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ARTICLE

THE SECOND CIRCUIT, CIVIL RIGHTS LITIGATION, AND EXPANDING FEDERAL JURISDICTION

Robert C. Wigton*

INTRODUCTION

In 1871,¹ Congress enacted 42 U.S.C. section 1983,² one of the most famous of the civil rights statutes. During the ninety years following its enactment, plaintiffs rarely invoked the Civil Rights Act of 1871.³ However, in 1961, following the Supreme Court's decision in *Monroe v. Pape*,⁴ there was a rapid expansion of plaintiffs' invocations of section 1983 to protect federal civil rights against infringement by state and local government. This article investigates the reaction of the Second Circuit to the Supreme Court's post-*Monroe* decisions favoring federal court adjudication

* Robert C. Wigton, Ph.D. (1988), J.D. (1983), State University of New York at Buffalo, is Assistant Professor of Political Science at Eckerd College, St. Petersburg, Florida, and a member of the New York State Bar.

1. 17 Stat. 13 (1871).

2. 42 U.S.C. section 1983 (1988). This statute is frequently referred to as the Ku Klux Klan Act. In its present form, the pertinent part of section 1983 reads:

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

42 U.S.C. section 1983 (1988).

3. P. SCHUCK, *SUING GOVERNMENT* app. 1 (1983); Lansford, *Comment: Municipal Liability Under the Ku Klux Klan Act of 1871 - An Historical Perspective*, in *SWORD AND SHIELD* 23 (1983).

4. *Monroe v. Pape*, 365 U.S. 167 (1961).

of civil rights disputes.

Over the last quarter century, the Supreme Court, through several lines of cases, has expanded the applicability of section 1983 to an ever greater range of controversies.⁵ Each of these lines of cases facilitated the institution or maintenance of section 1983 actions against state and local units of government. The expansion of the statute's application has important implications for American federalism because the statute provides the federal judiciary with a means to enforce subnational observance of federal rights and standards.

The federal judiciary, however, has often declined the Supreme Court's invitation to make federal courts the initial forum for civil rights cases. Federal court judges have frequently employed two legal doctrines, exhaustion of remedies and federal abstention, in order to justify a reapportionment of civil rights cases between the federal and state courts. This article focuses upon decisions utilizing these doctrines in the Second Circuit.

Part I of this article briefly reviews the Supreme Court's curtailment of an exhaustion of remedies requirement for section 1983 plaintiffs. The Court's decisions reveal how its expansion of section 1983 skewed the balance between national and subnational authority in favor of the federal judiciary.

Part II of this article assesses the Second Circuit's reaction to the elimination of the exhaustion requirement. Because lower federal judges have a closer relationship to the states and their political subdivisions, they tend to be more open to subnational resolution of civil rights issues. Second Circuit judges' decisions, therefore, should tend to limit or qualify those Supreme Court decisions that have expanded federal authority over section 1983 litigation.

A primary objective is to determine whether the lower federal courts have taken a more restrictive view of the applicability of section 1983 than the Supreme Court. The central concern is whether federal judges in the Second Circuit, as contrasted with

5. See, e.g., Howard, *Judicial Federalism: The State and the Supreme Court*, in *AMERICAN FEDERALISM: A NEW PARTNERSHIP FOR THE REPUBLIC* 215 (R. Hawkins ed. 1982); R. Wigton, *Federal Judicial Intervention on Behalf of Individual Rights: Section 1983 and Its Implications for American Federalism* (unpublished Ph.D. dissertation, State University of New York at Buffalo, 1988).

the Supreme Court, have consistently given greater weight to concerns of federalism.⁶ An attempt is also made to determine whether the differing perspective of the lower federal court judge is manifest in opinions of Second Circuit judges who have interpreted and applied Supreme Court opinions to civil rights litigation, particularly section 1983 actions.

Examination of the Second Circuit judges' various treatments of section 1983 actions accomplishes several objectives. First, it clarifies the significance of lower federal judges' roles in apportioning civil rights litigation between state and federal judiciaries. Second, it reveals that lower federal judges possess markedly different attitudes towards federalism than do Supreme Court justices, and that they espouse such views in opinions touching on federal relations. Third, and finally, this examination permits a general appraisal of the successes of lower federal court judges in determining the proper scope of section 1983 litigation under a federal system of government.

Civil rights litigation under section 1983 is the focus of this article because many observers regard the Civil Rights Act of 1871 as one of the judiciary's primary vehicles for re-adjusting the balances within American federalism.⁷ Accordingly, court opinions construing section 1983 often reveal judicial preferences for the apportionment of authority within the federal system. The adjudication of section 1983 actions provides one of the best vehicles for lower federal judges to express views on federalism that are contrary to the Supreme Court's views.

6. Such a different perspective on judicial federalism could result from the different recruitment patterns of lower federal judges, or from their closer professional relationship to state and local judicial and administrative remedial mechanisms. See, e.g., Dunn, *Judicial Election and the Missouri Plan*, in *COURTS, LAW, AND JUDICIAL PROCESSES* 105 (S. Ulmer ed. 1981) [hereinafter *JUDICIAL PROCESSES*]; Berkson, *The U.S. Circuit Judge Nominating Commission*, in *JUDICIAL PROCESSES*, *supra*, at 110; Goldman, *Should There Be Affirmative Action for the Judiciary?*, in *JUDICIAL PROCESSES*, *supra*, at 114; Slotnick, *The Changing Role of the Senate Judiciary Committee*, in *JUDICIAL PROCESSES*, *supra*, at 121; H. GLICK, *COURTS, POLITICS AND JUSTICE* 73 (1983); see also J. PELTASON, *FIFTY-EIGHT LONELY MEN* (1958); H. BALL, *COURTS AND POLITICS* 232-236 (2d ed. 1987).

7. Note, *Developments in the Law: Section 1983 and Federalism*, 90 *HARV. L. REV.* 1133 (1977); Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 *LOY. L. REV.* 659 (1979); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 *Nw. U.L. REV.* 277 (1965); Howard, *supra* note 5; R. Wigton, *supra* note 5.

I. *Monroe v. Pape* AND THE EXHAUSTION
OF REMEDIES REQUIREMENT

Modern expansion of federal jurisdiction over section 1983 litigation began with the United States Supreme Court's decision in *Monroe v. Pape*.⁸ The controversy in *Monroe* arose out of the Chicago police department's allegedly unreasonable search and seizure of the Monroe family.⁹ The United States Court of Appeals for the Seventh Circuit dismissed Monroe's section 1983 suit for failure to state a cause of action under either the Civil Rights Act or the Constitution.¹⁰

The issue on appeal to the Supreme Court concerned Monroe's failure to exhaust state and local remedies before filing a section 1983 suit in federal court.¹¹ Simply stated, the exhaustion of remedies doctrine holds that plaintiffs must first exhaust certain state and local remedies before entering a federal forum.¹² This requirement ensures that state judiciaries are the first to determine whether local governments have violated an individual's civil rights.¹³ If an individual is not required to first exhaust state and local remedies, federal courts would be in a position to dictate standards for subnational governments' treatment of citizens. Thus, the defendants in *Monroe* argued that the court should apply the exhaustion of remedies doctrine to Monroe's section 1983 action.¹⁴

Writing for the Court, Justice Douglas quickly disposed of the defendants' arguments, stating:

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and re-

8. *Monroe v. Pape*, 365 U.S. 167 (1961).

9. *Id.* at 169.

10. *Monroe v. Pape*, 272 F.2d 365 (7th Cir. 1959).

11. *Monroe*, 365 U.S. at 172, 183-84. section 1983 enables an individual to file suit against a subnational government for civil rights violations. *Id.* at 168-69. In this respect, section 1983 is a means of establishing standards of behavior for state and local governments.

12. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26 (2d ed. 1983). Courts have differed substantially over when exhaustion is required and what remedies must be exhausted. *Id.*

13. The aspect of the exhaustion doctrine most relevant here is the requirement that state remedies be exhausted prior to entering federal court. *Id.* at § 26:13. The "exhaustion of state remedies" rule is designed to eliminate "trivial" cases from the federal caseload, and preserve "comity" between state and federal courts. *Id.*

14. *Monroe*, 365 U.S. at 172.

fused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.¹⁵

With these infamous words, Douglas raised section 1983 to the status of a "supplementary" remedy, thereby sharply limiting the applicability of the exhaustion of remedies doctrine to section 1983 litigation. The *Monroe* Court's statement, that the federal remedy under section 1983 is supplemental to any comparable state remedy, had significant implications for the relationship between state and federal judiciaries, and for American federalism in general: *Monroe* established the "no-exhaustion" rule for section 1983 actions.

