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YOUNGER AND ITS PROGENY: A VARIATION ON THE THEME OF EQUITY, COMITY AND FEDERALISM

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So much has been written on the theme of *Younger*[1] and its progeny,[2] that my original intention to "update" my earlier work in this area[3] has given me some misgivings. But just as at an earlier time I tended to put less emphasis on the "federalism" significance of *Dombrowski*[4] and *Younger*, in favor of a "remedial-political" analysis,[5] I am persuaded that the Supreme Court's institutional behavior[6] in the years since *Younger* was decided, notwithstanding the doctrinal qnd policy articulation of federalism considerations, cannot be separated from the remedies context in which these questions necessarily arise, and in fact has been controlled by it. My conclusion, looking to the *results* of the Court's decisions, and to the

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

2. Some of the more recent works dealing with *Younger* and its progeny are: Bartels, *Avoiding a Comedy of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Fiss, Dombrowski, 86 YALE L.J. 1103 (1977); Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORN. L. REV. 463 (1978); Soifer & Macgill, *The* Younger *Doctrine: Reconstructuring Reconstruction*, 55 TEX. L. REV. 1141 (1977); *see also* Zeigler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Law Process*, 125 U. PA. L. REV. 266 (1976). A comprehensive historical analysis of the "*Younger* problem" is found in Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974).

3. Sedler, Dombrowski *in the Wake of* Younger: *The View from Without and Within*, 1972 WISC. L. REV. 1 [hereinafter cited as Sedler, *Wake*]; Sedler, *The* Dombrowski-*Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 KAN. L. REV. 237, 629 (1970) [hereinafter cited as Sedler, *Reflections*].

4. Dombrowski v. Pfister, 380 U.S. 479 (1965).

5. *See* Sedler, *Reflections*, *supra* note 3, at 255-58; Sedler, *Wake*, *supra* note 3, at 5-8, 57-61.

6. By "institutional behavior" I am referring to the pattern of results that is reached by the Court in the cases coming before it for decision. The Court's institutional behavior evolves over a period of time, and is not necessarily fully consistent with the doctrine articulated by the Court to explain the basis of its decisions. It is my submission that the "law" of the Constitution is a reflection of the interaction between the Court's institutional behavior and its articulated doctrine.

response of the lower federal courts to those decisions,[7] is that despite the articulation of federalism considerations, the Court has, with one possible exception,[8] *applied traditional remedies principles to determine the scope of federal judicial interference with the exercise of state governmental power.* The thrust of this article will be directed toward explaining this variation on the theme of "equity, comity and federalism."[9] I will conclude, however, by discussing the federalism considerations that I believe in our constitutional scheme should govern the nature and scope of federal judicial interference with the exercise of state governmental power.

I. EQUITY, COMITY AND FEDERALISM: THE STRUCTURAL PROBLEM

Younger and its progeny involve federal judicial interference with state governmental power in two different, though perhaps related ways, and thus pose, analytically at least, two different questions. One concerns federal judicial interference in pending state judicial proceedings, while the other concerns federal judicial interference with state governmental action when no state judicial proceeding is pending. Both questions, however, seemingly have been approached by the Court under the rubric of "Our Federalism." That phrase, as defined by Justice Black in *Younger*, incorporates the concept of *comity*: "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."[10]

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7. It is in the lower federal courts where the constitutional battles are waged on a day-to-day basis and where the impact of the Supreme Court's decisions is most cogently felt. For example, while the Supreme Court in *Younger* said that in *Dombrowski* it had not authorized federal judicial interference in pending state court criminal proceedings solely on the ground that the law under which the prosecution was brought was allegedly "void on its face," 401 U.S. at 47-51, this was precisely how the lower federal courts had read *Dombrowski*, and their institutional behavior reflected this reading. *See* the discussion and review of cases in Wechsler, *supra* note 2, at 861-66. The "law" of *Dombrowski*, therefore, was that federal courts could enjoin pending state court criminal proceedings when the law under which the prosecution was brought was found to be "void on its face" in violation of the First Amendment.

8. *See* the discussion of the applicability of *Younger* to pending state court non-criminal proceedings, notes 141-98 *infra* and accompanying text.

9. The phrase, "equity, comity and federalism," appears first in Steffel v. Thompson, 415 U.S. 452, 460 (1974).

10. 401 U.S. at 44.

Whenever federal and state interests are involved, said Justice Black, "Our Federalism" requires a balancing, and it represents a "system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states."[11] In terms of the doctrinal and policy articulation of *Younger* and its progeny, it would appear that the Court has balanced federal and state interests in deciding the appropriate scope of federal judicial interference with the exercise of state governmental power.[12]

In these cases, however, since the question is one of federal *judicial* interference with state governmental action,[13] there is a *remedies* component and a *justiciability* component as well. The remedies-justiciability component is applicable to federal judicial interference with all governmental action, and applies equally when the aid of the federal courts is invoked to challenge the validity of federal governmental action.[14] From a remedies standpoint, whether the case is in a federal court or in a state court, a party seeking injunctive relief against governmental action must show "irreparable injury,"[15] and a party seeking declaratory relief must show the existence of an "actual controversy"[16] between that party and the governmental official against whom relief is sought. Insofar as the federal courts are concerned, these remedies requirements blend with the justicia-

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11. *Id.* In a "powers" context, the balancing between federal and state interests, weighted on the side of the state, appears in recent cases such as Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), and National League of Cities v. Usery, 426 U.S. 833 (1976), where considerations otherwise applicable to determine the scope of federal and state power under the interstate commerce clause were subordinated to the consideration of "state sovereignty."

12. Most of the commentators accept the "federalism" explanation of *Younger* and its progeny, and they maintain that the Court has improperly struck the balance in favor of state interests. *See generally* the works cited in note 2 *supra*.

13. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (*congressional* interference with state governmental action).

14. *See* the discussion of this point in Sedler, *Reflections*, *supra* note 3, at 256-58.

15. The term, "irreparable injury," is another of those concepts developed during the separate administration of law and equity. To say that the plaintiff must demonstrate that he or she will suffer "irreparable injury" if an injunction is not granted is merely the traditional way of saying that the plaintiff must demonstrate the inadequacy of other remedies in order to be entitled to affirmative or "equitable" relief.

16. This is the term used in the federal Declaratory Judgment Act, 28 U.S.C. § 2201 (amended 1976), and in many state declaratory judgment acts.

bility requirements of "case or controversy,"[17] standing,[18] and ripeness,[19] and are often coextensive.[20]

When a party seeks relief in the federal courts against state governmental action, the federalism component[21] meets the remedies component, and one or the other could be dominant. Even though the party may be entitled to relief on the basis of remedies considerations, federalism considerations could preclude such relief. Conversely, so long as the case is justiciable under federal standards, federalism considerations could militate in favor of relief, although remedies considerations might not entitle the party to relief in the circumstances presented.[22] On the other hand, the federalism considerations could cancel out, and the availability of relief could be made to depend entirely on remedies considerations.

From a remedies standpoint, however, the dual system of federal and state courts gives rise to a problem that finds its genesis in the historically dual system of law courts and equity courts. Whenever there is a dual court system, whether one of "law" and "equity" courts, or one of federal and state courts, a party can seek relief in one court against proceedings that are pending in the other court.[23] With respect to the federal-state dual

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17. Art. III's case or controversy requirement has traditionally been interpreted to incorporate the concepts of adverseness between the parties, the prohibition against feigned and collusive suits, the stricture against rendering advisory opinions, and the requirement of a present personal stake in the litigation as reflected in the mootness doctrine. It has more recently been interpreted to incorporate the standing concept of "injury in fact that is likely to be redressed by a favorable decision." *See* Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 RUTGERS L. REV. 863, 867-68, 874-76 (1977) [hereinafter cited as Sedler, *Standing and the Burger Court*].

18. As to the present law of standing, *see generally* Sedler, *supra* note 17. The relationship between "irreparable injury" and standing in the first amendment context is discussed in Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 494-97 (1972).

19. To the extent that ripeness involves the matter of present injury due to the challenged action, it is closely related to the standing requirement of "injury in fact." *Compare* Poe v. Ullman, 367 U.S. 497 (1961), *with* Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

20. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974).

21. We will use "federalism" to denote both the "federalism" and the "comity" portion of "equity, comity and federalism."

22. For example, when a state law has been invoked against a party in pending state court proceedings, that party suffers "injury in fact" from that law for justiciability purposes. *See* Juidice v. Vail, 430 U.S. 327, 332-33 (1977), so there is no justiciability bar to the federal court's granting relief with respect to those proceedings.

23. The historical practice, based on the power of equity to proceed "*in personam*," resulted in the issuance of an injunction against a party, enjoining that party from instituting a suit or enforcing a judgment, so that there was no direct interference with the processes of the other court.

court system, federalism considerations, rooted in the Supremacy Clause,[24] constitutionally preclude state courts from granting relief against the continuation or initiation of proceedings in the federal courts,[25] but render fully constitutional federal court interference with pending as well as threatened state court proceedings.[26]

II. FEDERAL "EQUITY" AND STATE GOVERNMENTAL ACTION PRIOR TO *Younger*

When a federal court is asked to interfere with a pending state court proceeding, it is essentially in the position of an historical "equity" court that was asked to interfere with an action that was pending in the historical "court of law."[27] Since the plaintiff in the federal "equity" action has been brought before the state court, federal justiciability requirements are satisfied: the plaintiff suffers "injury in fact" from the action that is being challenged, and a "live controversy" is presented between the plaintiff and the state officials against whom relief is sought.[28] But under traditional remedies principles, it would be difficult for the federal plaintiff to obtain relief in "equity" against the pending state court proceeding. The plaintiff ordinarily could not satisfy the requirement of "irreparable injury," since the "remedy at law" — the defense to the pending state court proceedings would be "adequate" to protect the plaintiff's rights, and federal constitutional defenses, like other defenses, could be asserted in that proceeding. It was for this reason — the adequacy of the remedy by way of defense to the pending proceeding — that "courts of equity" ordinarily would not enjoin pending criminal prosecutions,[29] and this was equally

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24. U.S. CONST., art. VI, § 2.

25. Donovan v. Dallas, 377 U.S. 408 (1964).

26. *Id.* This principle is illustrated by the authorization to enjoin pending state proceedings in certain circumstances by 28 U.S.C. § 2283 (1978). The most notable circumstance, of course, is where the federal suit is brought pursuant to 42 U.S.C. § 1983 (1974). *See* Mitchum v. Foster, 407 U.S. 225 (1972).

27. When a party seeks a federal court injunction against enforcement of a state court injunction, the situation is analogous to the equity court's enjoining a party from enforcing a judgment obtained "at law."

28. *See* Juidice v. Vail, 430 U.S. 327; Trainor v. Hernandez, 431 U.S. 434 (1977). When the state court proceedings against that plaintiff have terminated, however, and there is no threat of future proceedings, the case is moot as to that plaintiff.

29. *See, e.g.*, Ivy v. Katzenbach, 351 F.2d 32 (7th Cir. 1965); Fairchild v. Brock, 88 Cal. App. 2d 425, 199 P.2d 9 (1948); Cicchetti v. Anderson, 90 R.I. 76, 155 A.2d 64 (1959). "Where prosecution has been initiated against a criminal-case defendant, there are often no good reasons for equitable interference, since any defense to the case can be presented, and

true of federal "courts of equity."[30] The refusal to grant relief against pending criminal prosecutions included the granting of declaratory relief. Since the validity of the law under which a party was being prosecuted could be challenged in the criminal proceeding, an independent action for declaratory relief was considered inappropriate.[31]

Yet, where the remedy by way of defense to the criminal prosecution was not adequate to protect the rights of the "equity" plaintiff, the requirement of "irreparable injury" was satisfied, and if the prosecution was substantively unlawful, it would be enjoined.[32] One of the clearest examples of a situation where the remedy by way of defense would not be adequate was where the prosecution was brought in bad faith as part of a scheme of harassment to deprive the plaintiff of constitutional rights, such as freedom of expression. In such a situation, it was the prosecution itself that caused the injury, so the remedy by way of defense would necessarily be inadequate to protect the right in question.[33]

The "equity" court would also enjoin threatened criminal prosecutions if the plaintiff could show that the prosecution was "imminent" and that "irreparable injury" would occur if the prosecution was allowed to take place.[34] In practice, "irreparable injury" to property rights usually would be found to exist on the part of persons and enterprises subject to state regulatory laws, and the courts would regularly entertain actions challenging the constitutionality of those laws.[35] As Professor Wechsler has demonstrated so convincingly, the federal courts were no exception and in a practically unbroken line of cases, the Supreme Court found threatened "irreparable injury," justifying an affirmative suit challenging the constitu-

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presented in the most orderly way, in the criminal prosecution itself." D. DOBBS, REMEDIES 113 (1973).

30. *See* the discussion in Wechsler, *supra* note 2, at 753-62.

31. *See, e.g.*, Reed v. Littleton, 275 N.Y. 150, 9 N.E.2d 814 (1937).

32. *See, e.g.*, Board of Commissioners v. Orr, 181 Ala. 308, 61 So. 920 (1913); Fairmont Foods Co. v. City of Duluth, 261 Minn. 189, 111 N.W.2d 342 (1961); Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915).

33. *See, e.g.*, Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946). *See also* Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968).

34. *See* the discussion and review of cases in Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 600-16 (1975).

