CONNECTICUT
LAW REVIEW

VOLUME 46 JULY 2014 NUMBER 5

Note

THE NECESSITY OF AN EQUITY AND COMITY ANALYSIS IN *YOUNGER* ABSTENTION DOCTRINE

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Today, courts and commentators treat the Younger *doctrine as a central rule with several enumerated exceptions. This prevailing view is incorrect. An analysis of the exceptions to the* Younger *abstention doctrine demonstrates that the exceptions are merely applications of the equity and comity principles that the* Younger *Court used to justify abstention. If federal courts blindly apply the exceptions to* Younger v. Harris, *as if the exceptions have independent legal justifications, they risk incorrectly determining the very cases that* Younger *doctrine requires them to avoid. Instead, federal courts should always consider whether abstention is mandated under the principles of equity and comity.*

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DREW ALAN HILLIER*

I. INTRODUCTION

Reasoning from principles of equity and comity, the United States Supreme Court in *Younger v. Harris*[1] held that federal courts should not enjoin pending state proceedings that implicate an important state interest.[2] Four exceptions to the *Younger* abstention doctrine apply when: (1) the state claim is brought in bad faith to harass the state defendant;[3] (2) the federal court is asked to enjoin a patently unconstitutional law;[4] (3) the defendant in the state proceeding is barred on procedural or other grounds from raising its federal claim;[5] or (4) the State or both parties waive *Younger* abstention.[6] Lower courts treat these exceptions as independent bases for departing from the *Younger* rule, as if justified by principles separate and apart from the *Younger* principles of equity and comity. I argue that this prevailing view of the *Younger* exceptions is incorrect.

An analysis of exceptions to the *Younger* abstention doctrine demonstrates that the exceptions are merely applications of the equity and comity principles that the *Younger* Court used to justify abstention. In deciding whether to abstain from issuing injunctions that relate to pending state court litigation, federal courts should not blindly apply the exceptions to *Younger v. Harris*, as if the exceptions have independent legal justifications in and of themselves. Instead, federal courts should always consider whether abstention is mandated under the principles of equity and comity. Incidentally, this view reflects the approach taken by Justices Ginsburg, Scalia, Sotomayor, and Kagan in a different context.[7]

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[1] 401 U.S. 37 (1971).

[2] *Id.* at 47–49.

[3] *Id.*

[4] *Id.* at 53–54.

[5] *Id.* at 43–44.

[6] Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471, 479–80 (1977).

[7] *See* Maracich v. Spears, 133 S. Ct. 2191, 2216 (2013) (Ginsburg, J., dissenting) ("It would be extraordinary for Congress to pass a law disturbing [the traditional state function of regulating the legal profession because] . . . . '[t]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly

Part II provides an exposition of *Younger* abstention generally. Part III argues that the exceptions to *Younger* abstention are merely the application of the principles of equity and comity. Part IV uses contemporary cases to demonstrate why an understanding of the principles of equity and comity is essential to analyze properly a *Younger* abstention issue. Finally, Part V addresses the strongest arguments against adopting my view of *Younger* abstention.

II. *YOUNGER* ABSTENTION

Younger abstention is an example of federal courts creating impediments to deciding cases beyond the jurisdictional requirements of the Constitution.[8] It is one of several non-constitutional abstention doctrines, many of which share the same policy justifications.[9] Judge-made bars to a federal court's exercise of jurisdiction are based primarily on the desire to promote good relations between the federal and state systems.[10] When a federal court invalidates a state law, the state's citizens and government officials might bristle at the federal court's interference. To the state legislator, the federal court represents a quasi-foreign power that need not have earned the approval of the state legislature, executive, or judiciary.[11] The abstention doctrines also help federal courts to avoid erroneous interpretations of state law and unnecessary constitutional rulings.[12]

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interfere with the legitimate activities of the States . . . .'" (quoting Levin v. Commerce Energy, Inc., 560 U.S. 413, 431 (2010))).

[8] *See* U.S. CONST. art. III, § 2 (delineating the constitutional limits of judicial power).

[9] *See, e.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (declaring that federal courts must abstain when an uncertainty in state law and a subsequent clarification of the uncertainty make a constitutional ruling by a federal court superfluous). An additional abstention doctrine is the *Burford* doctrine, which:

> [A]llows a federal court to dismiss a case only if it presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Quackenbush v. Allstate Ins., 517 U.S. 706, 726–27 (1996) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989)).

[10] *See Pullman Co.*, 312 U.S. at 500 ("Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .").

[11] *See* U.S. CONST. art II, § 2 (vesting the president with the power to "nominate, and by and with the Advice and Consent of the Senate . . . Judges of the supreme Court, and all other Officers of the United States").