Monroe was only the beginning of the Supreme Court's efforts to distinguish section 1983 from analogous state and local remedies. Two years after *Monroe*, in *McNeese v. Board of Education*,¹⁶ the Court broadened the no-exhaustion rule for section 1983 actions. The plaintiffs in *McNeese* sought the judicial enforcement of their right to attend racially integrated schools.¹⁷ Two lower federal courts dismissed the complaint because the plaintiffs had failed to first exhaust state and local administrative remedies before bringing suit in federal court.¹⁸ The two lower courts seemed to ignore *Monroe*, perhaps because it did not explicitly deal with the issue of exhaustion of administrative remedies.

Again writing for the Court, Justice Douglas reversed the lower courts, effectively closing the *Monroe* loophole, and allowing the McNeeses to bring a section 1983 action in federal court before exhausting state and local administrative remedies.¹⁹ The Court's 1967 decision *Damico v. California*,²⁰ further extended *Monroe's* no-exhaustion rule to subnational administrative remedies.²¹

Eliminating the exhaustion requirement for section 1983 plaintiffs permits direct access to a federal forum. Thus, plaintiffs

15. *Id.* at 183.

16. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

17. *Id.* at 669-70.

18. *McNeese v. Board of Educ.*, 199 F. Supp. 403 (E.D. Ill. 1961), *aff'd*, 305 F.2d 783 (7th Cir. 1962).

19. *McNeese*, 373 U.S. at 676.

20. *Damico v. California*, 389 U.S. 416 (1967).

21. *Id.* at 417.

can force defendants—be they state or local governments—to conform to federally established guidelines. Potentially, this eliminates any opportunity for state and local judges or administrators to fashion remedies. Federal courts, via section 1983 adjudications, may be in a position to pass judgment on the behavior of state and local governments. More importantly, the federal courts could set the standards by which state and local government bodies deal with individuals. This “short-circuiting” of the federal system may sharply limit the role of state and local courts and administrative agencies in resolving disputes potentially within the scope of section 1983.

Expansion of the applicability of section 1983 had implications for legal doctrines other than exhaustion. In *Monell v. New York City Department of Social Services*,²² the Court began to eliminate the traditional governmental immunity from section 1983 actions that municipalities previously enjoyed.²³ Since *Monell*, the erosion of immunities has continued, stripping municipalities of a valuable defense to section 1983 actions.²⁴ This development becomes significant in conjunction with the elimination of the exhaustion requirement for section 1983 plaintiffs. The Court removed much section 1983 litigation from the province of state and local judiciaries, and stripped municipalities of a potent defense against such actions.

The Supreme Court also expanded the range of rights that can be enforced under section 1983. In 1980, the Supreme Court, in *Maine v. Thiboutot*,²⁵ held that section 1983 could be used to enforce any federal statutory right.²⁶ Before *Thiboutot*, plaintiffs primarily invoked section 1983 under the fourteenth amendment to seek judicial enforcement of equal protection and due process under the United States Constitution. Through *Thiboutot* and its

22. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978).

23. See generally C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* 1041 (1980 & Supp. 1985).

24. See *Malley v. Briggs*, 475 U.S. 335 (1986) (limiting the immunity of state employees from liability under section 1983); *Pulliam v. Allen*, 466 U.S. 522 (1984) (sharply limiting the immunity of state and local judges from section 1983 lawsuits); *Owen v. City of Independence*, 445 U.S. 622, 635-38 (1980) (stripping municipalities of their “good faith” defense to section 1983 lawsuits). But see *Briscoe v. LaHue*, 460 U.S. 325 (1983) (defendant cannot assert a claim under section 1983 for damages against a government official for perjured testimony at defendant's trial); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipalities are immune from punitive damages under section 1983).

25. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

26. *Id.* at 4-11.

progeny, the Court provided section 1983 plaintiffs with the possibility of using the federal judiciary to compel state and local governments to enforce any right contained in a federal statute. Because of the potential effect on the balance between national and subnational civil rights adjudications, from the point of view of subnational units of government, this change was perhaps the most threatening of all of the section 1983 "federalizing" trends. Subsequent cases have appeared to limit *Thiboutot*, although the decision has not been overruled.²⁷

II. THE SECOND CIRCUIT'S REACTION

The Second Circuit did not complacently accept the Supreme Court's steady expansion of federal court authority over civil rights actions. Following the Court's determination in *Monroe*, Second Circuit judges used a variety of tactics to limit, distinguish, or otherwise qualify any Supreme Court decisions that expanded the availability of section 1983 remedies.

There are three broad categories of Second Circuit decisions limiting the effect of the Supreme Court's changes in the exhaustion rule. The first category of decisions encompasses cases decided on the basis of the traditional distinction between legal and equitable remedies.²⁸ Under these decisions, section 1983 plaintiffs must first exhaust some state and local remedies before they may seek equitable relief in a federal forum. The second category includes decisions that only permit plaintiffs to bring section 1983 actions in federal court after they have exhausted all "adequate" state and local administrative remedies.²⁹ The third category of decisions is comprised of those employing federal abstention doctrine.³⁰ Theoretically, federal abstention doctrine is distinct from the exhaustion doctrine. In the context of civil rights litigation, however, federal courts combine the two doctrines in order to craft opinions which justify reducing the likelihood that section 1983 plaintiffs will initially enter a federal forum.

27. See *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

28. See *infra* Section II(A).

29. See *infra* Section II(B).

30. See *infra* Section II(C).

A. Judge Friendly's Equitable-Legal Remedy Distinction

In the 1967 case of *Potwora v. Dillon*,³¹ Judge Friendly created a fundamental qualification to the *Monroe* no-exhaustion rule.³² The *Potwora* plaintiff, a bookseller, sought an injunction under section 1983 to force local police to return allegedly obscene books they had seized from his bookstore.³³

Judge Friendly reversed a district court order denying the injunction.³⁴ In large part, he based this decision upon the fact that the plaintiff was seeking an equitable remedy rather than a legal one.³⁵ Thus, Judge Friendly avoided *Monroe's* "no-exhaustion rule." Under his interpretation of *Monroe*, the blanket no-exhaustion rule is applicable only when the section 1983 plaintiff seeks a legal remedy. According to Friendly:

Monroe v. Pape was an action for damages and . . . must be read in that light; the Court surely had no intention to abrogate in civil rights cases the historic rule, embodied long ago in § 16 of the First Judiciary Act that suits in equity shall not be sustained in courts of the United States 'in any case where a plain, adequate and complete remedy may be had at law.'³⁶

Judge Friendly's interpretation of *Monroe* may be broadly traced to the prevailing doctrine that plaintiffs seeking equitable relief must first demonstrate that they have no adequate remedy at law.³⁷ Requiring that a plaintiff exhaust all remedies — legal and equitable — at the state and local level is, of course, different from requiring that legal alternatives be demonstrably inadequate or unavailable. Under section 1983, the two requirements have the same basic effect: federal courts defer to state and local remedies. Judge Friendly's *Potwora* opinion avoided the inconsistency between these two doctrines. Speaking only in general terms of comity and federalism, Friendly's interpretation of *Monroe* means that section 1983 plaintiffs no longer need to exhaust state and local remedies before seeking legal remedies in federal court. However,

31. *Potwora v. Dillon*, 386 F.2d 74 (2d Cir. 1967).

32. *Id.* at 77.

33. *Id.* at 75-76.

34. *Id.* at 79.

35. *Potwora v. Dillon*, 386 F.2d 74, 77 (2d Cir. 1967).

36. *Id.* (citations omitted).

37. J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, §§ 216-22 (S. Symons 5th ed. 1941); *Matthews v. Rodgers*, 284 U.S. 521, 526 (1932); 4 K. DAVIS, *supra* note 12, § 23:6.

this interpretation of *Monroe* still imposes an exhaustion requirement on section 1983 plaintiffs who seek equitable relief.

Under *Potwora*, the section 1983 plaintiff seeking an equitable relief must first exhaust all "plain, adequate, and complete" state and local remedies prior to entering federal court.³⁸ It is significant that this standard preserves the role of state and local level judicial and administrative processes in the resolution of section 1983 claims. Of greater significance, however, is that the creation of a bifurcated exhaustion standard encourages state and local governments to provide their own remedial mechanisms for civil rights claims. Friendly's approach avoids the disadvantages of either a rigid exhaustion requirement or a blanket no-exhaustion rule. Because all state remedies must meet the "plain, adequate and complete" standard set by federal courts, this approach only permits subnational participation in fashioning civil rights remedies within the bounds established by the federal judiciary.