35. *See, e.g.*, Doyle v. Clark, 220 Ind. 271, 41 N.E.2d 949 (1942).

tionality of state regulatory laws.[36] With the enactment of the Federa Declaratory Judgment Act,[37] declaratory relief was also available.[38]

Thus, the notion that "equity will not enjoin enforcement of th criminal law,"[39] is simply inaccurate. Whenever the remedy by way c defense to a pending criminal prosecution was not adequate to protect th rights in question, there was "irreparable injury" and injunctive relief wa available. When there was no pending proceeding at the time the sui seeking injunctive or declaratory relief was brought, the plaintiff had t show "threatened irreparable injury" or an "actual controversy," but, as practical matter, it was usually sufficient if the activity in which the plaintif wished to engage was subject to the law's restrictions. The federal courts sitting as "equity" courts, functioned in the same manner as their stat court counterparts. With respect to federal relief against pending stat court proceedings, the federal plaintiff ordinarily could not show that th remedy by way of defense to the pending state court proceeding would b an inadequate means of protecting the federal right in question, and it wa for this reason rather than because of "federalism" considerations tha federal courts would not enjoin pending state court proceedings.[40] Bu "irreparable injury" and "actual controversy" frequently could be show when the federal plaintiff was seeking prospective relief against th enforcement of state laws, and the federal courts regularly entertaine affirmative actions to determine the constitutionality of those laws.[4]

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36. *See* the discussion in Wechsler, *supra* note 2, at 753-13. While Ex parte Young, 2(U.S. 123 (1908), is the "classic example," Professor Wechsler points out that prior to *Youn* the Court had sanctioned affirmative actions challenging the constitutionality of sta regulation of railroad rates. *Id.* at 757-62.

37. 28 U.S.C. § 2201 (amended 1976).

38. *See* the discussion of this point by Justice Brennan in Perez v. Ledesma, 401 U.S. 8 93, 111-15 (1971) (Brennan, J., concurring and dissenting).

39. In *Younger*, Justice Black, while intimating that equitable relief against enforcemei of the criminal law was "extraordinary," nonetheless was careful to state the princip correctly with respect to relief against pending prosecutions: "courts of equity should not ac and particularly should not act to restrain a criminal prosecution, when the moving party ha an adequate remedy at law and will not suffer irreparable injury if denied equitable relief 401 U.S. at 43-44.

40. *See* Cline v. Frink Dairy Co., 274 U.S. 445 (1927). Note, however, that prior t *Mitchum*, the Anti-Injunction Act, 28 U.S.C. § 2283 (1978), was seen by some courts as limitation on the power of the federal courts to enjoin pending state court proceedings. *Se e.g.*, Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

41. *See* note 36 *supra*. As the Court stated in Packard v. Banton, 264 U.S. 140, 14 (1924): "equitable jurisdiction exists to restrain criminal prosecutions under unconstitution enactments, when the prevention of such prosecutions is essential to the safeguarding of righ of property." *See also* the discussion in Terrace v. Thompson, 263 U.S. 197, 214-15 (1923)

Federal judicial relief against enforcement of state laws then was available to the same extent as it was available against enforcement of federal laws,[42] and there generally were no federalism considerations preventing federal judicial relief against state governmental action.

This is where things stood in 1965 when *Dombrowski v. Pfister*[43] was decided. The facts and holding of that case have been dissected so many times that no useful purpose would be served by doing so again here.[44] Nor is it necessary to discuss again my analysis of *Dombrowski* from the remedial-political perspective.[45] Suffice it to say that while *Dombrowski* involved a federal court injunction against state criminal prosecutions and was interpreted as authorizing injunctive relief against pending as well as threatened prosecutions,[46] doctrinally at least, the "breakthrough" was in remedies terms rather than in federalism terms.[47] *Dombrowski* redefined "irreparable injury" *in the first amendment context* to include the "chilling effect" resulting from actual or threatened prosecution under a law "void on its face."[48] In this sense it was the remedial concomitant to the substantive "void on its face" doctrine.[49] This meant that when a party was prosecuted under a law that was allegedly "void on its face" in violation of the first amendment, the prosecution itself caused "irreparable injury," because it created a "chilling effect" on the exercise of first amendment rights by that party and by others.[50] Since this was so, the remedy by way

42. The Three-Judge Court Act, 28 U.S.C. § 2281 *et seq.* (repealed 1976), it should be noted, also required the convening of a three-judge court when injunctive relief was sought against the enforcement of a federal statute on grounds of its unconstitutionality.

43. 380 U.S. 479 (1965).

44. *See, e.g.*, Fiss, *supra* note 2, at 1105-16; Sedler, *Reflections, supra* note 3, at 237-42; Wechsler, *supra* note 2, at 835-45. *See also* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535 (1970).

45. *See* note 5 *supra.*

46. *See* the discussion and review of cases in Wechsler, *supra* note 2, at 861-66.

47. *See* the discussion in Fiss, *supra* note 2, at 1111-12; Sedler, *Reflections, supra* note 3, 243-45.

48. *See* the discussion in Sedler, *Reflections, supra* note 3, at 244-45.

49. As Professor Fiss has noted, "The central contribution of *Dombrowski* was its linkage of irreparable injury and overbreadth." Fiss, *supra* note 2, at 1112.

50. As to the relationship between the "void on its face" doctrine and *jus tertii* standing, see the discussion in Broadrick v. Oklahoma, 413 U.S. 601, 610-13 (1973), where the Court noted: "Litigants, therefore, are permitted to challenge a statute [on its face] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. *See also* the discussion in Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599, 612-26 (1962).

of defense to the prosecution was necessarily inadequate to protect first amendment rights, and the federal "equity" court could grant relief against the prosecution.

This meant in practice that there would be substantial federal judicial intervention in pending state court criminal proceedings. The defendant in the criminal proceeding, once it was initiated,[51] could bring an affirmative action in the federal district court to challenge the constitutionality of the law under which the prosecution was brought.[52] Under the substantive aspect of the "void on its face" doctrine, it did not matter, of course, whether the plaintiff's conduct itself was entitled to constitutional protection. If the statute was unconstitutional on its face, the prosecution under it was unconstitutional too. In case after case the federal courts entertained challenges to pending state prosecutions under the "void on its face" aspect of *Dombrowski*,[53] and not infrequently granted relief against them.[54]

Equally significant was the availability of the *Dombrowski*-type suit to obtain relief against threatened criminal prosecutions or other governmental action on the part of the federal government as well as the states.[55] The same "chilling effect" that could satisfy the remedies requirement of threatened "irreparable injury" also satisfied the justiciability requirement of standing.[56] The *Dombrowski*-type suit was a part of the Warren

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51. The initiation of the prosecution would satisfy the justiciability requirement of "injury in fact."

52. As a practical matter, then, *Dombrowski* gave the federal district courts the primary responsibility for protecting first amendment rights.

53. *See* note 36 *supra*.

54. Usually the relief would take the form of a declaratory judgment that the law was unconstitutional, although in certain cases injunctive relief was granted as well. *Compare* Kirkwood v. Ellington, 298 F. Supp. 461 (W.D. Tenn. 1969), *with* McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967). Relief was also granted against the enforcement of state court injunctions in civil proceedings where the injunctions were "void on their face," because they included constitutionally-protected conduct within their prohibition. *See, e.g.*, Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969).

55. *See* the discussion in Sedler, *Wake*, *supra* note 3, at 256-58. The leading case in this regard is National Student Assoc. v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969), where the court enjoined Selective Service officials from enforcing the "Hershey Directive," because of the "chilling effect" that it would have on war protest by draft registrants.

56. *See* the discussion of this point in Sedler, *Standing, Justiciability and All That*, *supra* note 18, at 495-97. Prior to *Dombrowski*, affirmative actions in the federal courts to protect first amendment rights were fairly rare, in large part because of the restrictive notion of standing enunciated in United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), which indicated that a person could not challenge a statute on first amendment grounds unless he or she had actually violated its prohibitions. After *Dombrowski*, standing was conferred because of the

Court's efforts to broaden accessibility to the federal courts, here in the context of protecting first amendment rights, and complemented the Court's lowering of justiciability bars in other areas.[57] As I have discussed more fully elsewhere,[58] not only was the availability of the *Dombrowski*-type suit to protect dissent and social change effort from repressive and unconstitutional governmental action crucial to the civil rights struggle of the early 1960's in the South, but it likewise provided legal protection for the anti-war movement and the more sweeping movement for social change that took place in the late 1960's and early 1970's as well. In my view, this contributed to its partial undoing in *Younger*.[59]

There was a federalism component to *Dombrowski*, but it was pointedly ignored by the majority,[60] *as it had been by the Supreme Court ever since* Ex parte Young.[61] On the assumption that the prosecution in *Dombrowski* caused "irreparable injury" to first amendment rights,[62] why could not relief be given by the state "equity" courts, as Justice Harlan asked in his dissent?[63] The same question, ironically enough, was asked by the first Justice Harlan in his dissent in *Ex parte Young*.[64] Although the Court in the years between *Ex parte Young* and *Dombrowski* emphasized federalism considerations when it said that federal courts could not intervene in

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chilling effect suffered by a person who was subject to the statute's prohibitions, and as one court observed: "[S]ubsequent case law weakened *Mitchell* as precedent in First Amendment cases, [since] *Mitchell* was decided prior to judicial recognition of the so-called 'chilling effect' doctrine." National Assoc. of Letter Carriers v. Blount, 305 F. Supp. 546, 549 (D.D.C. 1969), *appeal dismissed*, 400 U.S. 801 (1970). *See also* Baggett v. Bullitt, 377 U.S. 360 (1964).

57. As to the relationship between *Dombrowski* and the liberalized law of standing, see the discussion in Sedler, *Standing, Justiciability and All That*, *supra* note 18, at 495-97. As to the liberalization of the law of standing and the removal of other justiciability bars by the Warren Court, see the discussion *id.* at 481-88.

58. Sedler, *Reflections*, *supra* note 3, at 258-61.

59. Sedler, *Wake*, *supra* note 3, at 8-13.

60. *See* the discussions in Fiss, *supra* note 2, at 1114-15; Wechsler, *supra* note 2, at 839-40.

61. As Professor Wechsler has observed: "But we are not informed why lower *federal* courts should lend a hand if *state* equity is so empowered. Yet that is the paramount question. The failure of the Court to confront this question did not originate in *Dombrowski*. It had been the persistent failure of every Supreme Court decision since it all began in *In re Sawyer* in 1888." Wechsler, *supra* note 2, at 839.

62. It should be noted that in *Dombrowski* the plaintiffs were in effect seeking relief against threatened rather than pending criminal prosecutions, since the charges out of which *Dombrowski* arose had been dismissed prior to the institution of the federal suit. *See* the discussion in Sedler, *Reflections*, *supra* note 3, at 250.

63. 380 U.S. at 499-500.

64. Ex parte Young, 209 U.S. 123, 176 (1908) (Harlan, J., dissenting).

pending state court prosecutions,[65] and, in those few cases where it failed to find "irreparable injury" in regard to a threatened prosecution,[66] it never explained why those same federalism considerations did not dictate "abstention"[67] in all cases challenging state governmental action so that the state "equity" courts could protect federal constitutional rights. Instead, as in *Dombrowski*, whenever it found that the federal plaintiff made out a case for injunctive or declaratory relief, it assumed that it was proper for the federal "equity" court to grant that relief.[68] In *Dombrowski*, Justice Harlan, joined by Justice Clark, articulated precisely those federalism considerations which ordinarily would not allow an affirmative action in the federal courts challenging the constitutionality of state criminal laws and seeking to enjoin their present or threatened enforcement.[69] This view, apparently shared by Justice Black, was to surface in *Younger* and its progeny,[70] but it has been consistently rejected by the Court.[71]

From a federalism standpoint then, *Dombrowski* was consistent with the line of cases going back to *Ex parte Young* and beyond,[72] holding that when a plaintiff in a federal suit challenging the constitutionality of state

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65. *See, e.g.*, Stefanelli v. Minard, 342 U.S. 117 (1952).

66. *See, e.g.*, Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Fenner v. Boykin, 271 U.S. 240 (1926). As Professor Wechsler has clearly demonstrated, these cases were inconsistent with the *Ex parte Young* line of cases, and were effectively repudiated in Ferguson v. Skrupa, 372 U.S. 726 (1963), where the Court did not question the availability of affirmative relief in the federal courts to challenge the constitutionality of a state regulatory statute at the suit of one subject to its prohibitions, although it upheld the statute on the merits. Wechsler, *supra* note 2, at 826-27.

67. "Abstention" has sometimes been used to refer to the refusal of the federal courts to intervene in state court proceedings. The more common use of the term is in connection with "Pullman abstention," which refers to the deferral of the exercise of federal court jurisdiction pending an interpretation of state law by the state courts. *See generally* the discussion of "Pullman abstention" in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964).

68. *See* the discussion in Fiss, *supra* note 2, at 1116-17; Wechsler, *supra* note 2, at 810-13.

69. As Justice Harlan stated:

> Underlying the Court's major premise that criminal enforcement of an overly broad statute affecting rights of speech and association is in itself a deterrent to the free exercise thereof seems to be the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively. Such an assumption should not be indulged in the absence of a showing that such is apt to be so in a given case. No showing of that kind has been made.

380 U.S. at 499 (Harlan, J., dissenting).

70. *See* the discussion in Fiss, *supra* note 2, at 1105.

71. Justice Rehnquist on the present Court has been the most articulate proponent of this view.

72. As to the cases prior to *Ex parte Young*, see Wechsler, *supra* note 2, at 753-62.

governmental action satisfies the remedies criteria for injunctive or declaratory relief, federalism considerations do not preclude the granting of such relief. The breakthrough of *Dombrowski* was in the redefinition of "irreparable injury" in the first amendment context, and the increased federal judicial interference with state governmental action that followed after *Dombrowski* was the result of that redefinition.