[12] *Pullman Co.*, 312 U.S. at 499–501. Although the desire to avoid unnecessary constitutional rulings was not a justification clearly adopted by the *Younger* Court, the Supreme Court later noted that the desire is a justification for *Younger* abstention. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11–12 (1987) ("Another important reason for [*Younger*] abstention is to avoid unwarranted determination [sic] of federal constitutional questions. When federal courts interpret state statutes in a way that raises

The *Younger* abstention doctrine takes its name from a 1971 case, *Younger v. Harris*, where John Harris Jr. was charged with violating the California Criminal Syndicalism Act.[13] Harris filed a complaint in federal court seeking an injunction to prevent the Los Angeles District Attorney from prosecuting him under the Act and alleging that the Act violated his First and Fourteenth Amendment rights of free speech.[14] The district court held that the Act was "void for vagueness and overbreadth in violation of the First and Fourteenth Amendments" and enjoined the District Attorney from prosecuting Harris for alleged violations of the Act.[15] But Harris's success was short lived. In an opinion written by Justice Black, the Supreme Court held that the district court should have abstained from hearing the controversy.[16]

The Court noted that one of the "primary sources" of the "longstanding public policy against federal court interference with state court proceedings" includes "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[17] The Court did not justify its holding solely on the traditional division between law and equity, but "by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments."[18]

Comity, also called "Our Federalism," is a belief that states and their institutions should not be restrained in their ability to exercise "their separate functions in their separate ways."[19] The Court stated:

> [T]he normal thing to do when federal courts are asked to

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federal constitutional questions . . . 'the federal-court decision [is] advisory and the litigation underlying it meaningless.' . . . *Younger* abstention in situations like this 'offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.'" (footnotes omitted) (citations omitted) (quoting Moore v. Sims, 442 U.S. 415, 428–30 (1979))).

[13] 401 U.S. 37, 38 (1971).

[14] *Id.* at 39.

[15] *Id.* at 40.

[16] *Id.* at 38, 54.

[17] *Id.* at 43–44.

[18] *Id.* at 44.

[19] *Id.* Conceptually, Our Federalism is a species of the genus comity. *Compare* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (noting that comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"), *with* BLACK'S LAW DICTIONARY 1211 (9th ed. 2009) (defining "[O]ur [F]ederalism" as "[t]he doctrine holding that a federal court must refrain from hearing a constitutional challenge to state action if federal adjudication would be considered an improper intrusion into the state's right to enforce its own laws in its own courts").

> enjoin pending proceedings in state courts is not to issue such injunctions[] . . . except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate [or] . . . . "it plainly appears that [challenging the validity of a state statute in a state tribunal] would not afford adequate protection."[20]

While the Court noted the presence of federal statutes that prohibit injunctions against state proceedings, it emphasized that its decision not to allow an injunction rested "on the absence of the factors necessary under equitable principles to justify federal intervention."[21]

Justice Brennan, along with Justices White and Marshall, concurred in the result, noting that there was an ongoing state proceeding, that Harris had not alleged bad faith or harassment, and that his federal claims could be "adequately adjudicated" in the state proceeding.[22] Justices Stewart and Harlan concurred to emphasize the Court's holding that a federal court may not issue an injunction in an existing criminal proceeding, "save in exceptional and extremely limited circumstances, . . . [i.e.,] a threat of irreparable injury 'both great and immediate,'" such as when a statute is "patently and flagrantly unconstitutional on its face . . . or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement."[23]

Only Justice Douglas dissented.[24] Justice Douglas would have held that the California Criminal Syndicalism Act was illegal and allowed federal courts to interfere with criminal state proceedings whenever a "statute being enforced is unconstitutional on its face."[25] His dissent is noteworthy because Justice Douglas makes an argument that subsequent courts have sometimes overlooked. He argues that notions of comity and Our Federalism are not static:

> Whatever the balance of the pressures of localism and nationalism prior to the Civil War, they were fundamentally altered by the war. The Civil War Amendments made civil rights a national concern. Those Amendments, especially § 5 of the Fourteenth Amendment, cemented the change in American federalism brought on by the war. Congress immediately commenced to use its new powers to pass legislation. Just as the first Judiciary Act . . . and the "anti-

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[20] *Younger*, 401 U.S. at 45 (quoting Fenner v. Boykin, 271 U.S. 240, 243–44 (1926)).
[21] *Id.* at 54 (Stewart, J., concurring).
[22] *Id.* at 56–57 (Brennan, J., concurring).
[23] *Id.* at 56 (Stewart, J., concurring) (citations omitted).
[24] *Id.* at 38.
[25] *Id.* at 59 (Douglas, J. dissenting).

> injunction" statute represented the early views of American federalism, the Reconstruction statutes, including the enlargement of federal jurisdiction, represent a later view of American federalism.[26]

As Justice Douglas intimates, the use of comity and Our Federalism as talismans to justify a federal court's degree of interference with a state proceeding are of limited substantive—if not also rhetorical—value given that the meaning of the terms is not linked necessarily to immutable and essential elements of our nation's fabric—as is sometimes implied—but is instead always a contemporary normative claim.[27] Recognizing that their use is an implicit claim about how the state and federal governments should interact allows for a better understanding and application of the doctrine.

Accordingly, *Younger* is a barrier to federal courts issuing injunctions against pending state criminal proceedings when there is an adequate avenue of review of any federal claims and no unusual circumstance, such as bad faith prosecution or irreparable harm, that would require the federal court to exercise its equity powers.[28]

As it stands today, *Younger* applies to virtually all state judicial and administrative proceedings that implicate an important state interest.[29] Although *Younger* abstention applies to civil proceedings if there is an important state interest,[30] state civil litigation alone is not an important state interest sufficient to overcome *Younger* abstention.[31] Thus, the Supreme Court has held that a federal court should abstain from adjudicating a dispute that is already before a state anti-discrimination administrative body.[32]

Younger abstention turns on the principle of comity because without a state court proceeding, there is less risk of harming "federal-state

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[26] *Id.* at 61 (footnote omitted) (citation omitted).