Judge Friendly's approach neatly dovetails with the broad principles of American federalism. By eliminating the exhaustion requirement only in those cases where plaintiffs seek legal remedies, it permits and fosters state and local participation in the settling of civil rights controversies. At the same time, it preserves a role for the federal courts by assuring that there may be judicial review of the adequacy of available non-federal remedies. Local participation in civil rights cases provides greater sensitivity to local concerns and priorities, and also permits the adjudication of minor cases that would otherwise clog the federal docket. Furthermore, the federal court's role in assessing whether state and local remedies meet the "plain, adequate and complete" standard serves to assure that remedies available at the subnational level of government are adequate and uniform.

The *Potwora* approach quickly became a Second Circuit rule of decision in section 1983 actions.³⁹ It was also soon cited by judges in other circuits.⁴⁰ Although no other circuit fully embraced

38. *Potwora*, 386 F.2d at 77.

39. See *Wallace v. Kern*, 520 F.2d 400, 407 n.13 (2d Cir. 1975) *cert. denied*, 424 U.S. 912 (1976); *Engelman v. Cahn*, 425 F.2d 954, 958 (2d Cir. 1969) *cert. denied*, 397 U.S. 1009 (1970); *Wright v. McMann*, 387 F.2d 519, 522-23 (2d Cir. 1967); *Gras v. Stevens*, 415 F. Supp. 1148, 1153 (S.D.N.Y. 1976); *Silverman v. Browning*, 359 F. Supp. 173, 176-77 (D. Conn. 1972) *aff'd*, 411 U.S. 941 (1973).

40. See *Bonner v. Circuit Court of St. Louis*, 526 F.2d 1331, 1335-36 (8th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976); *Grayson v. Montgomery*, 421 F.2d 1306, 1309 (1st Cir.

Friendly's *Potwora* rule, none has openly rejected it. The Supreme Court has yet to rule directly on the *Potwora* exception to *Monroe's* no-exhaustion rule. Nine years after *Potwora*, Judge Friendly observed: "We find nothing in subsequent Supreme Court decisions that would cast doubt on the correctness of the conclusion in *Potwora v. Dillon*."⁴¹

Supreme Court opinions that deal with the exhaustion requirement for section 1983 plaintiffs seeking equitable relief arise most often in cases that involve the federal anti-injunction statute.⁴² The anti-injunction statute prohibits a federal court from enjoining state court proceedings unless "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Thus, the issue in such cases revolves around the question of whether the enactment of section 1983 is Congressional action "expressly authorizing" the federal courts to grant injunctions against state court proceedings.

The Supreme Court was slow to reach this issue,⁴³ finally addressing it in *Mitchum v. Foster*.⁴⁴ Writing for the *Mitchum* Court, Justice Stewart reviewed the circumstances surrounding the enactment of section 1983, and concluded that it was intended to alter the balance of federalism when civil rights are at issue. The Court found that section 1983 qualifies as an "expressly authorized" exception to the prohibition of federal stays of state proceedings under the anti-injunction statute.⁴⁵ Immediately following this apparently unambiguous statement, Justice Stewart qualified it by saying, "[W]e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."⁴⁶

Two years later, in *O'Shea v. Littleton*,⁴⁷ the Court applied its

1970); *Musselman v. Spies*, 343 F. Supp. 528, 536 (M.D. Pa. 1972); *Burns v. Wilkinson*, 333 F. Supp. 94, 97 (W.D. Mo. 1971); *Stanson v. Carroll*, 316 F. Supp. 484, 486 (E.D. Pa. 1970); *Armsden v. Cataldo*, 315 F. Supp. 129, 132 (D. Mass. 1970); *Miller v. Purtell*, 289 F. Supp. 733, 734 (E.D. Wis. 1968).

41. *Gras v. Stevens*, 415 F. Supp. at 1154 (Friendly writing for Three-Judge District Court).

42. 28 U.S.C. § 2283 (1988).

43. See *Perez v. Ledesma*, 401 U.S. 82, 120 n.4 (1971) (Brennan, J., concurring in part and dissenting in part); *Younger v. Harris*, 401 U.S. 37, 62 (1971) (Douglas, J., dissenting).

44. *Mitchum v. Foster*, 407 U.S. 225 (1972).

45. *Id.* at 243.

46. *Id.*

47. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Mitchum qualification.⁴⁸ The *O'Shea* Court refused to permit a federal court to enjoin the continued tenure of a state judge allegedly engaged in illegal judicial activity. Laying out the reasons for denying the injunction, the Court cited the *Mitchum* opinion,⁴⁹ and concluded that the principles of equity, comity, and federalism precluded equitable intervention.⁵⁰ The Court came very close to adopting the *Potwora* position on exhaustion of remedies. Denying the *O'Shea* plaintiffs equitable relief, the Court cited the plaintiff's failure to demonstrate the inadequacy of available state remedies.⁵¹

Subsequently, Judge Friendly seized upon the Court's *Mitchum* qualification to craft his own interpretation of that decision.⁵² Giving greater weight to the Court's reference to "federalism and comity" than to the actual holding in *Mitchum*, Judge Friendly preserved the *Potwora* exhaustion requirement for those section 1983 plaintiffs seeking equitable relief.⁵³

The Second Circuit has managed to maintain Judge Friendly's preservation of the *Potwora* exception without Supreme Court reversal or criticism. Within the larger unresolved question of the appropriate scope of section 1983 actions under a federal system of government, at least on the narrow issue this may represent something of a victory for the Second Circuit.

B. *The Adequate Administrative Remedies Exception*

Lower federal court judges in the Second Circuit —and elsewhere— have tried to dilute the effect of the Supreme Court's no-exhaustion rule by relying upon the distinction between judicial and administrative remedies. Courts have long recognized the distinction between these two types of remedies,⁵⁴ although there is still disagreement over the appropriate rule for each type of remedy.

The distinction between the exhaustion of judicial and admin-

48. *Id.* at 499-504.

49. *Id.* at 499.

50. *Id.*

51. *O'Shea v. Littleton*, 414 U.S. 488, 502, 504 (1974).

52. See *Gras v. Stevens*, 415 F. Supp. 1148, 1154 (S.D.N.Y. 1976) (Friendly writing for Three-Judge District Court).

53. *Id.*

54. 4 K. DAVIS, *supra* note 12, § 26:14.

istrative remedies for section 1983 plaintiffs can be traced back to *Monroe*.⁵⁵ Justice Douglas never clarified whether the Court's no-exhaustion rule applied only to a state's judicial remedies, or whether the Court also intended to free plaintiffs from the need to exhaust administrative remedies.⁵⁶ In his dissent from the Court's *Monroe* opinion, Justice Frankfurter apparently believed that the majority intended only to eliminate the requirement that section 1983 plaintiffs must first exhaust state judicial remedies before entering federal court.⁵⁷

In *Eisen v. Eastman*,⁵⁸ Judge Friendly took advantage of the uncertainty as to whether *Monroe* required exhaustion of both administrative and legal remedies.⁵⁹ Reviewing *Monroe* and other Supreme Court exhaustion cases,⁶⁰ Judge Friendly concluded that:

[T]hese decisions . . . simply condemn[] a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state *administrative* remedies is not required where the administrative remedy is inadequate, as in *McNeese*, or where it is certainly or probably futile, as in *Damico, Smith and Houghton*.⁶¹

Friendly said little about the policy advantages underlying a section requirement that section 1983 plaintiffs first exhaust administrative, as opposed to judicial, remedies at the subnational level.⁶² However, he did find that such a requirement is consistent with the broad principles of American federalism.⁶³ Friendly's effort to preserve an exhaustion requirement for section 1983 plaintiffs soon faced Supreme Court decisions disfavoring exhaustion.

In the four years following *Eisen*, the Court handed down three opinions dealing with section 1983 exhaustion.⁶⁴ The first

55. See *supra* notes 8-15 and accompanying text.

56. See *supra* note 15 and accompanying text.

57. *Monroe v. Pape*, 365 U.S. 167, 224-25 (1961) (Frankfurter, J., dissenting).

58. *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

59. *Id.* at 567-69.

60. *Houghton v. Shafer*, 392 U.S. 639 (1968); *King v. Smith*, 392 U.S. 309 (1968); *Damico v. California*, 389 U.S. 416 (1967); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

61. *Eisen*, 421 F.2d at 569 (emphasis added).

62. For the most thorough judicial explication of the policy advantages underlying an exhaustion of administrative remedies requirement, see, *Patsy v. Board of Regents of State of Fla.*, 634 F.2d 900, 909-12 (5th Cir. 1981) (en banc).