III. *Younger* AND ITS PROGENY: THE ADMIXTURE OF EQUITY, COMITY AND FEDERALISM

Like *Dombrowski*, so much has been written about *Younger v. Harris*[73] and the "*Younger* sextet"[74] that again no useful purpose would be served by dissecting these cases at length.[75] While I have also discussed *Younger* from the remedial-political perspective,[76] and the matter of satisfying the *Younger* criteria in practice,[77] what I want to focus on now is the admixture of remedies and federalism considerations as they were articulated by the Court in *Younger*.

From a remedies standpoint, what the Court did in *Younger* was to eliminate the "void on its face" aspect of *Dombrowski* in regard to federal relief against pending state court criminal proceedings. The fact that the law under which a party was being prosecuted was allegedly "void on its face" was held no longer to satisfy the remedies requirement of "irreparable injury."[78] Facial invalidity would have to be asserted as a defense in the

73. 401 U.S. 37 (1971).

74. Samuels v. Mackell, 401 U.S. 66 (1971), dealt with declaratory relief against a pending state court criminal prosecution, and will be discussed notes 80-81 *infra* and accompanying text. Boyle v. Landry, 401 U.S. 77 (1971), dealt with relief against threatened prosecutions, and will be discussed notes 94-96 *infra* and accompanying text. The other three cases, Byrne v. Karalexis, 401 U.S. 216 (1971), Dyson v. Stein, 401 U.S. 200 (1971), and Perez v. Ledesma, 401 U.S. 82 (1971), dealt with the application of *Younger* in the specialized context of state obscenity prosecutions and will not be discussed in the present article.

75. In addition to the works cited in note 2 *supra*, see Geltner, *Some Thoughts on the Limiting of* Younger v. Harris, 32 OHIO ST. L.J. 744 (1971); Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger, *and Beyond*, 50 TEX. L. REV. 1324 (1972).

76. Sedler, *Wake, supra* note 3, at 8-13.

77. *Id.* at 23-44.

78. As it had been in practice prior to *Younger* (*see* note 7 *supra*), and, as, it is submitted, was impliedly recognized by the Supreme Court in Cameron v. Johnson, 390 U.S. 611 (1968), when the Court dealt with the claim of bad faith enforcement only *after* it had found the statute under which the prosecution was brought to be facially valid. *See* the discussion of this point in Sedler, *Wake, supra* note 3, at 4-5. As Professor Wechsler has observed, "It was not the lower federal judiciary which had misconceived *Dombrowski* but the Supreme Court in *Younger* which altered it." Wechsler, *supra* note 2, at 887.

pending state court proceeding. Left intact though was the "bad faith an harassment" aspect of *Dombrowski*, which, as the Court noted, was i accord with traditional concepts of "irreparable injury."[79] In the compan ion case of *Samuels v. Mackell*,[80] the Court, again in accord with tradition al remedies concepts,[81] held that where injunctive relief was not availabl against a pending criminal prosecution, declaratory relief was not availabl either.

The admixture problem arose when Justice Black, writing for th Court, discussed the reasons for the "longstanding public policy agains federal court interference with state court proceedings."[82] In so doing, h fused remedies considerations and federalism considerations, with th emphasis on the latter. As to the remedies considerations, he referred t the "basic doctrine of equity jurisprudence that courts of equity should nc act, and particularly should not act to restrain a criminal prosecutior when the moving party has an adequate remedy at law and will not suffe irreparable injury if denied equitable relief."[83] As pointed out previously *Dombrowski* clearly was a departure from traditional notions of "irrepara ble injury" where first amendment rights were involved,[84] and the Cour was now returning to the traditional notions of "irreparable injury" in thi context. Once it had done so, there was no reason for it to go further: sinc a case for affirmative relief had not been alleged under the restore traditional criteria of "irreparable injury," the complaint should have bee dismissed. Nor, from a remedies standpoint, would there be any reason t distinguish between affirmative relief against pending criminal prosecu tions and affirmative relief against pending civil proceedings,[85] since i

79. 401 U.S. at 50. *See also* the discussion of this point in Sedler, *Reflections*, *supra* no 3, at 244, where it was observed that, "The 'harassment' or 'bad faith' rule of *Dombrowski* w in accord with traditional principles governing the affirmative propriety of injunctive reli and broke no new ground." To the same effect, see Soifer and Magill, *supra* note 2, at 116 "The actual holding of *Younger* and its companion cases, that absent bad faith or harassmer federal equitable relief is barred once criminal proceedings have commenced in state cour was supportable by a relatively unbroken line of precedent of respectably ancient vintage."

80. 401 U.S. 66 (1971).

81. *See* note 31 *supra* and accompanying text.

82. 401 U.S. at 43.

83. *Id.* at 43-44.

84. *See* the discussion, notes 48-50 *supra* and accompanying text.

85. This may have been necessary in order to obtain a majority. Justices Stewart ar Harlan, concurring in *Younger*, stated that the outcome might have been different if a sta civil proceeding were pending. 401 U.S. at 54-55 (Stewart, J., concurring). In the oth concurring opinions in the "Younger sextet," it was also stressed that it was a crimin prosecution against which relief was sought.

both instances affirmative relief would not be available unless it could be shown that the remedy by way of defense to the pending proceeding was not adequate to protect the right in question.

Justice Black, however, was determined to stress the federalism considerations that were at the heart of the Harlan-Clark dissent in *Dombrowski*. He went on:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions 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. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism' . . . .[86]

In view of this "even more vital consideration," said Justice Black, whenever federal relief was sought against a pending state court criminal proceeding, even "irreparable injury" was insufficient to justify relief unless it was "both great and immediate."[87]

Justice Black never explained the difference between "ordinary irreparable injury" and "great and immediate irreparable injury," and it is difficult to fathom what that difference would be. He noted cost and inconvenience of having to defend against a single prosecution did not constitute "irreparable injury," as the courts had long held, so presumably here he was referring to "ordinary irreparable injury." But he then cited the "bad faith and harassment" facts of *Dombrowski* as an illustration of the "kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith that had always been considered sufficient to justify federal intervention,"[88] so presumably he was saying that this amounted to "great and immediate irreparable injury." But, this was the same kind of "irreparable injury" that traditionally had been found sufficient to justify relief against a pending prosecution,[89] so it does not differ from "ordinary irreparable injury." The purported distinction between "ordinary irreparable injury" and "great and immediate irreparable injury" was further eroded by Justice Black's subsequent observations

86. 401 U.S. at 44 (emphasis added).

87. *Id.* at 45 (quoting from Fenner v. Boydkin, 271 U.S. 240, 243-44 (1926)).

88. *Id.* at 48.

89. *See* note 33 *supra*.

that "[t]here 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,"[90] and that "[O]ther unusual situations calling for federal intervention might also arise."[91] The purported distinction then becomes non-existent, and it seems clear that Justice Black was simply trying to weight the federalism component of *Younger* and to get the "behavioral message" across to the lower federal courts that they should not find "irreparable injury" lightly.

What *Dombrowski* was all about was the first amendment. In *Dombrowski* the Court expanded the concept of "irreparable injury" in the first amendment context to include the "chilling effect" on the exercise of first amendment rights that could result from prosecutions under facially invalid laws. It was the existence of those laws which created the impermissible "chilling effect" on first amendment rights, and, in *Dombrowski*, the Court held that the values embodied in the first amendment not only required that a party prosecuted under such a law be permitted to attack it "on its face"[92] but in addition that the party be entitled to bring a affirmative action to enjoin the prosecution. Since such suits could be brought in the federal courts under 42 U.S.C. § 1983, this meant that federal courts could enjoin pending state court criminal prosecutions, but this was only because affirmative relief, as opposed to the defense to the criminal prosecution, was considered necessary to protect first amendment rights.

What *Younger* did was to remove this additional source of protection for first amendment rights, and in this regard it was reflective of the Court's growing disenchantment with "chilling effect" and with the far-reaching implications of the "void on its face" doctrine. Indeed, some members of the Court were arguing that the "void on its face" doctrine should be abandoned as a substantive defense to a criminal prosecution.[93] This

90. 401 U.S. at 53.

91. *Id.* at 54. Justice Black also indicated that federal relief was proper if the statute under which the prosecution was brought was "flagrant and patently unconstitutional." *Id.* at 53-54 (quoting from Watson v. Buck, 313 U.S. 387, 402 (1941)). As to the meaning of "flagrant and patent unconstitutionality," see the discussion in Sedler, *Wake*, *supra* note 3, at 42-44. The fact that suit would be brought under such a law would be strong evidence of bad faith.

92. This would mean that the law will be declared invalid without regard to whether the conduct of the assailant itself was constitutionally protected in the circumstances presented. *See* the discussion note 50 *supra* and accompanying text.

93. *See, e.g.*, the dissent of Justice Blackmun, joined by Chief Justice Burger, in Gooding v. Wilson, 405 U.S. 518, 534-37 (1972) (Blackmun, J., dissenting).

disenchantment was further reflected by the Court's decision in *Boyle v. Landry*,[94] another companion case to *Younger*, where it held, following a rather convoluted analysis of the facts,[95] that allegations of "chilling effect" alone were insufficient to justify relief against future enforcement of facially invalid laws.[96] In *Laird v. Tatum*,[97] decided the following year, the Court again restricted "chilling effect," this time in regard to justiciability, when it held that alleged "chilling effect" on the exercise of first amendment rights due to military surveillance of civilian protest activity was insufficient to present a justiciable controversy unless the plaintiffs could show that their own activity was in fact "chilled" by the challenged surveillance.[98] And in *Broadrick v. Oklahoma*,[99] decided in 1973, the Court limited the substantive scope of the "void on its face" doctrine, where the challenged law did not by its terms regulate expression, to claims of "substantial overbreadth."[100]

What all of this indicates is that the thrust of *Younger* was directed against *Dombrowski's* expanded concept of "irreparable injury" in the first amendment context. Seen in this light *Younger*, like *Dombrowski*, was about the first amendment, and Justice Black's invocation of federalism concerns, while important perhaps to certain members of the Court, was not central to the decision of that case. *Younger* was simply the opening wedge in the Court's effort to limit "chilling effect" as a basis for challenging governmental action — federal as well as state — as violative of the first amendment.[101] If this analysis is correct, *Younger*, no more than *Dom-*

94. 401 U.S. 77 (1971).

95. *See* the discussion of this point in Sedler, *Wake*, *supra* note 3, at 18-20.

96. In *Younger*, the other plaintiffs had alleged a "chilling effect" on the exercise of their first amendment rights solely because of the prosecution of harris, which the Court, of course, found insufficient to satisfy the requirement of "threatened irreparable injury." 401 U.S. at 42.

97. 408 U.S. 1 (1972).

98. The holding has a "Catch 22" ring about it. You cannot bring a suit unless you have been "chilled," but if you have been "chilled," by definition, you will be "chilled" from bringing a suit.

99. 413 U.S. 601 (1973).

100. "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 622 (quoting from CSC v. National Assoc. of Letter Carriers, 413 U.S. 548, 615-16 (1973)). However, when the statute by its terms regulates or proscribes expression rather than conduct, the "void on its face" doctrine applies without regard to "substantial overbreadth." *See* Lewis v. New Orleans II, 415 U.S. 130 (1974).

101. *See* the discussion of the first amendment implications of the decision in the dissent of Justice Douglas, 401 U.S. at 58-60 (Douglas, J., dissenting).

browski, altered the federalism component of *Ex parte Young*, and imposed no federalism considerations that would operate to prevent federal judicial relief against state governmental action.[102]

The validity of this analysis is suggested if not demonstrated by *Mitchum v. Foster*,[103] decided the year after *Younger*, in which *only* federalism considerations were involved. There, a unanimous court[104] held that 42 U.S.C. § 1983 was a statutorily authorized exception to 28 U.S.C. § 2283, so that a federal court was not precluded from enjoining a pending state criminal prosecution if the *Younger* criteria were satisfied. In so doing, the Court in effect answered the federalism question that it had ignored in *Dombrowski*, just as it had in *Ex parte Young*, and the reasons it gave for its holding in *Mitchum* indicate why the question properly could be ignored: it is answered by 42 U.S.C. § 1983 itself. The federalism question is why, assuming that entitlement to affirmative relief is shown from a remedies standpoint, should not that relief be given by the state courts since the challenge is to state governmental action? The answer to that question is that 42 U.S.C. § 1983 imposes on the federal courts the primary responsibility for the protection of federal constitutional rights.[105] As Justice Stewart, writing for the Court, stated after reviewing the legislative history of § 1983 and the fourteenth amendment:

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to

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102. By this is meant that if the federal plaintiff can show affirmative entitlement to relief from a remedies standpoint, that remedy can be pursued in the federal courts notwithstanding that a challenge to state governmental action is involved.

103. 407 U.S. 225 (1972).

104. In a separate concurrence, Chief Justice Burger, joined by Justices White and Blackmun, emphasized that *Mitchum* did not undercut the *Younger* principles of "equity, comity and federalism" that apply when federal judicial interference is sought against a pending state court criminal proceeding. 407 U.S. at 244 (Burger, C.J., concurring). Justices Powell and Rehnquist did not participate.