[27] *But see* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 705 (1993) ("[T]he Supreme Court has increasingly used [Our Federalism] . . . as a basis for deferring to the States at the expense of federal jurisdiction.").

[28] *See* Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 705 (1992) ("Absent any *pending* proceeding in state tribunals, therefore, application . . . of *Younger* abstention was clearly erroneous.").

[29] *See id.* (explaining the aggregation of standards that delineate the *Younger* doctrine).

[30] *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (stating that *Younger* abstention applies in "certain civil proceedings . . . if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government").

[31] *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 367–68 (1989) (articulating that "[the Court] has never . . . suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action" because this broad application "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").

[32] Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619, 625, 628 (1986).

comity."[33] In *Ankenbrandt v. Richards*,[34] the Supreme Court held that *Younger* abstention was not merited when a mother commenced a tort suit on behalf of her daughters against the girls' father.[35] There, the district court and the U.S. Court of Appeals for the Fifth Circuit held that in addition to the domestic relations exception, *Younger* barred the exercise of jurisdiction.[36] The Supreme Court noted that it had "never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending *nor any assertion of important state interests made*."[37]

III. THE *YOUNGER* "EXCEPTIONS"

In what follows, this Note argues that each of the so-called exceptions is actually an application of the background principles of equity or comity.[38] Commentators focus on four exceptions: (1) Bad Faith and Harassment, (2) Patently Unconstitutional Statutes, (3) Lack of an Adequate State Forum, and (4) Waiver.[39]

A. *Bad Faith and Harassment*

In *Younger*, the Court stated that federal courts need not abstain if asked to enjoin a prosecution that is brought to harass and in bad faith.[40] This exception, as applied, is not actually an exception at all but a straightforward application of the equity and comity principles enunciated in *Younger*.

An injunction against prosecutions in bad faith and with intent to harass is consonant with the general equitable principles requiring

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[33] *See Ankenbrandt*, 504 U.S. at 704–05 ("[W]e have never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending nor any assertion of important state interests made.").

[34] 504 U.S. 689.

[35] *Id.* at 705–07 ("The courts below cited *Younger* . . . to support their holdings to abstain in this case. In so doing, the courts clearly erred.").

[36] *Id.* at 704–05. The domestic relations exception "encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." *Id.* at 704.

[37] *Id.* at 705 (emphasis added).

[38] Daniel C. Norris argues that the expansion of the *Younger* doctrine is such that any case removed to federal court can be refused under *Younger* abstention. Daniel C. Norris, Comment, *The Final Frontier of* Younger *Abstention: The Judiciary's Abdication of the Federal Court Removal Jurisdiction Statute*, 31 FLA. ST. U. L. REV. 193, 228 (2003). Norris argues that many exceptions to the *Younger* doctrine are illusory. *Id.* at 228–29 ("By essentially eliminating the right of a party to remove a case to federal court . . . the Court has substantially interfered with the Article III prerogatives of Congress."). My thesis is different insofar as he argues that many exceptions to the *Younger* doctrine are practically impossible to meet but I argue that the exceptions to the *Younger* doctrine are analytically indistinct from the doctrine.

[39] Brian Stagner, *Avoiding Abstention: The* Younger *Exceptions*, 29 TEX. TECH. L. REV. 137, 141, 157, 163, 176 (1998).

[40] Younger v. Harris, 401 U.S. 37, 47–49 (1971).

irreparable harm, the parties' good faith, and the absence of an adequate remedy at law.[41] A prosecution commenced to harass a defendant is an irreparable injury because once a criminal charge has been publicly levied, the harm that the charge alone causes cannot be compensated for by damages. Analytically, a prosecution brought to harass or intimidate cannot be done in good faith because the concepts are mutually exclusive. There is no adequate remedy at law because a jury verdict of not-guilty cannot cure the ill effects of having been charged.

Notwithstanding the traditional understanding of irreparable harm, while it is true that many causes of action provide damages for the violation of certain rights,[42] at times the harm caused by a bad faith prosecution cannot be overcome with money damages. For example, it is hard to see how damages could compensate for a bad faith prosecution that commences on the eve of an election against a political candidate, ruining that candidate's potentially singular opportunity for election. Thus, the bad faith exception is just an application of the basic maxim in equity that courts of equity should not act unless there is not an adequate remedy at law and risk of irreparable injury.[43] Here, as with most of the other so called exceptions, the principles which supported *Younger*, viz., comity and equity, have been wrongly reified and misunderstood as a result of twisting and solidifying them into exceptions.

B. *Patently Unconstitutional Statutes*

The next so-called exception to *Younger* abstention is the presence of a patently unconstitutional law. As Professor Chemerinsky has noted, "[t]his is a curious exception to the *Younger* doctrine because federal court action seems especially unnecessary when a state statute is so completely unconstitutional."[44] This too is not really an analytically independent exception to the *Younger* doctrine because there would be no disruption to comity or Our Federalism for a federal court to decide a case when a state court would undoubtedly make exactly the same decision, as the Court

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[41] *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 7 (1990) ("[The judge sitting in equity] demands that parties litigating in the court act . . . with good faith—revealing the truth, making efforts to find some middle ground, and obeying the dictates of conscience.").