63. *Eisen*, 421 F.2d at 568.

64. See *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

two, *Wilwording* and *Carter*, were brief per curiam opinions, offering little discussion of the exhaustion issues. Both opinions, however, held that section 1983 plaintiffs need not exhaust administrative remedies.⁶⁵ In neither opinion did the Court feel compelled to consider the "adequacy" of state remedies available to the plaintiff. The third opinion was *Gibson v. Berryhill*.⁶⁶ There, the Supreme Court extended its discussion of exhaustion, concluding that section 1983 plaintiffs are not required to appeal to state administrative agencies because such bodies are "unconstitutionally constituted and so [do] not provide [plaintiffs] with an adequate administrative remedy requiring exhaustion."⁶⁷

Judge Friendly soon had an opportunity to respond to these opinions. In *Blanton v. State University of New York*,⁶⁸ as he had set forth in *Eisen* four years earlier, Friendly attempted to preserve his requirement that section 1983 plaintiffs exhaust "adequate" state administrative remedies before entering federal court. He concluded that *Wilwording* referred to the exhaustion of *judicial* rather than *administrative* remedies at the state level, and, therefore, was not at odds with his *Eisen* opinion.⁶⁹ Friendly noted that the Court found *Carter* and *Damico* indistinguishable.⁷⁰ The latter opinion, based upon the Court's finding the state administrative remedy inadequate, relieved section 1983 plaintiffs of the exhaustion of state administrative remedies requirement.⁷¹

Friendly's interpretation in *Blanton* was also consistent with *Gibson*, which explicitly inquired into the adequacy of the administrative remedies available to the plaintiff.⁷² By making the existence of the exhaustion requirement dependent upon the adequacy of available administrative remedies, the *Gibson* Court had almost adopted the Second Circuit's *Eisen* position.

Judge Friendly's *Blanton* opinion allowed the Second Circuit to continue to rely upon a determination of the adequacy of state administrative remedies when deciding cases that turned on whether civil rights plaintiffs were required to first exhaust such

65. *Carter*, 405 U.S. at 671; *Wilwording*, 404 U.S. at 251-52.

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

67. *Id.* at 575.

68. *Blanton v. State Univ. of N.Y.*, 489 F.2d 377 (2d Cir. 1973).

69. *Id.* at 384.

70. *Id.*

71. *Damico v. California*, 389 U.S. 416 (1967).

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

remedies before entering federal court.⁷³ Subsequently, some circuit courts approvingly cited the *Eisen* exception to the no-exhaustion rule.⁷⁴ Other circuit courts, however, criticized *Eisen*, holding that the Supreme Court had eliminated the requirement that section 1983 plaintiffs exhaust subnational remedies before entering federal court.⁷⁵

*Patsy v. Board of Regents of Florida*⁷⁶ finally provided the Supreme Court with an opportunity to end the debate among the circuit courts over the legitimacy of Judge Friendly's *Eisen* exception. The Court considered and rejected a lengthy decision by the United States Court of Appeals for the Fifth Circuit which set forth a wide range of legal, historical, and policy arguments favoring the proposition that section 1983 plaintiffs must exhaust "adequate" state and local administrative remedies before entering federal court.⁷⁷

In the wake of the Supreme Court's definitive rejection of the requirement that section 1983 plaintiffs first exhaust adequate state administrative remedies before entering a federal forum, the Second Circuit fell into line. Following the *Patsy* decision, federal courts in the Second Circuit adopted the Supreme Court's broad no-exhaustion rule for section 1983 civil rights cases.⁷⁸

73. See *Jose P. v. Ambach*, 669 F.2d 865, 868-70 (2d Cir. 1982); *Swan v. Stoneman*, 635 F.2d 97, 102-06 (2d Cir. 1980); *Morgan v. LaVallee*, 526 F.2d 221, 224 (2d Cir. 1975); *Blanton v. State Univ. of N.Y.*, 489 F.2d 377, 383 (2d Cir. 1973); *Ruffler v. Phelps Memorial Hosp.*, 453 F. Supp. 1062, 1066-67 (S.D.N.Y. 1978); *Orazio v. Town of N. Hempstead*, 426 F. Supp. 1144, 1146-47 (E.D.N.Y. 1977); *Cofone v. Manson*, 409 F. Supp. 1033, 1036-37 (D. Conn. 1976); *Fuentes v. Roher*, 395 F. Supp. 1225, 1235-36 (S.D.N.Y. 1975); *Perzanowski v. Salvio*, 369 F. Supp. 223, 227 (D. Conn. 1974).

74. See *Coe v. United States Dist. Court for Dist. of Colo.*, 676 F.2d 411, 418 n.2 (10th Cir. 1982); *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 906 (5th Cir. 1981) (en banc), *rev'd*, 457 U.S. 496 (1982); *Canton v. Spokane School Dist. No. 81*, 498 F.2d 840, 844 (9th Cir. 1974); *Metcalf v. Swank*, 444 F.2d 1353, 1356 n.6 (7th Cir. 1971), *vacated*, 406 U.S. 914 (1972).

75. See *Green v. Ten Eyck*, 572 F.2d 1233, 1239-40 (8th Cir. 1978); *United States ex rel. Ricketts v. Lightcap*, 567 F.2d 1226, 1229-32 (3rd Cir. 1977).

76. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496 (1982).

77. *Id.* at 499, 516. See *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir. 1981) (en banc).

78. See *Mrs. W. v. Tirozzi*, 832 F.2d 748, 758 (2d Cir. 1987); *Patterson v. Coughlin*, 761 F.2d 886, 891 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *Quackenbush v. Johnson City School Dist.*, 716 F.2d 141, 148 (2d Cir. 1983), *cert. denied*, 485 U.S. 1071 (1984); *Mahoney v. Hankin*, 593 F. Supp. 1171, 1174 (S.D.N.Y. 1984).

C. *Federal Abstention and the Special Circumstances Requirement*

Federal courts have relied upon federal abstention doctrine to apportion litigation between state and federal judiciaries.⁷⁹ Federal abstention doctrine is a complex set of principles which developed in the course of the federal judiciary's attempts to avoid deciding those cases over which it had only nominal jurisdiction. The end product of this evolution is a doctrine similar to exhaustion. The similarity rests upon the desired result: state courts or administrative bodies initially attempt to adjudicate disputes.

Although the abstention doctrine and the exhaustion doctrine are distinct, in the realm of civil rights litigation, the two have become intertwined. Apparently, this entanglement is the result of frequently overlapping judicial considerations; the same considerations that mitigate against exhaustion frequently favor abstention.

Since 1941, the Supreme Court has defined a variety of situations where federal abstention is appropriate. The rationales offered for federal abstention range from the concrete to the ideal. At one end of the spectrum are such practical considerations as crowded dockets; at the other end, vague concerns over maintaining comity between state and federal judiciaries.

The most settled grounds for federal abstention involve a question of state law, the resolution of which might modify the federal claim. This type of abstention is derived from the landmark Supreme Court decision in *Railroad Commission of Texas v. Pullman Co.*⁸⁰ "Pullman abstention" is often justified because it permits the federal courts to avoid "needless friction" between state and federal judiciaries.⁸¹ Once issues of state law are resolved, *Pullman* abstention usually permits federal courts to rehear the case.

Federal abstention may also be applied where federal court intervention would create needless conflict with the administration

79. See generally C. WRIGHT, LAW OF FEDERAL COURTS § 52 (4th ed. 1983); cf. 28 U.S.C. § 2283 (1988). "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

80. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

81. *Id.* at 500.

of a state's affairs.⁸² This type of abstention may be traced to the Court's 1943 decision in *Burford v. Sun Oil Co.*⁸³ "*Burford* abstention" was first invoked to prevent federal interference with specialized state regulatory activities; however, it has since been used to avoid federal intervention in complex areas of state administration.⁸⁴ Where *Burford* abstention is involved, the case is usually dismissed, and there is little chance of it ever reaching a federal court.⁸⁵

Federal courts may also invoke federal abstention doctrine when there is a similar lawsuit pending before both federal and state courts. This form of abstention derives from the Court's 1976 opinion *Colorado River Water Conservation District v. United States*⁸⁶ and may be appropriate to those situations where other, more traditional, forms of abstention are not possible. *Colorado River* abstention may be invoked by federal courts where there are considerations involving the "conservation of judicial resources and comprehensive disposition of litigation."⁸⁷ In *Colorado River* and subsequent cases, the Court attempted to define the "exceptional circumstances" necessary to trigger abstention.⁸⁸ These circumstances include: whether the state or federal court has assumed jurisdiction of the *res* involved; the possible inconvenience of federal court involvement due to the geographic distance between state and federal courthouses; the need to avoid piecemeal litigation; the sequence in which state and federal courts took jurisdiction over the controversy; whether state law would adequately protect the rights of the party seeking federal court intervention; and, whether state or federal law provides the "rule of decision" in the dispute.⁸⁹

A final situation in which it is appropriate for the federal courts to invoke federal abstention doctrine derives from the

82. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943) (quoting *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941)).