105. As the Court had earlier stated in Zwickler v. Koota, 389 U.S. 241, 248 (1967): "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .' . . . We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constituion are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

> interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' . . . And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.[106]

Thus, the Court rejected the federalism concerns that were expressed in the Harlan-Clark dissent in *Dombrowski* and that were revived by Justice Black in *Younger*. The purpose of § 1983 was to give all persons a federal forum for the protection of federal constitutional rights, and impact of "Our Federalism" in this regard is in favor of federal judicial interference with state governmental action in order to protect federal constitutional rights.[107]

After seeming to remove federalism considerations as a limitation on the power of the federal courts to protect federal constitutional rights from state interference, Justice Stewart nevertheless referred to the principles of "equity, comity, and federalism" enunciated in *Younger* "that must restrain a federal court when asked to enjoin a state court proceeding."[108] The rationale of *Mitchum* would indicate that there are no federalism considerations that would preclude federal adjudication (indeed, the federalism considerations may point to federal adjudication), and at a minimum, if the federal plaintiff is entitled to affirmative relief from a remedies standpoint, such relief should be forthcoming. The failure to dispel the admixture of "equity, comity and federalism" in *Mitchum*, as we will see, has led to continued confusion as to the proper basis for federal judicial interference with state governmental action, and to that extent, has undercut the federalism holding of *Mitchum*.[109]

In *Younger*, Justice Black, despite the articulation of federalism concerns, emphasized that the holding was limited to interference in pending state court criminal prosecutions,[110] a point noted by Justice

106. 407 U.S. at 242 (citing *Dombrowski* and *Ex parte Young*).

107. The principle that a federal plaintiff is entitled to the choice of a federal forum to challenge the validity of state governmental action, even if that action is taken in violation of state law, was recognized earlier in Monroe v. Pape, 365 U.S. 167 (1961).

108. 407 U.S. at 243.

109. The confusion was compounded by the Court's citation to cases such as *Fenner*, *Beal* and *Buck*, which were departures from the Court's general approach to relief against threatened enforcement of state law. 407 U.S. at 243. *See* the discussion in Wechsler, *supra* note 2, at 798-813.

110. 401 U.S. at 53-54.

Stewart in *Mitchum*.[111] It may well have been that a majority could not be mustered in *Younger* to extend its criteria to all pending state court civil proceedings.[112] But from a remedies standpoint, the "irreparable injury" requirement would bar intervention in pending state court civil proceedings in the same manner as it would in pending state court criminal proceedings. If the Court in *Mitchum* had explained *Younger* solely in remedies terms, there would thus be no reason to distinguish between pending civil and pending criminal proceedings.

Not only did the Court not do this, but its holding that 28 U.S.C. § 2283 did not bar federal injunctive relief against a pending state court proceeding potentially extended suits seeking such relief beyond the first amendment context of *Dombrowski* and into civil proceedings.[113] Prior to *Dombrowski*, the Court had consistently refused to intervene in pending state court criminal proceedings in order to protect other federal constitutional rights, such as those guaranteed by the fourth amendment, for the traditional remedies reason that those rights could adequately be protected by way of defense to the pending proceeding.[114] Lurking in the background, however, was the possible bar of 28 U.S.C. § 2283. Now that this bar had been removed in *Mitchum*, it could be expected that federal relief would be sought against pending state court proceedings, civil as well as criminal, on the ground that federal constitutional rights would be violated in those proceedings. And in civil proceedings, it was not clear whether "irreparable injury" was a requirement at all.

The lower federal courts, however, tended for the most part to read *Younger* and *Mitchum* in remedies terms. A number of circuits have held that the *Younger* criteria of "irreparable injury" apply to all pending civil proceedings.[115] And while the lower federal courts have found "irrepara-

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111. 407 U.S. at 243.

112. *See* note 85 *supra*.

113. Following *Dombrowski*, relief was also granted against the enforcement of a state court injunction issued in a civil proceeding on the ground that the injunction was "void on its face." *See* note 54 *supra*.

114. *See, e.g.*, Stefanelli v. Minard, 342 U.S. 117 (1951), in which the Court also articulated federalism concerns.

115. *See* Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972), *stay denied*, 409 U.S. 1201 (1972); Louisville Area Inter-Faith Comm. v. Nottingham Liquors, Ltd., 542 F.2d 652 (6th Cir. 1976). In Schlesinger v. Councilman, 420 U.S. 738 (1975), the Court held that *Younger* applied to court-martial proceedings, basing the decision both on remedies considerations, and on "military necessity," which it analogized to the "equity, comity and federalism" of *Younger*.

ble injury" in certain cases where a clear showing of "bad faith and harassment" has been made,[116] this is not an easy showing to make, and the practical effect of *Younger* has been to essentially prevent federal court interference in pending state court proceedings.[117] This is the way things were before *Dombrowski*, which, as we have said, only expanded "irreparable injury" in the first amendment context, and the way they would be if interference in pending proceedings were governed solely by remedies considerations.

IV. RELIEF AGAINST FUTURE PROSECUTIONS: *Steffel* LIMITS *Younger*

In *Steffel v. Thompson*,[118] decided in 1974, the Court held that *Younger* was not applicable when there was no pending state court proceeding, and going further, that federal declaratory relief was available without regard to the "irreparable injury" requirement for injunctive relief.[119] For purposes of the federal declaratory judgment act, where a party desires to engage in particular conduct and has been threatened with arrest if that party does so, there is an "actual controversy" between that party and the officials charged with the enforcement of that law. In *Steffel*, the plaintiff had been distributing handbills at a shopping center and was threatened with arrest by the police if he continued to do so. He left, but two days later a companion was arrested for handbilling at the shopping center and charged with a violation of the state trespass law. On these facts and in the first amendment context in which the claim arose, the Court held that the plaintiff had demonstrated "specific chilling effect" on the exercise of first amendment rights, and thus could bring an affirmative action to challenge the constitutionality of the trespass statute as applied to his activity. The

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116. *See, e.g.*, Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972); Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972); Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971); Kelly v. Gilbert, 437 F. Supp. 201 (D. Mont. 1976).

117. No useful purpose would be served by a string citation to cases where the allegations of "bad faith" or "other irreparable injury" were found to be insufficient. The main Supreme Court cases specifically dealing with "bad faith" and "other irreparable injury" are Kugler v. Helfant, 421 U.S. 117 (1975), and Cameron v. Johnson, 390 U.S. 611 (1968).

118. 415 U.S. 452 (1974).

119. As regards declaratory relief, the remedies and justiciability requirements merge completely, since the federal Declaratory Judgment Act, 28 U.S.C. § 2201 (amended 1976), requires the showing of an "actual controversy," which is also what is required by the "case or controversy" provision of art. III. The Court specifically noted this point in *Steffel*, 415 U.S. at 458.

holding was in accord with prior lower court cases that had found a "specific chilling effect" in similar circumstances.[120]

From a remedies standpoint, the holding illustrates the principle that when a party wishes to engage in activities that are prohibited by a law and prosecution has been threatened against the party if he or she engages in such activities, that party is entitled to seek affirmative relief against its enforcement. If a prosecution is imminent, as it was in *Ex parte Young*, the party satisfies the requirement of "irreparable injury," and is entitled to injunctive relief. If the party's activities are subject to the law, as, for example, in *Doe v. Bolton*,[121] where a physician's practice of medicine was subject to the state's anti-abortion law, the party is at least entitled to declaratory relief. *Steffel* merely applied this principle in a first amendment context. The threat of arrest if the plaintiff continued to handbill at the shopping center, as well as the arrest of his companion for handbilling there, showed that the conduct in which he wanted to engage was considered by the state officials to be subject to the trespass law. Since he refrained from that conduct in order to avoid prosecution, the threatened enforcement created a "specific chilling effect" on the exercise of his first amendment rights, and he was entitled to bring an affirmative action to challenge the constitutionality of the law as applied to that activity.[122] Moreover, as the Court had long ago emphasized in *Ex parte Young*, a party is not required to violate a law in order to challenge its constitutionality; it is enough that enforcement has been threatened and the party continues to engage in the desired activity.[123] And while the Court emphasized that the traditional "irreparable injury" test for injunctive relief is not necessarily the same as the "actual controversy" test for declaratory relief,[124] this distinction may not be all that significant in practice. Prior to *Steffel*, lower court cases had found in these circumstances that the prosecution was "imminent," thus satisfying the "irreparable injury" requirement.[125] More to the point perhaps, federal courts usually

120. These cases are discussed in Sedler, *Wake*, *supra* note 3, at 46-56. In the view of Professor Fiss, *Steffel* represented the "triumph" of the strategy employed by Justice Brennan in the "Younger sextet" to salvage as much of *Dombrowski* as was possible. Fiss, *supra* note 2, at 1129.

121. 410 U.S. 179 (1973).

122. As to "specific chilling effect," see also National Student Assoc. v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969).

123. *See* 415 U.S. at 459.

124. *Id.* at 468-72. *See also* Zwickler v. Koota, 389 U.S. 241 (1967).

125. *See, e.g.*, Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971).

will only issue a declaratory judgment that a state or federal law is unconstitutional, on the very realistic assumption that governmental officials will not prosecute following such a declaration.[126]

Again, federal declaratory and injunctive relief had always been available against threatened enforcement of state law upon the suit by a person subject to the law's restrictions.[127] And again, from a remedies standpoint, the criteria for relief against a threatened prosecution necessarily differ from that applicable to relief against a pending prosecution. When there is no prosecution pending, the plaintiff does not *presently* have an "adequate remedy at law" by which to assert the claims that are being asserted in the "equity" action. As the Court noted in *Steffel*:

> [w]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.[128]

Although the Court was referring to federal judicial relief against the enforcement of a state law, the reasoning is equally applicable to federal judicial relief against the enforcement of a federal law[129] and for that matter to state judicial relief against the enforcement of a state law.

From a federalism standpoint, however, it *was* significant to the Fifth Circuit in *Steffel* that a plaintiff in a federal action was seeking relief against the enforcement of a state law. That court concluded that: (1) *Younger* made it clear that "irreparable injury" meant "bad faith and harassment"

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126. *See* Doe v. Bolton, 410 U.S. 179 (1973), and Roe v. Wade, 410 U.S. 113 (1973). As the Court noted in *Steffel*:

> In those two cases, we declined to decide whether the District Courts had properly denied to the federal plaintiffs, against whom no prosecutions were pending, injunctive relief restraining enforcement of the Texas and Georgia criminal abortion statutes; instead, we affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these would be given effect by state authorities.

415 U.S. at 469. Similarly, in the *Dombrowski* era the relief usually would take the form of a declaratory judgment of unconstitutionality. *See* note 54 *supra*.

127. *See* the discussion, notes 39-42 *supra* and accompanying text.

128. 415 U.S. at 462.

129. In Civil Serv. Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973), the Court simply assumed that federal employees could bring an affirmative action to challenge the constitutionality of the Hatch Act without alleging that they had violated its prohibitions, effectively completing the overruling of United Public Workers v. Mitchell, 330 U.S. 75 (1947), in this regard.

rather than "chilling effect," (2) that the *Younger* criteria of "irreparable injury" applied to a request for injunctive relief against a *threatened* state court prosecution as well as against a pending prosecution, and (3) that *Samuels v. Mackell*, mandated that the same test apply to federal declaratory relief, since declaratory relief would normally disrupt the state criminal justice system in the same manner as would injunctive relief.[130] While this admittedly was an extension of *Younger*, it was an extension that was consistent with the federalism considerations that had been articulated by Justice Black.

Again, these federalism considerations were in effect rejected by the Court in *Steffel*, as they had been in a virtually unbroken line of cases from *Ex parte Young* to *Mitchum*,[131] but the Court, in explaining its rejection, continued to adhere to the *Younger* admixture of "equity, comity and federalism." Although noting that there was no adequate state remedy when no state prosecution was pending, it also related the absence of a pending state proceeding to federalism concerns. As the Court stated:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[132]

In any event, *Steffel* limits the applicability of *Younger* to pending state court proceedings and says that federalism considerations are inapposite when no state court proceeding is pending.

The remedies explanation of *Younger* and *Steffel* relates the distinction between relief against a pending proceeding and relief against future enforcement to the traditional concept of "adequate remedy at law." When a pending prosecution has been brought in bad faith for the purpose of harassing the plaintiff, it is the prosecution itself that causes the "irreparable injury," and the remedy by way of defense is necessarily inadequate to protect the plaintiff's rights.[133] So too, although there may be a pending state court proceeding, if the claim that the plaintiff asserts in the federal "equity" action cannot be asserted as a defense to what is in

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130. *See* the discussion, 415 U.S. at 456-58.

131. *See* the discussion, notes 103-107 *supra* and accompanying text.

132. 415 U.S. at 462.

133. *See* particularly the discussion of this point in Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972).

effect the pending state court "law" action, there again is no "adequate remedy at law." In *Gerstein v. Pugh*,[134] for example, the Supreme Court allowed an affirmative action challenging the constitutionality of a state's pre-trial detention procedures, noting that this issue could not be raised as a defense to the state criminal prosecution.[135] If unconstitutional pre-trial detention were a defense to the prosecution, which logically it should not be, the plaintiff in the federal action would have had an adequate remedy by way of defense to the state court proceeding and would not be entitled to affirmative relief.[136] Similarly, in *Gibson v. Berryhill*,[137] the Court held that a federal court could enjoin pending proceedings before a state administrative agency[138] when the charge was that the agency was incompetent by virtue of bias to adjudicate the issues before it, including, of course, the issue of whether the proceedings were violative of due process because of that bias. In remedies terms, the plaintiff did not have an adequate remedy in the pending proceeding to assert the right that was asserted in the suit for affirmative relief. But where the prosecution itself does not cause "irreparable injury," and where the claims can be asserted and fairly adjudicated in the pending proceeding, there is an "adequate remedy at law," and affirmative relief is unnecessary.[139]

When no prosecution is pending, the matter of "bad faith" in threatening a prosecution or the ability to assert the substantive claim in defense of a prosecution not yet brought is completely irrelevant. The injury is

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134. 420 U.S. 103 (1975).