[42] *See, e.g.*, 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute . . . subjects . . . any [person] . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

[43] *See, e.g.*, *Younger*, 401 U.S. at 43–44 ("One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.").

[44] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 861 (5th ed. 2007).

reasoned.[45] This reading is congruous with the Court's comity-based concerns that federal courts ought not to make decisions founded upon uncertainties in state law, as reflected in the other abstention doctrines.[46] Issuing an injunction against a patently unconstitutional statute when a state court would do the same also meshes with the Court's desire to "avoid a duplication of legal proceedings . . . where a single suit" will do.[47]

Furthermore, given that comity is a proper respect for the relationship between state and federal governments,[48] the idea of a federal court issuing an injunction against a patently unconstitutional law does nothing to upset Our Federalism but is rather "loyal to the ideals and dreams" of it.[49] This is especially true because Our Federalism "does not mean blind deference to 'States' Rights,'" because federal courts are charged with upholding federal laws in a special way.[50]

C. *Inadequate State Forum*

The third exception to *Younger* abstention is the lack of an adequate state forum. A forum is not adequate if it is biased or a party is barred on procedural or other grounds from raising its federal claims, even if the highest state court has upheld the constitutionality of the law or practice at

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[45] *See id.* ("[T]he Court's reasoning was that if a statute is so thoroughly unconstitutional, then the result is obvious and there is little interference with state courts' decision-making because the outcome is preordained.").

[46] *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (suggesting that abstention is justified by a desire to avoid unnecessary decisions). This justification is similar to *Buford* abstention. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) ("Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976))).

[47] *Younger*, 401 U.S. at 44.

[48] *See id.* (defining comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

[49] *See id.* ("The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and national governments . . . ."); *see also* Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 705 (1992) ("Abstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" (alteration in original) (quoting *Colo. River Water Conservation Dist.*, 424 U.S. at 817)).

[50] *Younger*, 401 U.S. at 44.

issue.[51] The Supreme Court held that *Younger* abstention was required in a suit brought by a state court judge despite allegations that any state forum would not provide a fair hearing.[52] The Court emphasized the "deference" federal courts owe to the state criminal process.[53] In so doing, it recognized that the "equitable restraint" at the foundation of *Younger* abstention relies "on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights."[54]

This deference, reflecting the notion that equity follows law[55] and that no equitable remedy ought to be given unless there is no remedy at law, reveals that the inadequate state forum, like the other exceptions, is itself not an exception supported by analytically independent grounds, but is an application of the equitable principles by which the Court decided *Younger*.[56] Equity has traditionally given deference to law, supplanting law only as necessary to achieve a fair resolution of the controversy before it.[57] In describing an extraordinary circumstance not meriting the equitable restraint that *Younger* requires, the Court confirmed this reading when it stated that "such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for *immediate federal equitable relief*, not merely in the sense of presenting a highly unusual factual situation."[58] If a state tribunal is inadequate given that it does not allow an aggrieved party to raise its dispute because of a procedural hurdle, then that party has no remedy at law and an equitable remedy is appropriate if an injustice is to be avoided.[59] It follows that the lack of an adequate state

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[51] *See id.* at 45 (requiring abstention unless the state forum would not provide adequate protection); *see also* Gibson v. Berryhill, 411 U.S. 564, 575–78 (1973) (holding that the bias of the state tribunal was sufficient to overcome *Younger* abstention); Hansel v. Town Court, 56 F.3d 391, 394 (2d Cir. 1995) (requiring that a party not be barred on procedural or technical grounds in order to apply *Younger* abstention).

[52] Kugler v. Helfant, 421 U.S. 117, 124–29 (1975).

[53] *Id.* at 124.

[54] *Id.*

[55] This is known as *aequitas sequitor legem.* SPENCER W. SYMONS, A TREATISE ON EQUITY JURISPRUDENCE § 425 (5th ed. 1941).

[56] This is not to say that some members of the Court believed that *Younger* abstention is entirely reducible to equity procedure. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718 (1996) ("Though we have thus located the power to abstain in the historic discretion exercised by federal courts sitting in equity, we have not treated abstention as a technical rule of equity procedure." (quoting La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959)) (internal quotation marks omitted)).

[57] *See* SYMONS, *supra* note 55, § 425 (describing a traditional role of courts in equity).

[58] *Kugler*, 421 U.S. at 124–25 (emphasis added).

[59] The law has historically placed vexatious procedural hurdles before litigants. *See, e.g.*, ELIZABETH MAKOWSKI, ENGLISH NUNS AND THE LAW IN THE MIDDLE AGES 81–85 (2012) (describing how some of the more complicated medieval writs, viz., *formedon in the descender* and *per quae servitia*, made obtaining a remedy at law difficult for cloistered nuns and their opponents in medieval English courts).

forum is not an exception to the application of the *Younger* doctrine; it is the application of equitable principles.