83. *Id.*

84. See *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970); *Zwickler v. Koota*, 389 U.S. 241, 249 n.11 (1967); *England v. Medical Examiners*, 375 U.S. 411, 424 (1964) (Douglas, J., concurring); *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 189 (1959); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947).

85. When *Burford* abstention is invoked, the federal court usually issues a permanent injunction.

86. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

87. *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

88. *Id.* at 813.

89. See, C. WRIGHT, *supra* note 79, at 317.

landmark 1971 decision in *Younger v. Harris*.⁹⁰ *Younger* was the first abstention decision squarely based upon principles of federalism. In *Younger*, the Court refused to enjoin state prosecution of a defendant under a state statute. The Court stated that "extraordinary circumstances" involving the danger of irreparable harm must be present before a federal court may enjoin a pending state criminal prosecution.⁹¹

The refusal to enjoin state court proceedings, primarily on considerations of "comity," developed into a special application of the federal abstention doctrine, and is often referred to as the "Our Federalism" doctrine.⁹² The "Our Federalism" version of abstention has come to be the type most closely associated with the enforcement of federal civil rights.⁹³ Also this version of abstention remains one of the most controversial doctrines in the law of federal jurisdiction.

The *Younger* opinion represents one of the few instances where the Court dealt directly with the fundamental question of the appropriateness of federal abstention in civil rights litigation. In most abstention cases, this issue is buried beneath consideration of a myriad of factors that have been developed to provide guidance to lower federal courts whenever abstention may be invoked. There is, accordingly, a surprising paucity of case law that directly deals with whether the decision to abstain is, or should be, affected by the fact that federal civil rights are controverted.

Since the *Pullman* decision first established the abstention doctrine, the Court has never made entirely clear when the doctrine may be invoked. The "evolution" of the doctrine, if it can be so described, is erratic and confusing, and this confusion is most notable in the area of civil rights litigation. Generally, liberal members of the Court tend to disfavor abstention in civil rights cases. Such a position means earlier federal court involvement in the enforcement of civil rights. Conversely, conservative justices often favor federal abstention in civil rights litigation.⁹⁴

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

91. *Id.* at 43-54.

92. *Id.* at 53.

93. *Id.* at 44; C. WRIGHT, *supra* note 79, § 52A. Compare related cases decided in the same term: *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971).

94. The courts have not made any consistent distinction between civil rights cases and

Over time, the Court has come to refer to those factors permitting federal abstention as "special circumstances." Traditionally, federal abstention is viewed as an exception to the general rule that federal jurisdiction should be exercised where it exists. This view is reflected in the Court's position that circumstances permitting abstention must first be "special." Thus, federal abstention is said to be permissible only when narrowly defined "special circumstances" are present.⁹⁵

Historically, the Supreme Court controlled the invocation of abstention by interpreting what "special circumstances" must be present before a federal court may abstain. In the 1950s and 1960s, an activist Supreme Court confined the doctrine through narrow applications of the "special circumstances" requirement.⁹⁶ Confinement of abstention was frequently accompanied by statements describing the "duty" of federal courts to exercise jurisdiction to enforce federal rights,⁹⁷ and an underscoring of the delays thrust upon plaintiffs whenever the federal courts abstain.⁹⁸

The conservative swing of the Court in the 1970s was manifest in opinions generally favoring abstention in civil rights cases.⁹⁹ Such decisions were often justified by the need to avoid federal-state friction within a federal system.¹⁰⁰ The Court's 1971 decision in *Younger v. Harris*¹⁰¹ was the one Supreme Court decision to permit federal abstention that was clearly based upon considerations of comity and federalism.

section 1983 lawsuits in their determinations of the applicability of federal abstention doctrines.

95. The "special circumstances" limitation on the invocation of federal abstention is usually traced to *Propper v. Clark*, 337 U.S. 472, 492 (1949). See also *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). A good summary of what are considered "special circumstances" for purposes of federal abstention is set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814-17 (1976).

96. See *Harman v. Forssenius*, 380 U.S. 528, 534-37 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Harrison v. NAACP*, 360 U.S. 167, 176-77 (1959); Field, *Abstention in Constitutional Cases*, 122 U. PA. L. REV. 1071, 1133 n.165 (1974).

97. *Harrison*, 360 U.S. at 180-81 (Douglas, J., dissenting).

98. *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Baggett*, 377 U.S. at 378-79; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 425 (1964) (Douglas, J., dissenting). See also *Clark, Federal Procedural Reform and States' Rights to a More Perfect Union*, 40 TEX. L. REV. 211, 221 (1961).

99. See *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972); *Askew v. Hargrave*, 401 U.S. 476 (1971); *Reetz v. Bozanich*, 397 U.S. 82 (1970).

100. *Lake Carriers'*, 406 U.S. at 511 (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)); *Reetz*, 397 U.S. at 86-87.

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

In the years following the *Younger* decision, the Court gradually expanded the grounds for invoking this type of abstention.¹⁰² Where the Court refused to abstain in the post-*Younger* era, there were usually exceptional or unusual circumstances.¹⁰³ These general trends in the historical development of the abstention doctrine, and its application to the field of civil rights, provide a glimpse of the confusion underlying the evolution of the doctrine. Indeed, two sets of precedents have long existed: one generally favors the use of abstention in the civil rights field, the other disfavors such use.¹⁰⁴

Aside from *Younger*, the Court offered only occasional and conflicting statements on the broad question of the propriety of federal abstention in civil rights litigation. Over the years, some lower federal courts have interpreted the Supreme Court's position to be that federal abstention is quite appropriate in civil rights actions, particularly when a state criminal proceeding is pending.¹⁰⁵ Other lower federal courts reached the opposite conclusion.¹⁰⁶

102. *Hicks v. Miranda*, 422 U.S. 332 (1975) (applying *Younger* to state criminal proceedings instituted after filing of federal complaint); compare *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 613 (1975) (expanding the *Younger* abstention doctrine to civil proceedings generally); *Juidice v. Vail*, 430 U.S. 327, 334-35 (1977) (holding *Younger* non-intervention doctrine guided by notion of comity and proper respect for state functions whether state proceedings are civil or criminal); *Trainor v. Hernandez*, 431 U.S. 434, 443-44 (1977) (*Younger* doctrine bars federal court interference in state's ongoing civil enforcement action); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431-37 (1982) (when important state interests are involved, federal court should abstain under *Younger*).

103. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Willhauck v. Flanagan*, 448 U.S. 1323 (1980); *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 477-81 (1977); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976).

104. See *infra* notes 105 and 106.

105. *Grayson v. Montgomery*, 421 F.2d 1306, 1308 (1st Cir. 1970) ("[F]ederal courts have traditionally been reluctant to exercise their jurisdiction under the Civil Rights Act to intervene in the state criminal process."); *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n*, 396 F. Supp. 533, 537 n.5 (N.D. Cal. 1975) ("Prior to [*Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972)], the Supreme Court revealed that it was not always hesitant to recommend abstention in civil rights actions. And subsequent to *Lynch*, lower courts have continued, under the traditional *Pullman* analysis, to find abstention warranted in appropriate cases, even though they were brought under § 1983." (citations omitted)).

106. *Manney v. Cabell*, 654 F.2d 1280, 1284 (9th Cir. 1980) ("We bear in mind that the federal courts are particularly hesitant to abstain in section 1983 cases."); *Devlin v. Sosbe*, 465 F.2d 169, 172 (7th Cir. 1972) ("This court recognizes and agrees that the use of the abstention doctrine in cases involving civil rights, especially in cases where First Amendment rights are allegedly involved, is not to be encouraged."); *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("While the [abstention] doctrine has not been entirely abnegated and instances may still arise in which it will be appropriate, it is reasonable to conclude that

The lower federal courts' diverse treatment of civil rights cases involving abstention may be attributed to the Supreme Court's handling of the issue. Lower federal courts seeking to support the proposition that abstention is appropriate or desirable in civil rights cases can cite numerous Supreme Court precedents.¹⁰⁷ Con-

cases involving vital questions of civil rights are the least likely candidates for abstention." (citations omitted)); *Bergman v. Stein*, 404 F. Supp. 287, 293-94 n.6 (S.D.N.Y. 1975) ("Abstention is generally not favored in actions brought under 42 U.S.C section 1983."); *Brown v. Bronstein*, 389 F. Supp. 1328, 1332 (S.D.N.Y. 1975) ("The Supreme Court has cautioned that abstention is to be applied in narrowly limited 'special circumstances,' and only recently emphasized that a federal court should be mindful of the 'substantial authority for the proposition that abstention is not favored in an equal protection civil rights case brought . . . under 42 U.S.C. section 1983 . . .'" (ellipsis in original) (footnote omitted)); *Wall v. American Optometric Ass'n*, 379 F. Supp. 175, 184 (N.D. Ga. 1974) ("[A]lthough abstention is not foreclosed in civil rights cases, it is disfavored in such cases." (citations omitted)); *Marin v. University of P.R.*, 346 F. Supp. 470, 478 (D.P.R. 1972) ("Because of the delay caused by applying the abstention doctrine, it is particularly disfavored in First Amendment or civil rights cases.").

