Lorr, *supra* note 296, at 1150–52.

343. *See id.*

III.
REMEDYING COMITY AND FEDERALISM CONCERNS

While I find it regrettable, federal court restraint in the enforcement of federal rights dominates much of the work of federal courts today. To a generation of judges inheriting doctrines of judicial restraint and federalism born of the counterrevolution, deference to state courts is the long-received wisdom. But where comity and federalism concerns arise in federal litigation, they can be addressed at the remedial stage of the litigation rather than at its outset. That is, comity and federalism structure which remedy is appropriate rather than whether the case may proceed at all. This remedial approach properly balances competing federalism concerns.

How would this look in practice? The federal district court should not abstain at the outset unless one of the established abstention doctrines, such as *Younger* with its attendant limitations, applies.[344] If there is not another valid reason to dismiss the case, the district court would proceed through the litigation in the normal course, including discovery and summary judgment.[345] Assuming that there was validity to plaintiffs' claims on the merits, fact finding would likely illuminate both the offending conduct and its underlying cause, such as funding shortfalls, staffing or training issues, or a misunderstanding of federal law or bad faith in its application.

If the merits are substantiated, the district court would then need to turn to remedy. This would be an iterative, dialogic process, considering the comity and federalism concerns throughout. The district court should first consider no more than a declaratory judgment. If a declaratory judgment proves insufficient, then the district court might consider a targeted injunction that establishes a bright-line rule and does not permit the type of wholesale monitoring and auditing underlying *O'Shea*, *Rizzo*, and *Lyons*.

The district court should not issue a broad, structural-reform injunction, and it should be especially cautious about any attempts to enforce its injunction. The court could always refrain from granting additional relief or enforcement relief on comity grounds. It would likely reject attempts to enforce its remedy via contempt proceedings for state judge defendants, for instance, except in narrow circumstances where plaintiffs could show bad faith.

344. My focus here is primarily on the new comity abstention aspects of the federal litigation. State defendants would, of course, be able to raise any jurisdictional issues, immunities, preclusion, or other defenses in their motions to dismiss.

345. *See, e.g.*, Trowbridge v. Cuomo, No. 16 CIV. 3455 (GBD), 2016 WL 7489098, at *11 (S.D.N.Y. Dec. 21, 2016) (dismissing without prejudice on standing grounds but rejecting abstention arguments because (a) there had not been any factfinding to show abstention was necessary and (b) after factfinding, the court would be able to grant tailored declaratory or injunctive relief).

A. Abstention and Equity

Treating the new comity abstention concerns as remedial limitations is consistent with courts' treatment of other abstention doctrines and with traditional equitable practice. Federal courts sitting in equity, especially in constitutional cases, have long been able to fashion appropriate remedies.[346]

Abstention is first and foremost a creature of equity, and with equity comes the discretion to adjust relief. As Lael Weinberger has argued, federalism *qua* federalism as a justification for restraint was largely invented out of whole cloth by Justice Frankfurter in *Railroad Commission v. Pullman Co.*.[347] The distinction matters because federalism as a freestanding concern might counsel greater abdication from federal courts. But, recognizing federalism concerns as one piece of the equitable calculus maintains greater flexibility for federal courts deciding when to abstain.[348]

Professors Steven G. Calabresi and Gary Lawson have similarly argued that *Younger* and similar forms of abstention should not be understood as "near-blanket" prohibitions on injunctive relief.[349] Abstention is not jurisdictional, and *Younger* did not announce a jurisdictional rule, but rather a suggestion that equitable relief is inappropriate in circumstances where certain structural features render injunctive relief unwise.[350] This argument is consistent with the subsequent Supreme Court opinions in *New Orleans Public Service Inc.* and *Sprint*.[351]

Instead, *Younger* announced a set of considerations for courts to consider in their remedial calculus.[352] As part of that equitable calculation, then, courts

346. *See* Milliken v. Bradley, 418 U.S. 717, 738 (1974) ("Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."); *see also* J.S.R. by & through J.S.G. v. Sessions, 330 F. Supp. 3d 731, 744 (D. Conn. 2018) (noting district court's authority to fashion remedy for the actual constitutional harms determined by the court).