135. 420 U.S. at 108 n.9.

136. Whereas in Juidice v. Vail, 430 U.S. 327 (1977), utilization of the state court remedy would enable the plaintiffs to obtain the relief sought in the federal court action. *See* the discussion, notes 179-85 *infra* and accompanying text. As to adequacy of state court remedies for these purposes, see discussion in Zeigler, *supra* note 2, at 292-98, 303-06.

In Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), the court held that *Younger* was no bar to an affirmative action by out-of-state lawyers challenging the refusal of a state court judge to allow them to appear *pro hac vice* in a criminal case, nothing that while the defendants in the state court action might have an adequate remedy by way of a sixth amendment claim in that proceeding, no such remedy was available for vindication of the attorneys' rights.

137. 411 U.S. 564 (1973).

138. The Court specifically left open the question of whether *Younger* applied to pending state administrative proceedings. 411 U.S. at 574-75. The question was also left open in Friedman v. Beame, 558 F.2d 1107 (2d Cir. 1977).

139. In Trainor v. Hernandez, 431 U.S. 434 (1977), the Court remanded the case for a determination of whether the plaintiff could challenge the attachment statute in the pending state court proceeding.

having to forego the desired activity because of the threat of prosecution,[140] and it is this injury that entitles the plaintiff to affirmative relief.

The point to be emphasized is that the results in *Younger* and *Steffel* can be explained solely in remedies terms — "equity" — rather than in terms of "equity, comity, and federalism," and this explanation is consistent with the Court's prior doctrine and practice with respect to federal judicial interference with the exercise of state governmental power. Federalism considerations, as operating to bar federal judicial interference, it is submitted, are negated by 42 U.S.C. § 1983. This is reflected in *Mitchum*, which authorizes the federal "equity" court to intervene in a pending state court proceeding if the remedies requirement of "irreparable injury" is satisfied, in *Steffel*, which holds that a federal court may grant relief against the enforcement of a state law on the part of any person subject to its restrictions, and in *Younger*, which merely holds that the alleged facial invalidity of the law under which the prosecution is brought does not create "irreparable injury" to first amendment rights.

V. Developments After *Steffel*

In the last four years the Supreme Court has decided a number of other cases dealing specifically with what has simply come to be called "*Younger*." It is my submission that the *results* in all of these cases, like the results in *Younger* and *Steffel*, can be explained in remedies terms, although the Court continues to articulate the admixture of "equity, comity and federalism." The cases can be put into two categories: (1) cases involving the applicability of the *Younger* criteria to non-criminal proceedings; (2) cases defining the line between pending and non-pending proceedings for *Younger* purposes and the relationship between them.

A. The Younger *Criteria and Non-Criminal Cases*

From a remedies standpoint, the *Younger* criteria — which, in my view, is just another way of saying "irreparable injury" — should apply to all pending state court proceedings without regard to whether or not they are criminal in nature, as a number of lower federal courts have held.[141] So long as the proceeding was brought in good faith and the substantive claim can be asserted effectively as a defense to that proceeding, there is an

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140. In *Ex parte Young*, the desired activity was charging the rates the railroad wanted to charge; in *Doe v. Bolton*, it was performing abortions; in *Steffel* it was handbilling at the shopping center.

141. *See* note 115 *supra*.

adequate remedy "at law," and affirmative relief is unnecessary. Whether that remedy is available in a criminal proceeding or a non-criminal proceeding is completely irrelevant to the entitlement to affirmative relief.

This point is illustrated by cases where the defendant in a state court injunction proceeding brings a federal court suit to enjoin enforcement of that injunction.[142] In the heyday of *Dombrowski*, when facial invalidity was equated with "irreparable injury," federal courts would enjoin enforcement of state court injunctions that restrained protected first amendment activity on the ground that they were "void on their face."[143] After *Younger*, these injunctions were refused.[144] Typical of such a case is *Louisville Area Inter-Faith Committee v. Nottingham Liquors, Ltd.*[145] There, a state court had issued *ex parte* a broad injunction against picketing near certain business premises. The defendants in the state court action made no effort to dissolve the injunction.[146] They instead sought to enjoin the state court plaintiffs from enforcing it by filing suit in federal court, alleging that the state injunction violated the first and fourteenth amendments. Prior to *Younger*, the federal court would have entertained the suit and determined the constitutionality of the injunction.[147] Nonetheless, the Sixth Circuit held that the *Younger* criteria applied to all pending civil proceedings, invoking the now customary federalism considerations[148] but also emphasizing that the plaintiffs in the federal action had an adequate remedy in the state court by which they could raise their constitutional claims.[149] Other federal circuits have also held that *Younger* applies to all pending civil proceedings.[150]

The Supreme Court, however, has refrained from so holding, despite three opportunities to do so, but in all of these cases it has held the *Younger* criteria to be applicable in the case before it. The first of these cases was

142. Here the federal court is in the analogous position of an equity court asked to enjoin enforcement of a judgment "at law," although the judgment it is asked to enjoin is one granting "equitable relief."

143. *See* Machesky v. Bizzel, 414 F.2d 283 (5th Cir. 1969).

144. *See* Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974), where the Fifth Circuit, which ordered the issuance of such an injunction in *Machesky*, held that it was now barred from doing so by *Younger*.

145. 542 F.2d 652 (6th Cir. 1976).

146. Because it was issued *ex parte*, it would be violative of the first amendment. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

147. *See* note 143 *supra*.

148. 542 F.2d at 653.

149. *Id.* at 654.

150. *See* note 115 *supra*.

Huffman v. Pursue, Ltd.,[151] decided in 1975. There, an Ohio prosecutor brought a state court proceeding under a law that provided for the closure for up to a year of any place determined to be a public nuisance. The defendant was the operator of a theater that showed pornographic films, many of which had been found to be obscene. The court ordered the theater closed for a year. Rather than appeal that order, as could have been done under Ohio law, the theater operator brought an affirmative action for declaratory and injunctive relief in the federal court, alleging that the use of the public nuisance law to close the theater was violative of the first amendment. The three-judge federal district court, without discussing the applicability of *Younger*, found the closure to be violative of the first amendment and granted injunctive relief.

The Supreme Court vacated and remanded the cause to the district court. Justice Rehnquist, writing for the majority, stressed federalism considerations, noting that "[w]e have consistently required that when federal courts are confronted with requests for such relief [interference with state civil functions], they should abide by standards of restraint that go well beyond those of private equity jurisprudence."[152] To Justice Rehnquist, this was because:

> [i]ntereference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."[153]

But again, in accord with the now familiar admixture of federalism and remedies considerations, he also noted that, "*Younger*, however, also rests upon the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution."[154]

Although the present proceeding was not a criminal one, it was, according to Justice Rehnquist, "more akin to a criminal prosecution than are most civil cases," since the state was a party to the proceeding and the proceeding was "both in aid of and closely related to criminal statutes

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151. 420 U.S. 592 (1975).

152. *Id.* at 603.

153. *Id.* at 604.

154. *Id.*

which prohibit the dissemination of obscene materials."[155] Thus, "an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding,"[156] and *Younger* was applicable.[157]

The plaintiff had argued that there was no pending state court proceeding within the meaning of *Younger* because the state court proceeding had terminated at the time the federal suit was filed: a permanent injunction had been issued and no appeal was taken from the judgment. In responding to this argument, Justice Rehnquist invoked, as if they were related, what are really very different concepts of "exhaustion of state remedies," and "federal post-trial intervention designed to annul the results of a state trial." According to Justice Rehnquist, a party in the plaintiff's position "must exhaust his state appellate remedies *before* seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*."[158] Surely, however, Justice Rehnquist cannot be suggesting that if a party to a state court civil proceeding has exhausted state appellate remedies, that party may then bring an affirmative action in the federal courts seeking to have that judgment set aside. This would be federal post-trial intervention designed to annul the results of a state trial, which is proscribed in a civil case by ordinary principles of res judicata.[159] Here, the state officials did not plead res judicata,[160] but clearly this is what was involved. As Justice Rehnquist noted in a footnote, it ordinarily would be difficult to consider the duration of *Younger's* restrictions after entry of a state trial court judgment, without also considering the res judicata implications of such a judgment,[161] and as he specifically emphasized in another footnote, "[w]e in no way intend to suggest that . . . the normal rules of res judicata and judicial estoppel do not operate to bar

155. *Id.*

156. *Id.*

157. The Court specifically refused to decide whether *Younger* was applicable to all pending state court civil proceedings. *Id.* at 607. The plaintiff argued that since this was a civil proceeding, there was no possibility of obtaining federal review collaterally, as there would be in a criminal proceeding under the federal Habeus Corpus Act, 28 U.S.C. §§ 2241 *et seq.* In Justice Rehnquist's view, this was irrelevant, since there was the possibility of direct review in the Supreme Court, and in any event, "*Younger* turned on considerations of comity and federalism peculiar to the fact that state proceedings were pending. . . ." *Id.* at 606.

158. *Id.* at 608 (emphasis added).

159. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

160. 420 U.S. at 607 n.19.

161. *Id.*

relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings."[162]

It seems clear that Justice Rehnquist was talking about res judicata, and the invocation of the concept of "exhaustion of state remedies" was misplaced. The concept of "exhaustion of state remedies" operates only with respect to federal collateral review of state criminal proceedings, because exhaustion of state remedies is required by the federal habeas corpus act.[163] In exchange for the exhaustion requirement, the normal rules of res judicata and collateral estoppel do not apply.[164] In the case of proceedings brought under 42 U.S.C. § 1983, there is, of course, no exhaustion requirement,[165] but res judicata and collateral estoppel may be applicable. In *Huffman*, all issues relating to the issuance of the injunction that closed the theater for a year were subject to litigation in the state court action, and whether or not state appellate remedies had been pursued, the normal rules of res judicata would prevent their relitigation in a subsequent federal action.[166]

The more interesting question, which was not presented in *Huffman*, but as we will see subsequently, was in effect presented in *Wooley v. Maynard*,[167] concerns the res judicata or collateral estoppel effect of the state court judgment in a subsequent federal suit involving the same question that was litigated or could have been litigated in the state suit. Suppose that in *Huffman*, after the year was up, the theater operator reopened the theater and again showed pornographic films. He then brought an affirmative suit in the federal court, alleging that the state officials had threatened to enforce the public nuisance law against him again, and sought a declaration that such enforcement would be unconstitutional. Would he be barred by res judicata from asserting the claim in the federal action, since (1) the parties were the same in both actions, and (2) the constitutional question was litigated or could have been litigated in the state court action? We will defer our consideration of this question until we come to *Wooley v. Maynard*.

Why, may it be asked, did the Court in *Huffman* not hold that *Younger*

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162. *Id.* at 606 n.18.

163. 28 U.S.C. § 2241. *See generally* Preiser v. Rodriguez, 411 U.S. 475 (1973).

164. *See generally* Townsend v. Sain, 372 U.S. 293 (1963).

165. This point was emphasized in *Huffman*, but limited to the situation where there were no pending state court proceedings. 420 U.S. at 609 n.21.

166. *Cf.* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

167. 430 U.S. 705 (1977).

applied to all civil proceedings, as remedies considerations would dictate, and as the dissent feared it was going to do eventually?[168] It may have been that a majority could not yet be mustered to extend *Younger* to all civil proceedings,[169] and if this was so, it was because the Court was approaching this question at least on the basis of federalism considerations. Justice Brennan in dissent, joined by Justices Marshall and Douglas, argued that the federalism considerations reflected in 42 U.S.C. § 1983 and in the decision in *Mitchum* mandated federal interference in all non-criminal cases in order to protect federal constitutional rights.[170]

The position of the dissenters would carry the Court far beyond the point where it was in *Dombrowski*. *Dombrowski*, as we have said, expanded the concept of "irreparable injury" in the first amendment context, but there was nothing in *Dombrowski* that would authorize federal courts to intervene in pending state court proceedings, civil or criminal, to protect *other* federal constitutional rights; this was something the Court consistently had refused to do.[171] As the Court specifically noted in *Dombrowski*, "[i]n a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution,"[172] and further, "[i]t is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."[173] This would be equally true, of course, in regard to pending state court civil proceedings. Again, unless the proceeding was brought in bad faith or otherwise caused "irreparable injury," the remedy by way of defense to the proceeding would be adequate to protect the rights in question, including federal constitutional rights.

The position of the dissenters, however, was not based on the emanations of *Dombrowski*, but on the emanations of *Mitchum*.[174] Since the Court in *Mitchum* held that 42 U.S.C. § 1983 was a statutorily authorized exception to 28 U.S.C. § 2283, there would be no statutory federalism bar,

168. 420 U.S. at 613 (Brennan, J., dissenting).

169. Recall that in *Younger*, Justice Stewart emphasized in his concurrence that different considerations might apply in the case of a pending civil proceeding. 401 U.S. at 54-56 (Stewart, J., concurring).

170. 420 U.S. at 615-18.

171. *See, e.g.*, Stefanelli v. Minard, 342 U.S. 117 (1951).

172. 380 U.S. at 485.

173. *Id.* at 485 n.3.