Although the Court at times has believed that it was simply applying equitable principles in reaching its decision in *Younger*,[60] the principle that equity follows the law, *aequitas sequitor legem*, is not necessarily the best justification if taken apart from comity for considering the adequate state forum exception to be a straightforward application of equitable principles. For example, although the maxim "was frequently quoted by the earlier chancellors before the extent of the equitable jurisdiction had been fully determined" it never had "supreme and controlling efficacy."[61] In fact, "to raise it to the position of a general principle [of equity] would be a palpable error" because at times equity directly opposes the law and refuses to follow it.[62]

D. *Waiver*

The final exception discussed by commentators is waiver by a State.[63] This exception rests on the idea that *Younger* abstention permits the State to resolve the federal dispute already under consideration in the state system.[64]

The idea of waiver as an exception is an excellent example of why, in deciding *Younger* cases, courts should look to principles of equity and comity, not simply the application of categorical exceptions. An animating feature of the federal abstention doctrines is the preservation of good relations between federal and state institutions.[65] If respecting comity is a central purpose for the decision in *Younger*, then it is not at all clear that allowing a State to waive its *Younger* rights fits coherently with the previous doctrine.

Imagine the following scenario. A state judicial administrative agency is sued in state court on a state claim calling into question the agency's

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[60] *See Kugler*, 421 U.S. at 125 ("But whatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief . . . .").

[61] SYMONS, *supra* note 55, § 425.

[62] *Id.* § 427.

[63] Stagner, *supra* note 39, at 176.

[64] *Id.*

[65] *See* Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471, 480 (1977) ("It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.")

impartiality. The executive, fearing the disposition of the state case, goes to federal court to seek an injunction preventing the litigation. If the executive is successful, not in litigating whether the federal court should abstain, but in waiving abstention arguments, what might that say about the mutual respect between the federal and state judiciaries? Despite the Court's dismissive language and method in some case law,[66] it could suggest that the federal court does not think that the state system can adequately exercise its "separate functions in [its] separate way."[67]

Imagine a second scenario. A state executive agency is sued in state court on a federal claim. The executive, fearing the disposition of the state case, goes to federal court to seek an injunction preventing the litigation.[68] There, waiver of abstention arguments is less likely to violate comity because the underlying suit is a federal claim against the executive who herself is seeking an injunction. Still, executive institutions are not the only state institutions that deserve due deference in state matters. After all, the state court in which the agency was sued should also be considered. So, in deciding whether a state body can waive abstention, a court would have to look beyond the bright line of whether a State is before it. The court should consider whether choosing not to abstain would, as the Supreme Court stated, "unduly interfere with the legitimate activities of the States," including the state judicial function in resolving disputes properly brought before it.[69]

Accordingly, the waiver exception to *Younger* abstention is consonant with the Court's opinion in *Younger* only if the waiver does not run afoul of equitable restraints or risk upsetting the balance espoused in the concepts of comity and Our Federalism.[70]

Professor Chemerinsky argues that because a state government may waive its *Younger* abstention claim and given that *Younger* applies to civil proceedings, "there is no reason why the same waiver rules will not be followed in private litigation."[71] This argument is misguided, at least analytically, because it obviates the equity and comity principles in *Younger*. Waiver between two private parties in civil litigation is even

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[66] *Id.* at 480 & n.10.

[67] Younger v. Harris, 401 U.S. 37, 44 (1971).

[68] I recognize that the executive could remove the case to federal court, but the purpose of the scenario is to focus on abstention principles.

[69] *Younger*, 401 U.S. at 44–45.

[70] *See id.* at 54 ("[O]ur holding rests on the absence of the factors necessary under equitable principles to justify federal intervention . . . ."); *see also id.* at 44 ("[T]he underlying reason for restraining courts of equity from interfering . . . is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

[71] CHEMERINSKY, *supra* note 44, at 863.

more problematic than waiver by the state if it leads litigants to resort consistently to the federal system for injunctions to halt state proceedings in part because "[t]he Framers rejected" the "centralization of control over every important issue in our National Government and its courts."[72]

It would cause "friction"[73] if a civil action is filed in state court only to have a federal court order that the action cease, regardless of whether both parties agree to the federal court's involvement.[74] This is because the principles of comity and Our Federalism extend beyond the desires of two parties before the court on any given day. Rather, comity and Our Federalism require that the federal court sitting in equity respect not only the desires of the litigant before it,[75] but also the proper relationship between the state and federal courts.

While one could argue that waiver of *Younger* arguments would promote judicial efficiency and should be allowed, especially given that Our Federalism "does not mean blind deference to 'States' Rights,"[76] the argument fails because involving a federal court in an ongoing state proceeding is duplicative, not efficient.[77] The state court before which the action has commenced is probably better positioned than the federal court to evaluate a request for an injunction that is related to a case before the

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[72] *Younger*, 401 U.S. at 44. As a practical matter, it would seem odd if both parties consented to waiver of *Younger* abstention because ostensibly at least one party would not want the injunction to issue and waiving *Younger* would remove a hurdle to obtaining the injunction.

[73] Justice Frankfurter used the word "friction." *See* R.R. Comm'n v. Pullman, 312 U.S. 496, 500 (1941) ("Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .").