347. *See* Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737, 1740 (2020); *see also* Funk, *supra* note 219, at 2059–60 (noting "judicially invented historical narrative" regarding federalism and equity that has "led to a peculiar asymmetry in practice today, where it has become surprisingly easy for federal courts to equitably restrain the other federal branches but significantly difficult for them to redress even extreme violations of federal rights at the state and local level").

348. *See, e.g.*, Weinberger, *supra* note 347, at 1741, 1782–83.

349. Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 263–66 (1992).

350. *See* Spargo v. N.Y. State Comm'n on Jud. Conduct, 351 F.3d 65, 74 (2d Cir. 2003); Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention is *not* jurisdictional, but reflects a court's prudential decision not to exercise jurisdiction which it in fact possesses.").

351. One problem in these lines of cases is that, where courts have continued to articulate a strenuous view of comity abstention, they do so citing many older circuit-level precedent uncritically, apparently unaware that those cases are in conflict with subsequent Supreme Court opinions. *See supra* note 162 and accompanying text.

352. As Professors Calabresi and Lawson put it: "The correct core principle of *Younger* is thus that considerations of federalism—and, perhaps by implication, other structural concerns such as separation of powers and the nature of the judicial hierarchy—are factors to be weighed in the remedial

may consider federalism concerns or larger structural concerns within their discretion.[353] But these concerns are not dispositive; they are but one set of considerations to be put in conversation with the countervailing values on the other side.[354]

Federalism generally, and intersystemic adjudication specifically, offer value because they encourage "interaction of multiple independent voices" in conversation with each other over a given issue.[355] In Professor Robert Schapiro's view of federalism, which he labels as "polyphonic," state and federal courts "like other state and federal institutions . . . engage in an overlapping and competitive relationship" which "contains the greatest promise for the fullest vindication of state and federal rights in the contemporary United States."[356] For intersystemic litigation, the value of federalism comes from its ability to foster plurality, dialogue, and redundancy.[357]

Each of these values would be enhanced by my proposal. Taking federalism considerations into account as part of what remedy is appropriate, rather than whether the case may proceed at all, properly balances competing federalism concerns. It would neutralize the prudential concerns underlying *Younger* and *O'Shea*.[358] Providing a way for the case to proceed beyond the threshold would also encourage the beneficial aspects of federalism and preserve the federal courts' role in ensuring federal rights when plaintiffs choose to file in federal court.

B. The Benefits of a Remedial Approach to Comity and Federalism Concerns

First, considering comity and federalism concerns as part of a remedy allows for an appropriate level of dialogue between the federal courts, states, and the state governments' constituent parts. One of the claimed benefits of the federal system is to allow states to experiment with policies and procedure that align with local priorities. How well the states perform that role is a matter of

equitable balance by federal courts asked to enjoin state proceedings." Calabresi & Lawson, *supra* note 349, at 259–60.

353. *See* Weinberger, *supra* note 347, at 1740–41 (noting that broad abstention is justified if federalism is a freestanding value, rather than where federalism was one consideration among a broader equitable calculus).

354. Calabresi & Lawson, *supra* note 349, at 259–60.

355. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95 (2009).

356. *Id.* at 106–07.

357. *See id.* at 133; *see also* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1047–49 (1977).

358. This approach is consistent with what Professor Anne Rachel Traum has defined as a "distributed federalism" approach, which addresses federalism concerns at different stages of litigation, particularly at the remedial stage. See Traum, *supra* note 88, at 1804–05. Unfortunately, the cases cited above demonstrate that courts are not walking or "pivot[ing] away" from *Younger* if one looks at a larger framework of cases outside the criminalization of debt. *Id.* at 1807. And even for the criminalization of debt, the record of a receding *Younger* is mixed at best.

debate. But in any conception, the laboratory account only functions if federal rights provide a meaningful backstop against the deprivation of rights. The federal court's role here is to provide cold, sober assessments of the individual rights at issue, acting almost as a mediator between individuals and the state absent the biases and resource concerns that might cloud state policymakers' judgment.[359] It is the initiation of that dialogue, centered on the federal court's impartiality, that I see as the most important piece of federal court jurisdiction here.