174. *See* the discussion notes 27-31 *supra* and accompanying text.

so to speak, to federal judicial interference in pending state court civil proceedings (or for that matter, in pending state court criminal proceedings) in order to determine federal constitutional claims. But there would still be the remedies requirement of "irreparable injury," which ordinarily would be absent if those claims could be asserted in the pending state court proceeding.[175] In other words, if federal courts are to interfere in pending state court civil proceedings to protect federal constitutional rights, it is because federalism considerations mandate such interference despite the absence of the remedies requirement of "irreparable injury." The majority position on the Court appears to be that federalism considerations militate *against* interference, at least in some proceedings. In this situation, the lines are clearly drawn on the basis of differing conceptions of "Our Federalism," but the admixture of "equity, comity and federalism" that the Court has consistently invoked in all of these cases may obscure the nature of the division and divert the Court from facing it directly.

In two cases decided in 1977, *Juidice v. Vail*,[176] and *Trainor v. Hernandez*,[177] the Court again stopped short of extending *Younger* to all civil cases, but again held that *Younger* was applicable to the case in question. *Juidice* involved a challenge to the constitutionality of state civil contempt proceedings, while *Trainor* involved a challenge to the constitutionality of state attachment proceedings. In *Juidice* the parties in the state court action were private litigants; in *Trainor* the attachment proceedings were instituted by the state in connection with a civil suit to recover fraudulently obtained welfare payments.

Justice Rehnquist, who wrote the opinion in *Huffman*, also wrote for the Court in *Juidice*. Noting that although the Court in *Huffman* had not extended *Younger* to all civil proceedings, he saw *Huffman* as emphasizing that the "more vital consideration" behind the "*Younger* doctrine of nonintervention" was not the fact that the state criminal process was involved, but the "comity and federalism" considerations enumerated by Justice Black in *Younger*.[178] These considerations dictated the applicability of *Younger* to *Juidice*, since there, while the state was not a party, its contempt process was involved, and its interest in that process was "of sufficiently great import"[179] to require the application of *Younger*.[180]

175. *See* note 170 *supra*.

176. 430 U.S. 327 (1977).

177. 431 U.S. 434 (1977).

178. 430 U.S. at 334.

179. *Id.* at 335.

180. *Id.* at 337. As in *Huffman*, it "save[d] for another day the question of 'the

Justice Stevens, who concurred in the result, explained *Younger* in purely remedies terms. As he stated:

> The major premise underlying the Court's holding in *Younger v. Harris* . . . is that a court of equity should not act when the moving party has an adequate remedy at law. Consistently with *Younger*, a court of equity may have a duty to act if the alternative legal remedy is inadequate.[181]

When this was so, there were no countervailing federalism concerns, since *Mitchum* directed the federal courts to act where state proceedings are "inadequate to vindicate federal rights."[182] And since the challenge was to the constitutional validity of the state contempt proceedings themselves, by definition, resort to state court proceedings "cannot provide an adequate remedy for [plaintiffs'] federal claim."[183] On the merits, however, he ruled against the plaintiffs.

In my view, Justice Stevens' analysis of the adequacy of state remedies here is not sound. The concept of "adequate remedy at law" relates only to whether or not the claim can be asserted as a defense to the pending proceeding and fairly determined in that proceeding.[184] Since the state court could hold that the contempt proceedings themselves were unconstitutional, the federal plaintiff would suffer no injury by being compelled to litigate their constitutionality before that court.[185] From a remedies standpoint, the plaintiffs in *Juidice* clearly had an adequate remedy by which to assert their constitutional claims in the pending state court proceeding, and thus suffered no "irreparable injury" which would entitle them to maintain the "equity" action in the federal court.

In *Trainor*, Justice White, writing for the Court, found the requisite state interest, justifying the application of *Younger*, by virtue of the fact

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applicability of *Younger* to all civil litigation.' " *Id.* at 336 n.13. Note that in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the Court held that the challenged garnishment was separable from the pending state court debt collection suit, so that in effect there was no pending state court proceeding for *Younger* purposes. *See also* Fuentes v. Shevin, 407 U.S. 67 (1972).

181. 430 U.S. at 339 (Stevens, J., concurring).

182. *Id.*

183. *Id.* at 340.

184. It was for these reasons respectively that there was no adequate state court remedy in Gerstein v. Pugh, 420 U.S. 103 (1975), and Gibson v. Berryhill, 411 U.S. 564 (1973). *See also* Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978).

185. As the plaintiff would suffer, for example, where the proceedings were brought in bad faith, so that the necessity of defending against them would cause the injury to the right in question.

that the state was a party to the proceedings, that the proceedings were brought to vindicate the integrity of the state's welfare program, and that, as in *Huffman*, the state could have brought a criminal proceeding instead of a civil one.[186] Justice White also took pains to emphasize that with respect to the admixture of remedies and federalism considerations, federalism was the "more vital consideration."[187] He illustrated this point by noting that when federal relief was sought against a pending state court proceeding, the existence of an adequate "remedy at law," which normally would be determined by looking to available federal remedies, had to be "broadened to focus on the remedies available in the pending state proceeding."[188] Since the district court had not determined whether the plaintiffs in the federal action could present their constitituonal challenge to the attachment statute in the pending state court proceedings, the case was remanded for a determination of this question.[189]

I would submit that the fact that the federal court must look to the remedies available in the pending state court proceeding is in no way due to federalism considerations, but results from the dual court system in which the federal court is in the position of the historical "court of equity" while the state court is in the position of the historical "court of law." Since the federal court is being asked to enjoin a pending state court proceeding, the availability of federal "legal" remedies is completely irrelevant. If the claim that the attachment statute was unconstitutional could be raised in the pending state court proceedings, the plaintiff in the federal "equity" action had an adequate remedy "at law" in the pending state court proceedings, and the remedies requirement of "irreparable injury" was not satisfied.

Justice Blackmun, while concurring in the Court's opinion in *Trainor*, wrote a separate opinion "only to stress that the substantiality of the State's interest in its proceeding has been an important factor . . . from the beginning."[190] In his view, the Court "has imposed a requirement that the State must show that it has an important interest to vindicate in its own courts before the federal court must refrain from exercising otherwise proper federal jurisdiction."[191] He went on to say that such an interest is

186. 431 U.S. at 444.
187. *Id.* at 441, 443.
188. *Id.* at 441.
189. *Id.* at 447.
190. *Id.* at 448.
191. *Id.*

not involved where the federal relief is only against a threatened state proceeding, as in *Steffel*, but is involved where the interference would be with a pending state criminal proceeding or quasi-criminal proceeding, as in *Younger* and *Huffman*, or with a state's contempt procedures, as in *Juidice*. Largely for the reasons outlined by Justice White, he found that the state's interest here too was substantial.

Justices Brennan and Marshall dissented together in *Juidice* and *Trainor*, again distinguishing between criminal and civil proceedings, and emphasizing as in *Huffman*, the primary responsibility of the federal courts to protect federal constitutional rights.[192] Justice Stevens dissented in *Trainor* on a number of grounds,[193] and Justice Stewart, who dissented in *Juidice* on "Pullman abstention" grounds,[194] stated in *Trainor* that he agreed with both the Brennan and Stevens dissents.[195]

As stated previously, in regard to the applicability of *Younger* to civil proceedings, the lines on the Court, with the apparent exception of Justice Stevens, are clearly drawn on the basis of differing conceptions of "Our Federalism." Insofar as the decisions are based on the articulated federalism considerations, they are inconsistent with my remedies explanation of *Younger* and its progeny.

The Court's institutional behavior, however, and the behavior of the lower federal courts when called upon to deal with this question are not inconsistent with this explanation. In each of the three cases, a majority of the Court has found *Younger* applicable, and the lower federal courts have either held that *Younger* applies to all civil proceedings,[196] or to the particular civil proceeding in question.[197] There has been no reported unreversed lower court decision holding that *Younger* was not applicable to any pending state court proceeding; and unless the Supreme Court expressly holds that *Younger* is inapplicable to a particular pending civil proceeding, it is highly unlikely that a lower federal court will do so either.[198] In practice, therefore, *Younger* has effectively prevented federal

192. *Id.* at 453-56.

193. *Id.* at 460-70. Among the grounds was the fact that the statute was "flagrantly and patently unconstitutional" within the meaning *Younger*.

194. 430 U.S. at 337-38.

195. 431 U.S. at 448.

196. *See* note 115 *supra*.

197. *See, e.g.*, Williams v. Washington, 554 F.2d 369 (9th Cir. 1977); Anonymous v New York City Bar Assoc., 515 F.2d 427 (2d Cir.), *cert. denied*, 423 U.S. 863 (1975); Terminal-Hudson Elec., Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal. 1975).

198. For a view as to when *Younger* should and should not be applicable to pending state court civil proceedings, see Bartels, *supra* note 2, at 66-92.

judicial interference in pending state court proceedings "across the board" unless the remedies requirement of "irreparable injury" can be satisfied, and *Mitchum* has not expanded the role of the federal courts in protecting federal constitutional rights when proceedings are pending in a state court.

B. The Borderland of Pending and Non-Pending

In three other cases, decided in 1975 and 1977, the Court has sharply defined the lines of federal intervention so as to make such intervention depend on the *concurrent pendency* of federal and state court proceedings. Where there is concurrent pendency, federal intervention is precluded unless the *Younger* criteria are satisfied. Where there is not, federal intervention is proper regardless of what has occurred in any prior state court proceeding. The concurrent pendency approach is clearly consistent with the remedies explanation of *Younger* that has been advanced in this article.

In *Hicks v. Miranda*,[199] decided in 1975, the Court held that where state criminal proceedings are instituted against the federal plaintiff *after* the federal suit was filed, "but before any proceedings of substance on the merits have taken place in the federal court,"[200] *Younger* is applicable. In *Hicks*, the state police had seized a film and charged two employees of the theater at which it was shown with a violation of the state obscenity law. The film was also declared obscene and confiscated in a civil proceeding. The theater owners then filed a federal suit against state officials, seeking a declaration that the state obscenity law was unconstitutional and an injunction against its enforcement. While the federal suit was pending, the state filed criminal charges against the theater owners too. The federal court refused to dismiss the suit, on the ground that it was filed prior to the state criminal proceeding and alternatively that the *Younger* criteria were satisfied. On the merits, it found that the obscenity law was unconstitutional and enjoined its enforcement.

The Supreme Court reversed. In an opinion by Justice White, it held, without extended discussion, that (1) the interests of the theater owners were intertwined with those of their employees, and (2) in any event, once the theater owners were charged, *Younger* applied. Justice White noted that the Court had never held that in order for *Younger* to apply, "the state criminal proceedings must be pending on the day the federal case is

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199. 422 U.S. 332 (1975).

200. *Id.* at 349.

filed,"[201] and concluded that to allow the federal suit to proceed after the state suit was filed, would "trivialize the principles of *Younger*."[202] The Court also held that the findings of the District Court as to bad faith and harassment were "vague and conclusory" and set them aside.[203] Justice Stewart, joined by Justices Brennan, Marshall and Douglas, dissented, contending that the holding in *Hicks* "trivialize[d] *Steffel*," and was an "open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."[204]

From a remedies standpoint, however, the holding in *Hicks* does not "trivialize *Steffel*," any more than a contrary holding would have "trivialize[d] *Younger*." If the Court had held that the subsequent filing of the criminal proceeding did not "oust the jurisdiction" of the federal "equity" court, that holding would have been in accord with traditional equity practice as well as its own prior pronouncements reflecting that practice.[205] On the other hand, under a more realistic definition of adequacy of other remedies, once a criminal charge was filed against the federal plaintiffs, they had an "adequate remedy at law," since they could assert the unconstitutionality of the obscenity statute as a defense in the pending state court proceedings. The prior filing of the federal suit is thus irrelevant to the adequacy of other remedies question. In this regard, *Hicks* is consistent with a remedies explanation of both *Younger* and *Steffel*: because a state court prosecution is now pending, the plaintiff has an adequate remedy by way of defense to that prosecution and does not need a federal

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201. *Id.*

202. *Id.* at 350.

203. *Id.* at 350-52.

204. *Id.* at 353, 357 (Stewart, J., dissenting).

205. As the Court had long ago noted in In re Sawyer, 124 U.S. 200, 211 (1888): The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there* . . . .

Id. at 211 (emphasis added).

It reaffirmed this principle in *Ex parte* Young:

When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court first having obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.

209 U.S. at 161.

There was no discussion whatsoever of the historical equity practice or of the Court's prior pronouncements in Justice White's opinion in *Hicks*. *See also* the discussion of this point in Soifer and Macgill, *supra* note 2, at 1193-95.

court declaration as to the constitutionality of the law under which the prosecution is being brought.[206]

In practice, *Hicks* necessitates that a *Steffel*-type action be brought by a "clean" plaintiff, that is, a plaintiff who has not arguably violated the challenged law, so that any prosecution for its violation would clearly constitute "bad faith" under *Younger*.[207] In addition, if the federal plaintiff can show "irreparable injury" because of the threatened enforcement of the law, the federal court, if it is concerned about preserving its "jurisdiction," could issue a preliminary injunction against prosecution of the federal plaintiff.[208]

Both of these factors were present in *Doran v. Salem Inn, Inc.*,[209] decided less than a week after *Hicks*. Three bar owners in the Town of North Hempstead, New York, were providing topless dancing for the entertainment of their customers, in response to which the town passed a "bare breast" ordinance, prohibiting any female from appearing in a public place with uncovered breasts. The bar owners all covered up their dancers and shortly thereafter brought a federal suit challenging the constitutionality of the ordinance. One of them, however, uncovered his dancers, and was immediately charged with a violation of the ordinance. The federal court subsequently issued a preliminary injunction against the enforcement of the ordinance.