[74] It is probably rare that both parties would want to waive abstention because the plaintiff in the state litigation would ostensibly wish to remain in the state forum. Both parties might waive abstention if doing so was in their mutual interests. Still, if the goals of the parties were to cease the state litigation, there would have to be an additional reason why the parties could not settle without the state court's approval, as might be the case in a criminal or class action context. This could be the case if the claims and counterclaims of the plaintiff and defendant were such that a stay of the state court litigation becomes preferable to its resolution. Suppose the following: A plaintiff has a $100 claim with a .5 probability of success with a $25 cost to litigate in state court and $20 cost to seek a federal injunction. A defendant has a $200 counterclaim with a .5 probability of success but a $75 cost to litigate in state court and a $20 cost to seek a federal injunction. Given that some courts will automatically disregard *Younger* if both parties elect to waive *Younger* arguments, the probability of success of seeking a federal injunction is 1. Accounting for the probability of success and costs at the state litigation, the plaintiff can gain $25 from the claim and lose $100 from the counterclaim for a net loss of $75. The defendant can gain $25 from the counterclaim and lose $50 for a net loss of $25. So as long as the cost to litigate for a federal injunction is less than $75 for the plaintiff and $25 for the defendant, it is in the interest of both parties to waive any abstention argument.

[75] *See* HOFFER, *supra* note 41, at 7 ("The parties may rely on [the court's] good conscience to act in the best interests of them all.").

[76] *Younger*, 401 U.S. at 44.

[77] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976) (noting that federal courts can refrain from hearing duplicative cases of pending state proceedings).

state court.[78] When a claimant brings a suit in federal court potentially subject to *Younger* abstention, the federal court must then become apprised of the intricacies of the state remedies available, which often involves learning the minutiae of a state administrative body or the finer points of state appellate procedure.[79] While not insurmountable, such hurdles are more easily overcome by a state court.

IV. THE IMPORTANCE OF A COMITY AND EQUITY BASED ANALYSIS

An examination of the following cases shows that an analysis based on the *Younger* principles of comity and equity is preferable to the application of the so-called exceptions to the *Younger* doctrine.

Few cases illustrate as vividly the need to decide *Younger* cases with close attention to the principles of equity and comity as *O'Neill v. Coughlan*.[80] Judge William O'Neill was a judge of the Ohio Court of Appeals who sought election to the Supreme Court of Ohio.[81] His campaign ran on the theme that "Money and Judges Don't Mix" and included a refusal to accept any donation larger than ten dollars and a website that stated, "The time has come to end the public's suspicion that political contributions influence court decisions. . . . This Court is Not for Sale!"[82] As a result, a chairman of the Republican Party filed a grievance with the Office of Disciplinary Counsel, alleging that Judge O'Neill had violated the Ohio Code of Judicial Conduct by identifying himself as a judge without specifying his court, identifying himself as a member of a political party, and "wrongfully attacking the credibility of the Ohio judiciary."[83] Like the plaintiff in *Younger*, Judge O'Neill sued the Disciplinary Counsel for the Supreme Court of Ohio in federal court under the First Amendment to enjoin the enforcement of the Ohio Code of Judicial Conduct against him.[84] Interestingly, given that his political opponents might consider an eventual appeal, the parties did not dispute that Judge O'Neill could adequately raise his constitutional challenges in

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[78] One can argue that asking a state court to issue an injunction against itself—in actuality asking a state judge to order a fellow state judge to stop reviewing a case before him or her—is so unlikely to happen as to be practically impossible. This argument is weak because it forgets that state courts have appellate procedure. *See, e.g.*, CONN. GEN. STAT. § 52-278*l* (describing appeals for prejudgment remedies).

[79] For example, a suit to enjoin a state administrative judge of a state anti-discrimination administration might require a federal court to examine administrative regulations, guidance, and legislative history, in addition to ordinary state procedure.

[80] 511 F.3d 638 (6th Cir. 2008).

[81] *Id.* at 639.

[82] *Id.* (internal quotation marks omitted).

[83] *Id.* at 639–40.

[84] *Id.* at 639.

the grievance process.[85]

In applying *Younger* abstention, the Sixth Circuit held that the state had not waived *Younger* abstention simply by failing to assert abstention "before arguing for dismissal of the claims on the merits."[86] The court noted that the State could "waive *Younger* abstention upon the state's clear and explicit statement that it did not want the Court to apply *Younger*."[87] While the court's reliance on that rule is workable, it will not uniformly produce correct results because it elides the careful inquiry into Our Federalism and comity that the *Younger* doctrine demands.

In light of the argument above that waiver by both parties is not a sufficient condition for a court not to abstain, *O'Neill v. Coughlan* demonstrates how an application of the waiver exception—as if it was an analytically independent rule—could have led the Sixth Circuit to decide this case incorrectly. If the state in *O'Neill v. Coughlan* had unequivocally asked the court not to consider *Younger*, the district court could then have reached a decision on the merits.[88] Yet, allowing a federal court to interfere here, in a political quarrel within the state judiciary, would violate a central tenant of Our Federalism that demands a system with "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [enforce federal rights] in ways that will not unduly interfere with the legitimate activities of the States."[89] If the state grievance process is completely capable of addressing the plaintiff's claim that is inextricably linked to a dispute about the state judicial code of conduct, then allowing the state to waive *Younger* abstention can hardly be said to be an effort by the federal court to vindicate federal rights "in ways that will not unduly interfere with the legitimate activities of the States."[90]

A better waiver analysis by the Sixth Circuit would have considered that even if the State had desired to waive *Younger* abstention, the district court still should have abstained because interfering with the state judiciary, at the risk of violating comity, was unnecessary given that there

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[85] *See id.* at 643 ("O'Neill contested only the first factor, arguing that there was no ongoing state judicial proceeding because the filing of the grievance was a predicate to, but did not start, a state judicial proceeding."). *But see id.* at 646 (Moore J., dissenting) ("Although O'Neill might have ultimately brought his constitutional arguments before the Ohio Supreme Court, the administrative disciplinary process afforded him no explicit opportunity to do so prior to review by the court. As a result, the administrative process did not offer O'Neill an adequate state forum to raise constitutional issues before the election; in the meantime, the threat of disciplinary action under the Judicial Canons restricted O'Neill's political speech.").