107. The Supreme Court precedents most frequently cited for the position that abstention is appropriate in civil rights cases include: *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (where the Court held *Younger* abstention required in an action challenging the constitutionality of a Texas statute); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 431-37 (1982) (holding *Younger* abstention principles fully applicable to state noncriminal proceedings where important state interests were involved); *Trainor v. Hernandez*, 431 U.S. 434, 441-47 (1977) (holding *Younger* abstention broad enough to prevent a federal court from enjoining an ongoing civil suit in state court); *Judice v. Vail*, 430 U.S. 327, 333-36 (1977) (holding federal abstention appropriate on principles of federalism under *Younger* where case involved noncriminal state proceedings in which appellees had an opportunity to raise federal claim in state court); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509-11 (1972) (holding federal abstention proper where resolution of ambiguities in state law likely to avoid or modify federal constitutional questions).

Cases decided prior to *Younger* which are often relied upon by those favoring abstention in civil rights litigation include: *Askev v. Hargrave*, 401 U.S. 476, 478 (1971) (holding abstention appropriate where interpretation of state law might obviate the federal claim); *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) ("The *Pullman* doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies."); *Zwickler v. Koota*, 389 U.S. 241, 248-52 (1967) (holding abstention narrowly limited to "special circumstances," usually involving the possibility of the federal claim being avoided by interpretation of state law); *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965) ("It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."); *Cleary v. Bolger*, 371 U.S. 392, 397 (1963) ("Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle 'is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue.'"); *Harrison v. NAACP*, 360 U.S. 167, 176 (1959) ("[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."); *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) (holding that the content of a federal right, especially one concerning domestic relations, may be

trariwise, lower federal courts seeking to avoid abstention are able to find Court opinions supporting their position.¹⁰⁸ This is because, for the greater part of this century, the Supreme Court has vacillated on the question of the propriety of abstention in civil rights litigation. Often vacillation reflects shifts in the prevailing ideology of the Court when its membership changes.¹⁰⁹

determined by state law); *Stefanelli v. Minard*, 342 U.S. 117, 120-25 (1951) (holding that federal courts should refuse to intervene in state criminal proceedings to suppress use of evidence allegedly seized in violation of fourth amendment); *Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943) ("[C]ourts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . .").

108. The most frequently cited Supreme Court cases for the proposition that abstention is to be disfavored in civil rights litigation include: *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 628 (1974) ("[T]here is substantial authority for the proposition that abstention is not favored in an equal protection, civil rights case brought as was this one under 42 U.S.C. section 1983 . . ."); *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("[A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim."); *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965) ("We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the 'special circumstances' prerequisite to its application must be made on a case-by-case basis.") (citation omitted); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 434 (1964) (Douglas, J., concurring) ("[A]pplication of the *Pullman* doctrine to the field of civil rights, particularly to controversies involving the rights of Negroes, will have, I think, serious effects."); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-73 (1963) (holding, *inter alia*, that the purpose of section 1983 was to override certain kinds of state laws and that this would be defeated if federal civil rights claims must await an attempt to vindicate the same in a state court.); *NAACP v. Button*, 371 U.S. 415, 427-28 (1963) (holding that a federal court may prevent a state from infringing first amendment rights in the name of regulation); *Harrison v. NAACP*, 360 U.S. 167, 180 (1958) (Douglas, J., dissenting) ("From the time when Congress first implemented the Fourteenth Amendment by the comprehensive Civil Rights Act of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people."); *Propper v. Clark*, 337 U.S. 472, 492 (1949) ("The submission of special issues is a useful device in judicial administration in such circumstances as existed in . . . *Pullman* . . . but in the absence of special circumstances it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.") (citation omitted); *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) ("In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, . . . it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.").

109. See Judge Kaufman's review of the evolution of federal abstention in *Reid v. Board of Education of New York*, 453 F.2d 238, 241-44 (2d Cir. 1971).

In recent years, however, the weight of authority appears to be that abstention is generally disfavored in civil rights litigation. The primary justification offered for this position is that abstention in such cases results in undue delay in the adjudication of important federal rights,¹¹⁰ and that the federal judiciary has a special role in enforcing civil rights. However, the Supreme Court's treatment of the issue remains sufficiently ambiguous to invite divergent interpretation. Certainly the Court's movement against abstention in civil rights cases was not as dramatic as its limitation of the applicability of either the exhaustion of remedies doctrine¹¹¹ or the municipal immunity doctrine.¹¹²

D. *The Second Circuit and Abstention in Civil Rights Litigation*

Absent a definitive Supreme Court position on abstention in civil rights cases, one might expect that lower federal judges with strong preferences concerning the appropriate forum for civil rights litigation would take the opportunity to interpret the abstention doctrines in conformity with their own predilections. Specifically, one might expect that federal judges who favor state court participation in civil rights enforcement would tend to favor an expanded use of abstention. Conversely, one might expect that judges less disposed toward state court participation would disfavor the use of abstention.

Since the early 1960s, Second Circuit courts have produced a significant number of opinions dealing with the issue of abstention in civil rights cases. The Second Circuit has issued some of the strongest statements both for and against abstention in civil rights litigation.¹¹³ The Second Circuit's reaction to the Supreme Court's positions on abstention can be divided into two distinct periods: pre-*Younger* and post-*Younger*. In the years before *Younger*, federal abstention was usually *Pullman* abstention.¹¹⁴ Accordingly, in

110. See, e.g., *Marin v. University of P.R.*, 346 F. Supp. 470, 479-80 (D.P.R. 1972).

111. See *supra* Section I.

112. See *supra* text accompanying notes 22-24.

113. See *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967) ("[I]t is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention."); *Kabelka v. City of New York*, 272 F. Supp. 998, 999 (S.D.N.Y. 1967) ("No special circumstances are advanced as warranting this Court's assumption of jurisdiction to determine the constitutional questions presented rather than wait upon a determination by the New York courts.")

114. See *East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106, 110 (2d Cir.

such cases, courts primarily focused on whether there was an unsettled question of state law that could affect the adjudication of rights under the federal constitution.

Prior to *Younger*, courts in the Second Circuit had many opportunities to articulate positions on the propriety of abstaining from civil rights litigation. In the years immediately following the Supreme Court's *Pullman* decision, Second Circuit courts approvingly cited the general trend favoring abstention.¹¹⁵ Judge Clark's opinion in *Clark v. Propper*¹¹⁶ was the single major challenge to liberal invocation of *Pullman* abstention. In that case, the Second Circuit set forth the grounds required for federal abstention in rather limiting language: "[Federal abstention] seems designed for and limited to cases involving serious and doubtful questions, often of a constitutional nature, involving the inner economy or the sovereign rights of a state where federal action, if not circumspect, may upset the delicate balances necessarily inherent in a federal system of government."¹¹⁷

The emphasis in this re-statement of the *Pullman* doctrine appears to be on the words "serious" and "doubtful." This seems to represent an effort to ensure that trivial matters of state law do not prevent federal courts from taking jurisdiction. Such an interpretation is buttressed by additional language in the case referring to the relative importance of federal rights as opposed to state concerns.¹¹⁸

A year after Clark's narrow interpretation of when federal abstention would be appropriate, Judge Learned Hand displayed a much more hospitable attitude towards federal abstention. Indeed, Hand adopted Justice Reed's formulation to describe the unsettled abstention doctrine in terms that went well beyond *Pullman*:

[W]here equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal court

1949); *Paris v. Metropolitan Life Ins. Co.*, 167 F.2d 834, 836 (2d Cir. 1948).