The Supreme Court, in an opinion by Justice Rehnquist, unanimously held that the federal suit could be maintained by the two bar owners who were not charged under the ordinance, but not by the third bar owner who was. From a remedies standpoint, the result is clearly correct, and reinforces the remedies explanation of *Hicks*. As in *Hicks*, once the third bar owner was charged, he had an adequate remedy by way of defense to the state court prosecution and could challenge the constitutionality of the ordinance in that proceeding. The two bar owners who covered up were entitled to at least declaratory relief under *Steffel*, since the activity in

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206. *Cf.* Bartels, *supra* note 2, at 41: "The majority in *Hicks* therefore decided that in the balance of federal and state interests, the state's interest in having its criminal processes proceed unimpeded is stronger than any federalism interest in having earlier-filed federal actions adjudicated in federal rather than state courts."

207. As to why a prosecution in these circumstances would constitute "bad faith" for *Younger* purposes, see the discussion in Sedler, *Wake*, *supra* note 3, at 30.

208. The plaintiffs in *Hicks* had moved for a preliminary injunction after their motion for a temporary restraining order was denied, but it did not appear that they pursued the request for preliminary relief strongly.

209. 422 U.S. 922 (1975).

which they wished to engage, offering topless dancing as entertainment for their customers, was prohibited by the ordinance.

The state officials argued that since one of the plaintiffs in the federal suit was barred from obtaining federal relief under *Younger*, the other two should be as well. The Second Circuit, on the other hand, took the position that since two of the plaintiffs were not barred under *Younger*, federal relief should be available for the third plaintiff too. The Supreme Court disagreed with both positions, and applied *Younger* to the plaintiff who had been charged and *Steffel* to the plaintiffs who had not been charged. As pointed out above, this result is consistent with a remedies explanation of both *Younger* and *Steffel*.[210]

In response to the view of the Second Circuit that there should not be "conflicting outcomes in the litigation of similar issues,"[211] however, Justice Rehnquist again invoked federalism considerations, noting that this interest, "while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law."[212] But how, may it be asked, do the federalism considerations operate here? Given the federalism values articulated by Justice Black in *Younger* and by Justice Rehnquist and Justice White in *Huffman*, *Hicks*, *Juidice*, and *Trainor*, can it not be contended that the pendency of a case involving the identical ordinance in the state court[213] should cause the federal court to "stay its hand?" And given those values, should this not be so, since as a practical matter, state court officials are not likely to prosecute following a federal court declaration of unconstitutionality, as the federal courts have repeatedly assumed?[214] Apparently the Court did not think so in *Salem Inn*.

The Court also held that *Younger* did not apply to the granting of preliminary injunctive relief and upheld the issuance of the preliminary injunction. Again, from a remedies standpoint, *Younger* would necessarily be inapplicable to a claim for preliminary injunctive relief. Since there was no pending state court proceeding, the only question would be whether the plaintiff had made out a case of threatened "irreparable injury," which

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210. *See also* the discussion of "personalization" in Fiss, *supra* note 2, at 1130-33, 1147-48.

211. 422 U.S. at 928.

212. *Id.*

213. The three bar owners were also represented by the same counsel, and obviously were engaged in a "joint enterprise" in their challenge to the ordinance.

214. *See* the discussion note 126 *supra* and accompanying text.

the plaintiffs presumably could do here, since they could show that they were losing business by being unable to provide topless entertainment.[215]

But again federalism considerations might dictate a contrary result. Assuming that the federal plaintiff has arguably violated the law in question, which was not so in *Salem Inn*, the issuance of a preliminary injunction, as the Court noted, "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*."[216] And if the preliminary injunction were not issued, the state could then prosecute and under *Hicks* could oust the federal court of jurisdiction. Despite the Court's admonition to district courts to "weigh carefully the interests on both sides,"[217] its refusal to extend *Younger* to the issuance of preliminary injunctive relief, as well as its holding that the issuance of the preliminary injunction here was not an abuse of discretion, makes such injunctions a real possibility in practice.

Salem Inn and *Hicks* must be read together in terms of explaining the Court's institutional behavior, and *Salem Inn* may minimize to a large extent the adverse effect of *Hicks* for the federal plaintiff. If the federal plaintiff is "clean" or can persuade the federal district judge to issue a preliminary injunction, *Hicks* is obviated.[218]

The separation between pending and non-pending proceedings was completed in *Wooley v. Maynard*,[219] decided in 1977. The plaintiffs were a married couple who, as Jehovah's Witnesses, objected on religious grounds to displaying on their vehicles the New Hampshire license plate containing the state motto, "Live Free or Die," and covered up the motto on their plates. Mr. Maynard was prosecuted three times in a New Hampshire state court for a violation of the state statute prohibiting the obscuring of license plates. He was convicted each time and on one occasion was sentenced to fifteen days in jail, which he served. The Maynards then brought a federal court suit challenging the constitutionality of the statute as applied to their actions in covering up the motto and seeking an injunction against future prosecutions. The three-judge court found the

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215. Loss of business from the threatened enforcement of a law was a traditional ground of "threatened irreparable injury." *See* note 41 *supra*.

216. 422 U.S. at 931.

217. *Id.*

218. Where the federal plaintiff has arguably violated the law in question, and seeks a preliminary injunction, the "race to the courthouse" has been replaced by a "race to relief." A more pessimistic view as to the adverse effect of *Hicks* is taken in Fiss, *supra* note 2, at 1134-36.

219. 430 U.S. 705 (1977).

tatute unconstitutional as applied and enjoined further prosecution of the Maynards.

On appeal to the Supreme Court, the state officials argued that Mr. Maynard was precluded by *Younger* and *Huffman* from seeking federal elief because he had failed to seek review of his convictions in the state ppellate courts, as he could have done, citing *Huffman* for the proposition hat "a necessary concomitant of *Younger* is that a party in [plaintiff's] osture must exhaust his state appellate remedies before seeking relief in he District Court."[220] Without dissent on this point,[221] the Court, peaking through Chief Justice Burger, found *Huffman* inapposite. In *Huffman*, said the Chief Justice, "the [plaintiff] was seeking to prevent, by neans of federal intervention, enforcement of a state-court judgment leclaring its theater a nuisance."[222] The situation here was very different. As the Court stated:

> Here, however, the suit is in no way 'designed to annul the results of a state trial' since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, *e.g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes.[223]

Since the activity in which the Maynards desired to engage, obscuring the notto on their license plates, was prohibited by state law, and since Mr. Maynard had been prosecuted under that law for engaging in that activity, nder *Steffel* there was an "actual controversy" between the Maynards and he officials charged with enforcement of the law, thus entitling the Maynards to declaratory relief.[224] And since there was a threat of repeated rosecutions[225] coupled with the possibility that the Maynards would be rohibited from driving because of their violation of the statute, the equirement of "irreparable injury" was satisfied, thus justifying injunctive elief as well.

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220. *Id.* at 710 (quoting Huffman v. Pursue, Ltd., 420 U.S. at 606).

221. Justice White, joined by Justices Blackmun and Rehnquist, dissented in part on the round that the issuance of an injunction against the threatened prosecution was improper. *Id.* at 717-19. Justices Blackmun and Rehnquist dissented on the merits. *Id.* at 719-22.

222. *Id.* at 710.

223. *Id.* at 711.

224. *Id.*

225. The threat of repeated prosecutions satisfied the traditional "multiplicity of suits" asis of "irreparable injury."

The holding in *Maynard* eliminates the confusion caused by Justice Rehnquist's invocation of the "exhaustion of state remedies" concept in *Huffman*. As pointed out previously, even if the plaintiff in *Huffman* had exhausted his state appellate remedies, he would be barred by principles of res judicata from challenging the validity of the closure order in a subsequent federal court action.[226] All that it was necessary for the Court in *Huffman* to have said was that since the plaintiff was challenging the closure order that was still in effect, *Younger* was applicable, and the closure order would have to be challenged in the state courts. Mr. Maynard, however, was not challenging the validity of the past convictions, so there was no pending state court proceeding, and *Steffel* rather than *Younger* applied.

Now, however, let us turn to the question that we left unanswered in our discussion of *Huffman*. If, after the closure order had expired, the theater owner reopened the theater, showing pornographic films, and then brought a federal action seeking prospective relief against the enforcement of the Ohio public nuisance law, would the theater owner be barred by res judicata or collateral estoppel from litigating the question of the law's constitutionality since that question was litigated or could have been litigated in the prior state court proceeding? *Maynard* in effect answers this question in the negative. Since the issue of the constitutionality of the application of the New Hampshire statute to Mr. Maynard's conduct could have been litigated in the prior state court proceedings, he could have been held to be collaterally estopped from litigating it in the subsequent federal suit.[227] He was not, and *Maynard* seems to hold that insofar as doctrines of res judicata and collateral estoppel may be operative in a subsequent federal suit, they only proscribe an attempt to "annul the results of a state trial."[228] When the federal plaintiff seeks only prospective relief, as in *Maynard* and in our *Huffman* example, it is irrelevant that the constitutional issue could have been raised in the prior state proceeding, and presumably irrelevant that it was raised and decided in that proceed-

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226. *See* the discussion notes 163-66 *supra* and accompanying text. For illustrative cases invoking res judicata to bar federal relief with respect to a pending or completed state court proceeding, see Piatt v. Louisville & Jefferson County Bd. of Educ., 556 F.2d 809 (6th Cir. 1977); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); Sorger v. Philadelphia Redev. Auth. 401 F. Supp. 348 (E.D. Pa. 1975); Wisnoski v. Weihing, 396 F. Supp. 1358 (E.D. Wis. 1975)

227. Collateral estoppel involves issue preclusion and unlike res judicata, does not require identity of parties in the subsequent action.

228. 430 U.S. at 711 (quoting from Huffman v. Pursue, Ltd., 420 U.S. at 609).

ng. It is only the prior state proceeding itself that cannot be "annulled" in he subsequent federal proceeding.[229]

The federalism considerations, however, that the Court frequently has nvoked on the side of federal non-interference could dictate the applica- ion of res judicata and collateral estoppel to these situations. It could be ontended that these principles bar federal relief if the state court either did ass or could have passed on the constitutional question inasmuch as for he federal court to relitigate the same question in a subsequent suit "can eadily be interpreted as reflecting negatively upon the state court's ability o enforce constitutional principles."[230] Notwithstanding, the Court did ot so hold in *Maynard*, and in this regard the applicable principle appears o be that articulated in *Salem Inn* to the effect that "[t]he very existence of ne system of federal courts and 50 systems of state courts, all charged with he responsibility for interpreting the United States Constitution, suggests hat on occasion there will be duplicating and overlapping adjudication of ases. . . ."[231]

More to the point as regards our present analysis, the fact that the state ourt proceeding in *Maynard* had been completed when the federal suit as filed illustrates the application of the *concurrent pendency* principle. o long as federal and state proceedings are not concurrently pending, *Younger* is inapplicable. In this sense, *Maynard* and *Hicks* are comple- entary and support a remedies explanation of *Younger* and its progeny. f a state proceeding is pending during the time of the federal suit, the

229. *Cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). A somewhat different explanation is given to Soifer and Macgill, *supra* note 2, at 1213-15. *See also* the discussion in Fiss, *supra* note 2, at 1139-43.

230. Huffman, 420 U.S. at 604.

231. 422 U.S. at 928. In Sosna v. Iowa, 419 U.S. 393 (1975). the federal plaintiff had filed for a divorce in an Iowa state court, which dismissed her suit because she had not satisfied the state's durational residency requirement. Instead of challenging the constitutionality of the requirement in that proceeding and pursuing state appellate remedies, she brought the federal court suit. On appeal to the Supreme Court, the parties were directed to brief the "*Younger* issue," and both the plaintiff and the state urged that the Court "reach the merits." The Court concluded that, "In this posture of the case, and in the absence of a disagreement between the parties, we have no occasion to consider whether any consequences adverse to appellant [plaintiff] resulted from her first obtaining an adjudication of her claim on the merits in the Iowa state court and only then commencing this action in the United States District Court." *Id.* at 396 n.3. Since the plaintiff could only get one divorce in Iowa, *Sosna* seems more like *Huffman* than like *Maynard*, and the federal plaintiff would be seeking to "annul" the prior state proceeding in the subsequent federal proceeding. But since *Younger* does not go to the jurisdiction of the federal court — when the plaintiff's claim is founded on 42 U.S.C. § 1983, federal jurisdiction exists under 28 U.S.C. § 1343(3) — the defense to federal intervention provided by *Younger* can be waived, as it was here.

federal plaintiff, in the absence of a showing of "irreparable injury," has a adequate remedy by way of defense to the pending state court proceeding i which to assert the federal constitutional claim, and it is of no import tha the federal suit was filed first. Conversely, if no state court proceeding i pending at the same time as the federal proceeding is pending, the federa plaintiff by definition can have no adequate remedy by way of defense to a non-existent proceeding, and it is likewise of no import that such a remed may have existed at an earlier time. The concurrent pendency principl was also involved in *Salem Inn*, where the party against whom a stat proceeding was pending could not maintain the federal suit, but thos against whom no state proceeding was pending could maintain the suit. I is the concurrent pendency principle, illustrated in *Hicks*, *Salem Inn*, and *Maynard* that furnishes the strongest support for a remedies explanation o *Younger* and its progeny.

VI. EQUITY, COMITY FEDERALISM: A RETROSPECTIVE VIEW

It has been the thesis of this article that while *Younger* and its progeny have seen the Court articulate an admixture of remedies and federalism considerations as the basis for its decisions, and while as between the two federalism has been the "more vital consideration," the *results* of these decisions can best be explained in remedies terms and are in accord with traditional remedies principles relating to judicial interference with governmental action.