[86] *Id.* at 643.

[87] *Id.* at 642.

[88] *See id.* ("[A] state may waive an argument for *Younger* abstention . . . .").

[89] Younger v. Harris, 401 U.S. 37, 44–45 (1971).

[90] *Id.* at 44.

was no showing that the federal rights would go un-vindicated.[91]

An additional consideration is the difficulty of identifying the "State." In *O'Neill v. Coughlan*, the court assumes that the disciplinary counsel for a state supreme court could be the "State" for purposes of waiver.[92] However, such an assumption is unreasonable given that the state is comprised of more than just the judicial branch. The assumption is especially unreasonable where the underlying dispute involves the integrity of a state's judicial officers and where a state legislature ultimately has authority to impeach judges.[93] Thus, a proper waiver analysis requires a court to consider whether a party can waive as the "State" while still respecting Our Federalism.

In another case, *Verizon New England, Inc. v. Rhode Island Department of Labor and Training*,[94] the First Circuit considered the exception for a patently unconstitutional law.[95] Verizon's unionized employees went on strike and applied for state unemployment benefits, which were ultimately granted by the state board of review.[96] While Verizon's appeal was pending in state court, Verizon sued in federal court for declaratory and injunctive relief on a theory of preemption under the National Labor Relations Act.[97]

Verizon argued that *Younger* abstention was inapplicable solely because of the existence of a facially conclusive preemption claim.[98] The court recognized an exception to *Younger* "where preemption is 'facially conclusive' or 'readily apparent.'"[99] The court noted that a preemption claim could not be facially conclusive if it presented "a novel question of law" or involved a factual dispute.[100] The First Circuit held that the plaintiff had not made a facially conclusive preemption claim because, for reasons unimportant here, case law indicated a lack of preemption and there was a factual dispute.[101] Although the court noted in passing that this

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[91] *But see* Joshua G. Urquhart, Younger *Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 3 (2011) (suggesting that the state tribunal rarely rules favorably on any federal claims dismissed from federal courts under the *Younger* doctrine).

[92] *O'Neill*, 511 F.3d at 639, 641.

[93] *See* OHIO CONST. art. II, § 23 ("The house of representatives shall have the sole power of impeachment . . . ."); *id.* § 24 ("The governor, judges, and all state officers may be impeached . . . .").

[94] 723 F.3d 113 (1st Cir. 2013).

[95] The court considered whether a "facially conclusive" claim of preemption fell under the exception for statutes "flagrantly and patently violative of express constitutional prohibitions." *Id.* at 116–17 (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366–67 (1989)) (internal quotation marks omitted).

[96] *Id.* at 115.

[97] *Id.*

[98] *Id.* at 116.

[99] *Id.* at 117.

[100] *Id.* (quoting Colonial Life & Accident Ins. Co. v. Medley, 572 F.3d 22, 24 (1st Cir. 2009)) (internal quotation marks omitted).

[101] *Id.*

exception "evolved out of the Supreme Court's suggestion . . . that *Younger* abstention may not be appropriate if the federal plaintiff will suffer irreparable injury absent equitable relief,"[102] the court's analysis does not consider whether an irreparable injury will result, but instead focuses on the existence of a "substantial" preemption claim.[103]

The Eight Circuit risked making a similar error in *Geier v. Missouri Ethics Commission*.[104] There, the court concluded that the patently unconstitutional exception to *Younger* abstention did not apply to a suit involving a state political action committee's efforts to reduce state taxation in Kansas City because the political action committee challenged a law under authority that was readily distinguishable from the court's prior rulings.[105] The court did not, however, consider whether abstaining was an appropriate action under the principles of comity and federalism.[106]

The circuit courts' approach will not always lead to a correct conclusion. Even if there is a conclusive claim of preemption and no factual dispute, it does not follow that *Younger* abstention is inappropriate because if there is no risk of irreparable harm, the equitable principles enunciated in *Younger* would suggest that the federal court abstain.[107] Likewise, a tension arises by accepting the propositions both that there is an adequate avenue for review of federal claims in the state level and that a facially conclusive claim of preemption is sufficient for a federal court not to abstain. If a federal court posits—as it must to even consider other exceptions to *Younger*—that the pending state proceeding allows for an *adequate* avenue of review for federal claims, then it is an *ipse dixit* to say that the presence of a facially conclusive preemption is an exception to *Younger* abstention. This is because, ostensibly, if the state proceeding is adequate, the federal plaintiff is able to seek an injunction and pursue the preemption claim in state court. Finally, by focusing on the patently unconstitutional exception independent of its equity and comity foundations, a court risks disrupting the careful balance of Our Federalism by interfering unnecessarily in ongoing state proceedings.

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[102] *Id.* at 116 (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366 (1989)) (internal quotation marks omitted).

[103] *Id.* at 119.

[104] 715 F.3d 674 (8th Cir. 2013).

[105] *Id.* at 676, 679.