115. See *Zalkind v. Scheinman*, 139 F.2d 895, 903 (2d Cir. 1943); *Cohen v. American Window Glass Co.*, 126 F.2d 111, 114 (2d Cir. 1942). Both opinions discuss concerns that weigh against finding federal jurisdiction in situations where potentially determinative state law is yet unsettled in a state's own courts.

116. *Clark v. Propper*, 169 F.2d 324 (2d Cir. 1948).

117. *Id.* at 327-28.

118. *Id.*

to the courts of the legislating authority unless exceptional circumstances command a different course.¹¹⁹

Judge Hand's adoption of the Reed formulation shows his preference for federal court restraint in areas of potential state concern. In particular, Hand reversed the "special circumstances" requirement of the abstention doctrine. Most judges began any consideration of abstention with the presumption of federal court jurisdiction, and then looked for special circumstances that might warrant invocation of abstention.¹²⁰ Inverting this process, Judge Hand required that the plaintiff make an initial showing of special circumstances before a federal court would take jurisdiction over an issue of "primary importance" to a state.¹²¹

Throughout the 1960s, Second Circuit decisions continued to recognize and apply *Pullman* abstention.¹²² Most of the courts' opinions contained little or no discussion of the desirability of abstention in federal civil rights cases. Virtually no serious criticism of *Pullman* emerged from this period.

It was not until the wave of civil rights litigation of the 1960s that there was substantial consideration of the issue of other forms of abstention in the context of civil rights litigation. In a 1964 decision, *Sostre v. McGinnis*, the Second Circuit summed up its views on abstention in civil rights litigation:

The Supreme Court has approved abstention in litigation arising under the Civil Rights Act. Abstention is appropriate where its purpose is "the avoidance of unnecessary interference by federal courts with proper and validly administered state concerns" and where the issues are delicate or involve a sensitive state social policy.¹²³

Sostre cited not only to *Pullman*, but also to Supreme Court decisions in *Harrison v. NAACP*¹²⁴ and *Chicago v. Fieldcrest Dair-*

119. *East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106, 110 (2d Cir. 1949) (quoting *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383-84 (1949)).

120. See *supra* text accompanying notes 95-98.

121. This inversion of the "special circumstances" requirement is not unique to Judge Hand. See, e.g., *Kabelka v. City of New York*, 272 F. Supp. 998, 999 (S.D.N.Y. 1967).

122. See *Sostre v. McGinnis*, 334 F.2d 906, 912 (2d Cir. 1964); *Pugach v. Dollinger*, 277 F.2d 739, 742 (2d Cir. 1960); *Fenster v. Leary*, 264 F. Supp. 153 (S.D.N.Y. 1967).

123. *Sostre*, 334 F.2d at 912 (quoting *Harrison v. NAACP*, 360 U.S. 167, 176 (1959)).

124. *Harrison v. NAACP*, 360 U.S. 167 (1959).

ies, Inc.¹²⁵ The *Sostre* opinion provides grounds which appear to allow federal abstention in almost any civil rights case.¹²⁶ Rather than limiting federal abstention to situations where there exists an ongoing state criminal proceeding, the *Sostre* formula permits abstention in a much wider range of situations. Indeed, the criteria are set forth in such vague language as to invite federal abstention.

The generous criteria for granting abstention, enunciated by Judge Hayes in *McGinnis*, appear to indicate a strong Second Circuit desire to refrain from removing civil rights litigation that is before a state court.¹²⁷ Yet, only three years later, the Second Circuit held abstention inappropriate in such cases, stating that "cases involving vital questions of civil rights are the least likely candidates for abstention."¹²⁸

In *Long Island Vietnam Moratorium Commission v. Cahn*,¹²⁹ the Second Circuit issued its only other pre-*Younger* decision displaying similar hostility towards federal abstention. This case involved a first amendment challenge to a New York statute relating to the exhibition of the American flag.¹³⁰ The Second Circuit upheld a federal district court's refusal to abstain,¹³¹ explaining that, "[i]n the circumstances of this case, abstention could cause irreparable harm to plaintiffs and to others similarly situated and could thus effectively nullify First Amendment rights."¹³² Relying on Supreme Court decisions in *Zwickler v. Koota*¹³³ and *Dombrowski v. Pfister*,¹³⁴ the Second Circuit held that the delay inherent in abstention could result in an "impermissible chilling of the very constitutional rights which the plaintiff seeks to protect."¹³⁵

The *Koota* and *Dombrowski* opinions, which firmly opposed federal abstention in civil rights cases, stand in stark contrast to an

125. *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942).

126. *Sostre*, 334 F.2d at 911-13.

127. *Id.*

128. *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967) (citing *McNeese v. Board of Educ.*, 373 U.S. 668, 673-74 (1963)). The Second Circuit did not repeat this unequivocal language between *Pullman* and *Younger*.

129. *Long Island Vietnam Moratorium Comm'n v. Cahn*, 437 F.2d 344 (2d Cir. 1970).

130. *Id.* at 345-46.

131. *Long Island Vietnam Moratorium Comm'n v. Cahn*, 322 F. Supp. 559 (E.D.N.Y. 1970).

132. *Cahn*, 437 F.2d at 347.

133. *Zwickler v. Koota*, 389 U.S. 241 (1967).

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

135. *Cahn*, 437 F.2d at 347.

apparently strong preference for non-interference among pre-*Younger* judges within the Second Circuit. One of the strongest non-interference opinions was that of Judge Mansfield in *Kabelka v. City of New York*.¹³⁶ Mansfield relied on those Supreme Court precedents emphasizing the importance of federal non-interference in state criminal proceedings.¹³⁷

A good example of Second Circuit reliance on *Dombrowski* for support of abstention in civil rights litigation prior to *Younger* is *McLucas v. Palmer*,¹³⁸ which involved a section 1983 challenge to the procedures used at the appellant's criminal trial.¹³⁹ The court refused to grant a declaratory judgment in lieu of an injunction because there was an on-going state criminal prosecution.¹⁴⁰ The court exhibited concern for avoiding federal-state friction, stating that, "*Dombrowski v. Pfister* . . . was at pains to recognize 'that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.'"¹⁴¹

In *Coleman v. Ginsberg*,¹⁴² another 1970 decision, the Second Circuit recognizing a general policy disfavoring abstention in civil rights litigation, nonetheless found that the circumstances of the case justified abstention.¹⁴³ The decision appeared motivated, in part, by the fact that the case involved the relationship between a state employer and its employees. The court found this to be "a delicate area where a federal court should not intrude unnecessarily."¹⁴⁴ By abstaining, and leaving resolution of the state's treatment of its employees to the state courts, the court demonstrated sensitivity for "comity" between federal and state courts.¹⁴⁵

In 1971, the year of the Supreme Court's *Younger* decision,

136. *Kabelka v. City of New York*, 272 F. Supp. 998 (S.D.N.Y. 1967).

137. *Id.* at 999. See *Dombrowski*, 380 U.S. at 483-85; *Harrison v. NAACP*, 360 U.S. 167 (1959).

138. *McLucas v. Palmer*, 427 F.2d 239 (2d Cir. 1970).

139. *Id.* at 241.

140. *Id.* at 241-42.

141. *Id.* at 241 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965)) (citations omitted). Compare, *Fenster v. Leary*, 264 F. Supp. 153 (S.D.N.Y. 1967).

142. *Colman v. Ginsberg*, 428 F.2d 767 (2d Cir. 1970).

143. *Id.* at 769.

144. *Id.*

145. The particular delicacy for issues of federalism in this context is illustrated by the difficult resolutions of federal-state disputes in the landmark cases *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which overruled *National League of Cities*.

Judge Kaufman of the Second Circuit ordered abstention in *Reid v. Board of Education of New York*.¹⁴⁶ Judge Kaufman traced the history of abstention in the Supreme Court's decisions from the expansive use of the doctrine in the 1941 *Pullman* case to the limitations imposed by the activist Court of the 1950s and 1960s.¹⁴⁷ Kaufman concluded, however, that the Supreme Court had reverted to its *Pullman* position favoring abstention.¹⁴⁸

Accordingly, Kaufman ordered abstention in *Reid*, preferring that the state interpret its own law, as this interpretation could affect the federal constitutional claim.¹⁴⁹ In addition, Kaufman noted that the case involved "a particularly sensitive and complex area of state regulation."¹⁵⁰ This latter remark suggests Kaufman's appreciation of the issues of federalism presented by the case, despite a holding based on traditional abstention analysis.