Second, my proposal allows and maintains the federal court's remedial flexibility. The federal court does not have to issue large-scale, structural injunctions and then monitor the state's performance against strict metrics. Instead, the federal court can focus on broader bright-line rules, or delineate the rights at issue through a declaratory judgment.[360] The state would therefore maintain significant control to decide *how* it will implement those changes—either through additional legislation, funding, or positions, or by adopting new policies that recognize state constraints while remedying the violations of federal law.

Third, the remedial approach is consistent with congressional intent in providing jurisdiction to the federal courts for constitutional challenges. The course of action described above is exactly what is envisioned by Section 1983, which requires a declaratory judgment from the federal court first and, only after that is violated or not available may the district court proceed to injunctive relief.

Finally, the remedial approach is more consistent with the abstaining courts' insistence that state actors meaningfully engage with their constitutional and statutory duties.[361] Where state actors are acting in good faith, it is unlikely that further litigation beyond a declaratory judgment would be necessary. My approach ensures that the theory stays consistent with the actual facts on the ground that the abstaining courts currently ignore in practice.

C. Mitigating the Harms of Concurrent Jurisdiction

The remedial approach also mitigates the primary harms justifying the new comity abstention doctrine. Consider, for instance, the Fifth Circuit's concern that ruling on the fee structures of the state public defenders' office would sow

359. *Cf.* SCHAPIRO, *supra* note 355, at 134 (advocating for federal review of state constitutional claims because federal judges are "rooted in an institutional context different from that of state judges," and therefore "able to offer a perspective that differs from that of state judges").

360. *See* Courthouse News Serv. v. Gilmer, 48 F.4th 908, 915 (8th Cir. 2022) ("A consistent theme in all the cases we have discussed is a concern about excessive interference by federal courts in state-court business. If Courthouse News eventually prevails on its constitutional claim, declaratory relief would mitigate this concern to some degree by giving Missouri courts the widest latitude in the dispatch of their own internal affairs.") (internal citations and quotations omitted); *see also* Traum, *supra* note 88, at 1801 (noting federal courts, relying on *Gerstein*, "articulate important rights relying on a flexible but clear constitutional standard without federal enforcement").

361. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1074 (7th Cir. 2018).

chaos into the state's criminal justice system.[362] This concern, a litigation position from the state adopted without much interrogation from the circuit, is likely overblown even as to injunctive relief. But a declaratory judgment from the district court would not require defense counsel's withdrawal from cases when it is issued. The state would thus be left to decide how to address the declaration in line with its other obligations, broadly defined.[363] The declaration itself might strengthen the defenders' bargaining position with the legislature over the office's funding, mooting the need for additional litigation. Similarly, in *Disability Rights* the federal court could merely have clarified that New York's procedures did not meet minimum due process requirements, and left it to the state defendants to fashion procedures that it wanted to implement in the first instance. The state court's system could continue to function, as the adequacy of different procedures worked through the state's lower and appellate courts in due course.

The federal declaratory judgment was designed precisely for these purposes. As Samuel Bray has argued, numerous courts and scholars have seen the declaratory judgment as a "milder" remedy.[364] Bray argues, however, that the key distinction between the declaratory judgment and injunctive relief is the ability for a district court to manage parties' compliance. An injunction allows continual oversight; a declaratory judgment does not.[365] In other words, a declaratory judgment's structural features speak directly to the abstaining courts' concerns about auditing and monitoring.

Likewise, the remedial approach mitigates any serious concern about enforcement. With an appropriately tailored injunction, it is unlikely that individual plaintiffs will try to return over and over again to federal courts to jam up the system. In the ADA challenges to state court procedures during COVID, for instance, the district court could have merely evaluated whether the state's return-to-court policy had been rescinded.[366] That would not lead to a flood of follow-on litigation in federal court, and individual state court defendants would have little recourse in federal court. The primary question before the district court on that type of remedy is closer to an on/off switch, rather than a question of how a federal court's remedy is being implemented in thousands of cases.