[106] *Id.* at 679.

[107] *See* Younger v. Harris, 401 U.S. 37, 53 (1971) ("There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.").

V. COUNTERARGUMENTS

One can argue that analyzing an abstention case by equity and comity principles instead of by applying standard exceptions serves no purpose because it would not change the outcomes. First, as discussed above, whether a court focuses on exceptions or the principles of equity and comity can affect the disposition of a case. For example, whether waiver by the state is a coherent exception depends on the nature of the claim and the relation of the state to the opposing party and state court. Second, even if outcomes would not change, it is still useful to consider equity and comity principles in abstention cases insofar as it works toward conceptual clarity by showing that the "exceptions" to *Younger* abstention do not have any foundation apart from the principles of equity and comity. Finally, an examination of how contemporary cases would be analyzed under my view shows that failing to recognize the centrality of comity and equity in *Younger* abstention risks making poorly justified cases.

Second, one can argue that an emphasis on the background principles of equity and comity is undesirable because it gives federal judges more discretion even as federal power has increased.[108] This counterargument can be taken at least two ways. The first contends that giving federal courts more discretion is almost always bad. The second argues that equity and comity do not provide the courts with *enough* guidance for the use of their discretion to be sound.

Neither of these arguments is persuasive, yet circuits are split over the standard of appellate review in *Younger* cases.[109] Equity exists to give

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[108] *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 91 (1995) ("The increasing unchecked power of federal judges suggests the need for new restraints on judicial authority that respect the continuing need for independence of Article III judges.").

[109] The majority of circuits use a de novo standard but some use an abuse of discretion or mixed standard. *See* Vasquez v. Rackauckas, 734 F.3d 1025, 1035 (9th Cir. 2013) (de novo); Verizon New England, Inc. v. R.I. Dep't of Labor & Training, 723 F.3d 113, 116 (1st Cir. 2013) (de novo); United States v. South Carolina, 720 F.3d 518, 526 (4th Cir. 2013) (abuse of discretion); Geier v. Mo. Ethics Comm'n, 715 F.3d 674, 678 (8th Cir. 2013) (abuse of discretion); Nimer v. Litchfield Twp. Bd. of Trs., 707 F.3d 699, 700 (6th Cir. 2013) (de novo); Jackson Hewitt Tax Serv. Inc. v. Kirkland, 455 F. App'x 16, 17 (2d Cir. 2012) (de novo); Bice v. La. Pub. Defender Bd., 677 F.3d 712, 715 (5th Cir. 2012) ("This court reviews a district court's abstention ruling for abuse of discretion, but it reviews de novo whether the elements for *Younger* abstention are present."); Pennsylvania v. Vora, 443 F. App'x 683, 684 (3d Cir. 2011) (using plenary review for whether requirements to abstain under *Younger* are met and abuse of discretion over the lower court's decision to abstain); Rumber v. District of Columbia, 595 F.3d 1298, 1301–02 (D.C. Cir. 2010) (unclear whether abuse of discretion or de novo); Vill. of De Pue, v. Exxon Mobil Corp., 537 F.3d 775, 782 (7th Cir. 2008) (de novo); Yellowbear v. Wyo. Att'y Gen., 525 F.3d 921, 923 (10th Cir. 2008) (de novo); Hughes v. Att'y Gen. of Fla., 377 F.3d 1258, 1262 (11th Cir. 2004) (abuse of discretion). A de novo review is preferable because uniform applications of comity and equity principles will be enhanced under that standard, leading to greater consistency in the relationship between the state and federal systems.

judges discretion to achieve a fair result when law will not allow it.[110] The fact that equity has a well-established role in our system weighs against a view that judicial discretion is negative. In addition, most disputes require a judge because they do not have a clear resolution despite the presence of many so-called discretionless rules. Also, it is deceptive to assert that judges ought not to have discretion because even in applying so called bright-line rules, a judge must make a choice as to the meaning of the words that compose the rule. True, there is a long tradition in this country of skepticism when a single person holds legal and equitable powers,[111] but appellate review and the development of standards over time limit the risk that a judge will abuse her discretion without correction.[112]

VI. CONCLUSION

Although many commentators and courts discuss *Younger* doctrine as a central rule with many exceptions, it is more intelligible and faithful to the doctrine to realize that the exceptions as applied are not exceptions at all. In deciding whether to abstain from issuing injunctions that relate to pending state court litigation, federal courts should not blindly apply the exceptions to *Younger v. Harris* as if the exceptions had an independent legal justification in themselves, but should instead consider whether abstention is mandated under the principles of equity and comity.

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[110] *See* SYMONS, *supra* note 55, §§ 359, 425 (stating that equity may give a remedy that the law lacks).

[111] *See* LETTERS FROM THE FEDERAL FARMER (1787), *reprinted in* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 19, 32, 44 (Michael P. Zuckert et al. eds., 2009) ("It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion. I confess in the constitution of this supreme court, as left by the constitution, I do not see a spark of freedom or a shadow of our own or the British common law.").

[112] One could attack this claim on the ground that I have not refuted the counterargument but merely pushed back the worry of too much discretion from the trial court to the appellate courts. This assertion would be warranted if the agreement of both the Executive and Legislature were not required for federal judicial appointments. This minimizes the risk that an intemperate individual, likely to abuse the judicial office, will sit on the bench.