The results in remedies terms may be summarized as follows. Where a state court proceeding is pending concurrently with the federal proceeding, irrespective of which proceeding was filed first, the plaintiff in the federal "equity" action has an "adequate remedy at law" by way of defense to the pending state court proceeding, and is not entitled to affirmative relief[232] unless it can be shown that this remedy is not adequate to protect the rights in question.[233] Where no state court proceeding is pending concurrently with the federal proceeding, even though there may have been a prior state court proceeding, by definition there is no "adequate remedy at law," and

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232. *See* Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977) Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) Younger v. Harris, 401 U.S. 37 (1971).

233. *See* Gerstein v. Pugh, 420 U.S. 103 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973)

the plaintiff is entitled to declaratory relief or injunctive relief if an "actual controversy" or threatened "irreparable injury" is shown.[234]

It is only in the area of relief against pending state court civil proceedings that the *doctrine* enunciated by the Court is necessarily inconsistent with this remedies explanation. From a remedies standpoint, federal relief should not be available against any pending state court civil proceeding unless "irreparable injury" is shown, and from a remedies standpoint, there is no basis for distinguishing between pending criminal and pending civil proceedings. In this area the doctrine that the Court has articulated is based entirely on federalism considerations. In practice, however, the Court has invariably held that *Younger* applied to the particular civil proceeding before it, and the lower federal courts likewise have held that *Younger* either applies to all civil proceedings or to the civil proceeding in question. While the doctrine, therefore, is not consistent with a remedies explanation of *Younger* and its progeny, the practice of the courts is.

Insofar as the results in these cases are explained in remedies terms, they also indicate that, despite the general view to the contrary,[235] *Younger* and its progeny have *not* been a significant element of the present Court's ongoing process of restricting access to the federal courts to protect federal constitutional rights.[236] As *Steffel, Salem Inn* and *Maynard* make clear, the Court has not invoked "Our Federalism" to bar federal relief against state governmental action, so long as concurrent state court proceedings are not pending against the federal plaintiff. And *Mitchum* authorizes federal relief against a pending state court proceeding whenever the remedies requirement of "irreparable injury" is satisfied.

But, it may be asked, what about *Younger* and the restrictions on federal relief against pending state court proceedings that implicate federal constitutional rights? As stated previously, *Younger*, like *Dombrowski*, was about the first amendment, not about federal judicial protection of federal constitutional rights.[237] *Younger* removed the "void on its face" aspect of *Dombrowski* and thereby significantly weakened the protection that the Court had afforded to first amendment rights. A similar weaken-

234. *See* Wooley v. Maynard, 430 U.S. 705 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Steffel v. Thomspon, 415 U.S. 452 (1974).

235. *See, e.g.*, the discussion in Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545, 556-68 (1977).

236. *See generally* SOCIETY OF AMERICAN LAW TEACHERS, SUPREME COURT DENIAL OF CITIZEN ACCESS TO THE FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTION: THE RECORD OF THE BURGER COURT (1976).

237. *See* the discussion note 92 *supra* and accompanying text.

ing of the protection afforded to first amendment rights, both substantively and remedially, however, was occurring in other cases, including those involving challenges to federal governmental action,[238] reflecting, in my view, the Court's value judgment to limit the scope of the dissent and social change function of the first amendment.[239] But *Younger* did not deal with the matter of access to the federal courts generally, nor with federal judicial interference with state governmental action beyond the first amendment context, and the invocation of federalism considerations in *Younger* merely may have served to mask the value judgment that the Court was making about the dissent and social change function of the first amendment.

Once *Younger* is put into its first amendment context, it is clear that the other non-intervention decisions of the *Younger* progeny — *Huffman, Hicks, Juidice* and *Trainor* — do not represent a diminution of access to the federal courts to protect federal constitutional rights *because no such access existed previously*. *Huffman* and *Hicks* involved first amendment claims, and once "void on its face" was no longer equated with "irreparable injury" to first amendment rights, there was no basis for federal "equity" intervention since the federal plaintiff now had an "adequate remedy at law" for the assertion of first amendment claims by way of defense to the pending state court proceeding. *Juidice* and *Trainor* involved claims that other federal rights were being violated in pending state court proceedings and even in the heyday of *Dombrowski*, the Supreme Court had never authorized federal interference in pending state court proceedings to protect non-first amendment rights.[240] What *Younger* took away then was the expanded protection to first amendment rights that had been given in *Dpmbrowski*, and *Younger* and its progeny imposed no *new* restrictions on access to federal courts to protect federal constitutional rights. The limitations on access that exist under *Younger* and its progeny are the result of the application of traditional remedies principles to judicial relief against governmental action and are fully consistent with the Court's prior practice in this area.

The real federalism significance of *Younger* and its progeny then is not that the Court has invoked federalism considerations to restrict the federal judicial protection that would be afforded against state governmental

238. *See* the discussion notes 93-100 *supra* and accompanying text.

239. As to the dissent and social change function of the first amendment, see the discussion in Sedler, Book Review, 80 YALE L. J. 1070, 1079-80 (1971).

240. *See* the discussion notes 113-44 *supra* and accompanying text.

action under traditional remedies principles, but that it has not seen "Our Federalism" as imposing the *affirmative responsibility* on the federal courts to protect federal constitutional rights from state governmental action *without regard to traditional remedies principles.* This affirmative responsibility would seem to follow from the emanations of *Mitchum,* as the dissenters so cogently argued in *Huffman*[241] and subsequent cases.[242] The crucial federalism question, it is submitted, is whether federal judicial relief should be granted against pending state court proceedings in order to protect federal constitutional rights, not because there is not a legally adequate remedy by which those rights can be protected in the state court proceedings,[243] but because the federal courts, which as a result of 42 U.S.C. § 1983 have been "interpose[d] . . . between the States and the people, as guardians of the people's federal rights [and] to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' "[244] have the affirmative responsibility to protect those rights notwithstanding the pendency of a state court proceeding.

The reasons why the federalism considerations articulated by the Court in *Mitchum* mandate that the federal courts should have this affirmative responsibility, have been fully developed by Justices Brennan and Marshall in dissent,[245] and by other commentators,[246] and there is no reason to elaborate on them here. Unlike Justices Brennan and Marshall, however, I would not distinguish between pending civil and pending criminal proceedings. In both instances the role of the federal courts "to protect the people from unconstitutional action under color of state law"[247] is the same. With the enactment of 42 U.S. C. § 1983, Congress gave the federal courts the primary responsibility for the protection of federal constitutional rights, and it should not abdicate that responsibility merely because the

241. 420 U.S. at 613-18 (Brennan, J., dissenting).

242. *See* note 192 *supra.*

243. I continue to believe, however, as Professor Amsterdam has pointed out, that "federal judges are more enlightened concerning, more tolerant toward, and more courageous to protect, federal rights than are their state counterparts." Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793, 837 n.186 (1965). On the matter of federal and state court judges, see also Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977).

244. Mitchum v. Foster, 407 U.S. 225, 242 (1972).

245. *See* notes 192 and 241 *supra.*

246. *See generally* the works cited in note 2 *supra* and Neuborne, *supra* note 243.

247. 407 U.S. at 242.

federal plaintiff has an "adequate remedy at law" in a pending state court proceeding. As Justice Brennan stated in his dissent in *Juidice:*

> In requiring the District Court to eject the federal plaintiff from the federal courthouse and to force him to seek vindication of his federal rights in pending state proceedings, the Court effectively cripples the congressional scheme enacted in § 1983. The crystal clarity of the congressional decision and purpose in adopting § 1983, and the unbroken line of this Court's cases enforcing that decision, expose *Huffman* and today's decision as deliberate and conscious floutings of a decision Congress was constitutionally empowered to make. It stands that § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum *because* of the pendency of state civil proceedings where Congress intended that the district court: should entertain his suit *without regard* to the pendency of the state suit. Rather than furthering principles of comity and our federalism, 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, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.[248]

It is these federalism considerations that properly should prevail over any remedies considerations that would support the denial of federal relief when a proceeding is pending concurrently in the state courts.

Nor will the availability of federal relief against pending state court proceedings produce any real collision between federal and state courts or interfere with the effective operation of the state courts. In practice, state courts and state officials generally do recognize that the federal courts have the primary responsibility to protect federal constitutional rights and to interpret the federal constitution.[249] As was demonstrated in the "*Dombrowski* years," when a federal court issues a declaratory judgment that a state law is unconstitutional, it is highly unlikely that state officials will prosecute under it,[250] a point that the Supreme Court itself expressly recognized in *Roe v. Wade.*[251] And even if injunctive relief should be

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248. 430 U.S. at 343-44. It is submitted that the congressional intent referred to is no different depending on the criminal or non-criminal nature of the state proceeding.

249. Nor are the state court judges, most of whom are popularly elected, and state officials adverse to having the federal court "take them off the hook" by ruling on the constitutionality of state laws. While federal interference "can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles,' " *Huffman,* 420 U.S. at 604, it may be queried whether state court judges would really mind that "negative reflection."

250. *See* note 54 *supra.*

251. *See* the discussion, note 126 *supra* and accompanying text.

necessary, it can be granted against the state officials or the civil litigants, and ordinarily the state judiciary will not be involved.[252] Federal judicial interference with the state judicial system thus can be kept to a minimum. This point is illustrated by both *Juidice* and *Trainor* where the federal court's determination of the plaintiffs' constitutional claims would not affect the continuation of the pending state court proceedings since the challenge was only to the validity of subsidiary contempt and attachment procedures, not to the underlying state law claim, and their invalidation by the federal court would not affect the substance of the state court proceeding.

The only time that the federal courts should not interfere in a pending state court proceeding is where the federal claim arises during the pendency of a state court *trial,* and federal court resolution of that claim would delay the trial of the case. As the Court noted in *Dombrowski,* "[i]t is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."[253] But if such a claim were raised prior to trial, such as in a suit to enjoin state officials from using the evidence,[254] there is no reason why a federal court should not determine the constitutional question and if it finds the evidence to have been illegally seized, enjoin its use in any subsequent trial.[255] So long as resolution of the federal claim would not disrupt the trial of a pending state court case, there should be "due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims,"[256] and the federal court should entertain the suit.[257] By so doing, it will be

252. In criminal cases, as a practical matter, the federal suit is likely to be brought shortly after the initiation of the state court proceeding, and it is very probable that the state proceeding will be held in abeyance pending the federal court's determination of the constitutional question.

253. 380 U.S. at 485 n.3.

254. *See, e.g.,* Stefanelli v. Minard, 342 U.S. 117 (1951), where the federal suit was brought after the plaintiff had been indicted by the state grand jury, but prior to the trial of the case.

255. As applied to claims of illegal search and seizure, this approach would enable the federal courts to determine the claim, which they are now precluded from doing in a habeas corpus proceeding brought after conviction. Stone v. Powell, 428 U.S. 465 (1976).

256. Zwickler v. Koota, 389 U.S. 241, 248 (1967).

257. Of course, where the claim was first raised and litigated in the pending state court proceeding, res judicata would prevent its relitigation in an independent federal court proceeding. *See* note 226 *supra.* A party is entitled to a choice of a federal forum in which to litigate that party's federal constitutional claim, but is not entitled to litigate the claim in *both* the state and federal courts.

performing the function that Congress entrusted to the federal courts by the enactment of 42 U.S.C. § 1983 and it will be performing this function without in any real way interfering with the ability of the state courts to carry out their own operations.[258] This, it is submitted, is the unrealized promise of *Mitchum*.

VII. CONCLUSION

In this article I have attempted to demonstrate that while *Younger*, and its progeny have articulated an admixture of remedies and federalism considerations, with the latter being "more vital," the results in these cases indicate that the Court has generally applied traditional remedies principles to determine the scope of federal judicial interference with the exercise of state governmental power. If a state proceeding is pending during the time of a federal suit, the federal plaintiff, in the absence of a showing of "irreparable injury," has an adequate remedy by way of defense to the pending state court proceeding in which to assert the federal constitutional claim.[259] But if there is no concurrent pendency of federal and state court proceedings, by definition the plaintiff cannot have an adequate remedy in a non-existent state court proceeding and is entitled to federal declaratory or injunctive relief if an "actual controversy" or threatened "irreparable injury" is shown.

When so viewed, *Younger* and its progeny have not been a significant factor in the present Court's ongoing process of restricting access to the federal courts to protect federal constitutional rights. Considerations of "Our Federalism" have not prevented federal protection where remedies considerations justify relief against state governmental action. The real problem, it is submitted, is that the Court has not seen "Our Federalism" as imposing the affirmative responsibility on the federal courts to protect federal constitutional rights from state governmental action without

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258. Typical of such a case is Diaz v. Stathis, 576 F.2d 9 (1st Cir. 1978), where two defendants in a pending state criminal proceeding and a plaintiff in a pending state civil proceeding brought a federal suit to challenge the exclusion of persons with Hispanic surnames from the jury rolls. The court held that the suit of the defendants in the criminal proceeding was barred by *Younger*, but that the plaintiff in the state civil proceeding might be able to obtain declaratory relief. It found, however, that the civil plaintiff had not met the burden of showing the necessity for federal intervention. Adjudication of the question of jury exclusion by the federal court would in no way interfere with either the pending criminal or civil proceeding.

259. Although the Court has not in terms of doctrine applied this principle to all pending state court civil proceedings, this has been the result in practice. *See* the discussion, notes 196-98 *supra* and accompanying text.

regard to traditional remedies principles. As it now stands, it is the law of remedies that determines the scope of federal judicial interference with the unconstitutional exercise of state governmental power. That this is so indicates that something is amiss in "Our Federalism"