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362. *See* Bice v. La. Pub. Def. Bd., 677 F.3d 712, 717–18 (5th Cir. 2012) (resolving, without evidence, a dispute about whether the case would alter "the Board's funding so drastically as to require public defenders to withdraw from pending proceedings" in favor of the defendants).

363. This example also demonstrates the potential for appropriate limiting factors. Litigation regularly binds the positions or options available to parties in other pieces of litigation. Focusing on who the defendant is—i.e., the state court judge or a party like the public defender service—helps mitigate any concern that the state courts themselves will be unable to function because of the federal court's remedy.

364. Bray, *supra* note 53, at 1096.

365. *See id.* at 1124–33.

366. *See* Bronx Defs. v. Off. of Ct. Admin., 475 F. Supp. 3d 278, 285–86 (S.D.N.Y. 2020) (abstaining from challenge to New York criminal court's plan to return to in-person hearings during COVID-19 pandemic).

The fear of contempt is also instructive. It is true that in appropriate cases declaratory judgments could lead to injunctive relief, which then could lead to the sort of oversight-through-contempt that is at the heart of abstaining courts' logic. Again, I think we should be skeptical that state policymakers will ignore their statutory and federal obligations after the federal court has weighed in.

But existing *Younger* caselaw also recognizes that bad faith or bias can be a motivating factor in refusing to abstain.[367] If the decision about whether to abstain comes at the threshold of the litigation, however, it has to be made in the abstract, often on assertions by the parties and without adversarial testing or factfinding. If the abstention decision comes later, as a question of remedy, rather than at the outset, a district court will also be evaluating compliance on a fuller record.[368] The district court will have additional information about why the state actors claim they cannot or have not complied with federal law. It can thus fully evaluate whether the state actors behaved in good faith or were, for instance, so dismissive of their federal obligations as to not even read the district court's decision.[369] The contempt discussion thus looks very different once rights are clarified through a bright-line injunction or a declaratory judgment than it does at the start of litigation. And, where a federalism or comity concern remains with attempting to enforce the district court's remedial order, it is then within the district court's discretion to decline to issue contempt orders.

Faced with a federal suit that raises the comity and federalism concerns animating the new comity abstention, a federal district court should still hear the case and decide it on its merits. In some cases, the merits will be difficult but ultimately weigh in favor of the federal court defendants. Then, the court will not have to decide whether to issue an injunction that could affect state court proceedings. But should the federal plaintiffs succeed, the district court can take any federalism concerns into account in how it remedies the violations.

CONCLUSION

Federalism concerns are not and should not be a one-way, rights-frustrating ratchet. As noted above, the opportunities for federalism come from conversations between state governments and between the states and the federal government. Those conversations may be productive, meaningful, and rights-creating, or at least spaces in which local communities have some flexibility in the administration of their local institutions. However, the Constitution and our

367. *See* 401 U.S. 37, 49–50 (1971).

368. Assuming, of course, a permanent rather than a preliminary injunction was issued after a decision on the merits.

369. *See, e.g.*, Oglala Sioux Tribe v. Van Hunnik, No. 5:13-cv-05020-JVL, 2016 WL 7324077, at *4 (D.S.D. Dec. 15, 2016) (noting one defendant, a state's attorney, "never specifically examined the 2015 order for the purpose of curing any constitutional deficiencies occurring in 48–hour hearings" and "had no explanation as to why he did not review the order and discuss its content" with inferior attorneys in his office in charge of the relevant hearings).

federal system require effective enforcement of federal rights and a meaningful floor below which state courts cannot be allowed to fall.

The new comity abstention doctrine, as described above, frustrates the best of the federal system. The doctrine ensures federal rights are often unenforceable, furthering a rights-remedy gap for parties whose federal rights weaken when they are forced into state court proceedings. Federal courts should reject this new form of abstention or, at the very least, narrow its scope to limited circumstances, to ensure justice is possible within the federal courts' equitable jurisdiction.