Of special interest in *Reid* was Judge Kaufman's willingness to order abstention¹⁵¹ in spite of Supreme Court decisions disfavoring an exhaustion of state remedies requirement in civil rights litigation.¹⁵² Kaufman based this decision on a finding that the state claims were "wholly separate and distinct from the federal constitutional claims."¹⁵³

In the majority of the Second Circuit's decisions before 1971, the basis for abstention was the existence of ongoing state criminal proceedings. The potential effect on the resolution of parties' civil rights claims was not a significant consideration in these abstention decisions. In reaching its decision, the Second Circuit, however, seldom addressed the broader issue of abstention in civil rights litigation in isolation from other concerns. The Second Circuit may have been no more concerned with federalism in its civil rights cases than was the Supreme Court.

The Supreme Court's 1971 decision in *Younger v. Harris* thus represents an important turning point in the development of ab-

146. *Reid v. Board of Educ. of New York*, 453 F.2d 238, 244 (2d Cir. 1971).

147. *Id.* at 240-44.

148. *Id.* at 242. As support for his position, Kaufman cited, *Askew v. Hargrave*, 401 U.S. 476 (1971) and *Reetz v. Bozanich*, 397 U.S. 82 (1970).

149. *Reid*, 453 F.2d at 243-44.

150. *Id.* at 243.

151. *Id.* at 244.

152. See *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961).

153. *Reid*, 453 F.2d at 244.

stention in civil rights litigation.¹⁵⁴ *Younger* indicated the Supreme Court's new willingness to grant abstention in civil rights cases. In particular, the *Younger* Court sharply limited its 1965 *Dombrowski v. Pfister*¹⁵⁵ decision. This was perceived as a trend toward a more liberal use of abstention.¹⁵⁶

After *Younger*, an individual seeking to obtain a federal injunction of state proceedings had to demonstrate "bad faith, harassment, or any other unusual circumstance,"¹⁵⁷ a higher standard than previously required of such plaintiffs. Traditional notions of comity and federalism were the justifications offered to explain this reluctance to intervene in state court proceedings.¹⁵⁸

Of interest is the Second Circuit's response to the Supreme Court's new emphasis, as reflected in the *Younger* decision, on the importance of federal comity in civil rights litigation. If lower federal court judges are more sympathetic to state administrative and judicial handling of civil rights matters, as often hypothesized, one would have expected *Younger* to be warmly received and widely applied within the Second Circuit.

In *Younger*, due to the existence of an ongoing state criminal proceeding, the Supreme Court found federal court intervention to be offensive to fundamental notions of federalism.¹⁵⁹ The Court explicitly reserved judgment concerning situations where state criminal proceedings are not in progress at the time a federal suit is initiated.¹⁶⁰ This confinement of the *Younger* principle presented lower federal courts with the opportunity to extend *Younger* to a wider range of cases.

The Second Circuit initially refused to extend *Younger*. In several decisions in the mid-1970s, the Second Circuit opined that *Younger* was no barrier to federal equitable intervention because there were no ongoing state criminal proceedings.¹⁶¹ These cases

154. See *supra* text accompanying notes 90-112.

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

156. The Court in *Younger* retreated from the *Dombrowski* position that a state prosecution which has a "chilling effect" on first amendment rights is sufficient grounds for a federal injunction of those proceedings. *Younger v. Harris*, 401 U.S. 37, 50-54 (1971).

157. *Id.* at 54.

158. *Id.* at 43-44.

159. *Id.*

160. *Younger v. Harris*, 401 U.S. 37, 41 (1971).

161. *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21-22 (2d Cir. 1974); *414 Theatre Corp. v. Murphy*, 499 F.2d 1155, 1160 (2d Cir. 1974); *Boraas v. Village of Belle Terre*, 476 F.2d 806, 811-12 (2d Cir. 1973). See also, Note, *Implications of the Younger Cases for the Availabil-*

represented the Second Circuit's preference for limiting *Younger* abstention to a narrow range of fact situations. Typical of these early refusals to apply *Younger* abstention to novel situations was Judge Oakes' remark in *414 Theatre Corp. v. Murphy* that, "the principles of comity and federalism and consideration of equity practice 'have little force in the absence of a pending state proceeding.'" ¹⁶²

The willingness of the Second Circuit to grant injunctions against state actions despite *Younger* reflected a determination that federal protection of civil rights outweighed considerations of comity and federalism.¹⁶³ By adopting this position, the Second Circuit relinquished an opportunity to expand the *Younger* doctrine to new situations where state prosecutions were "imminent" or "threatening."

Younger also appeared to be confined to situations where the state proceedings were criminal in nature, in addition to the condition that state proceedings be ongoing. In 1975, with *Huffman v. Pursue*,¹⁶⁴ the Supreme Court would extend *Younger* abstention to civil proceedings. In cases that arose during the intervening years between *Younger* and *Huffman*, lower federal courts had an opportunity to erode the criminal-civil distinction, and, thereby, significantly expand *Younger* abstention.

In the four years between *Younger* and *Huffman*, only two cases of note reached the Second Circuit. The first of these was *Erdmann v. Stevens*¹⁶⁵ in 1972. In this case the Second Circuit found that disciplinary proceedings against an attorney were sufficiently comparable to a criminal proceeding to warrant application of *Younger* principles.¹⁶⁶ *Erdmann* would appear to indicate a willingness to read *Younger*'s broad principles, and its emphasis on comity, so as to include quasi-criminal proceedings.

In the following year the same court applied a much narrower reading of the criminal proceedings requirement of *Younger*. In

ity of Equitable Relief When No State Prosecution is Pending, 72 COLUM. L. REV. 874 (1972).

162. *414 Theatre Corp.*, 499 F.2d at 1161 (quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972)).

163. See, e.g., *Salem Inn*, 501 F.2d at 22.

164. *Huffman v. Pursue*, 420 U.S. 592 (1975).

165. *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972).

166. *Id.* at 1208-09.

*Blouin v. Dembitz*¹⁶⁷ the Second Circuit refused to extend *Younger* abstention to a state support action by labelling it "quasi-criminal."¹⁶⁸ In defending its decision, the court explained that, "[t]his is not to say that we think the general doctrine of federal-state comity is completely inapplicable here. But we do believe that the particularly stringent formulation of that doctrine in *Younger* should be limited, at least until the Court instructs otherwise, to cases involving traditionally criminal proceedings."¹⁶⁹

In the years immediately after *Younger*, the Second Circuit continued to send contradictory messages about when federal abstention was an appropriate response to civil rights litigation. Despite the Supreme Court's curtailment of *Dombrowski* as grounds for intervention in ongoing state proceedings, some Second Circuit judges continued to favor abstention even when first amendment rights were chilled by state action.¹⁷⁰

But there were also strong signals from the Second Circuit that abstention was favored in civil rights litigation. This was readily apparent in a series of Second Circuit opinions in the mid-1970s. In the first of these, *Wallace v. Kern*,¹⁷¹ the Second Circuit reversed a lower federal court judge who had imposed new bail procedures in his district.¹⁷² In striking down the new procedures, the Second Circuit made reference to *Younger's* principles and their application outside the traditional injunction setting.¹⁷³ Speaking for the court, Judge Mulligan stated: "The proposition that the principles underlying *Younger* are applicable only where the federal court is seeking to enjoin a pending state criminal prosecution is not supportable."¹⁷⁴ Other Second Circuit decisions of the period showed a similar willingness to transfer *Younger's* principles of federalism to new situations.¹⁷⁵ This willingness suggests

167. *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973).

168. *Id.* at 490.

169. *Id.* at 490-91 (citation omitted).

170. An early example of this was the decision in *Cortwright v. Resor*, 447 F.2d 245 (2d Cir. 1971). Although technically not an abstention case, it involved similar issues. The majority did not deal explicitly with the abstention issue, but Judge Oakes, dissenting, insisted that *Dombrowski* was "still good law where there has been actual harassment, as found here by the trial court, despite *Younger v. Harris*. Even a very little chill on a very big right is too much." *Id.* at 258 (Oakes, J., dissenting).

171. *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

172. *Id.* at 401. See *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973).

173. *Wallace*, 520 F.2d at 405-06.

174. *Id.* at 405.

175. See *United States v. Bell*, 524 F.2d 202, 209 (2d Cir. 1975); *McCune v. Frank*, 521

that lower federal judges are sensitive to matters of federalism and are willing to extend those concerns into novel areas.

The foregoing is but a small sampling of Second Circuit cases in the area of abstention in civil rights litigation. Nonetheless, it is representative of the Second Circuit's contradictory handling of *Younger's* revival of federalism/comity considerations in the civil rights realm. The disparity in the Second Circuit's handling of these matters can only be attributed to personal philosophical differences among individual judges. Some Second Circuit judges were anxious to preserve federal-state comity. Others, despite prior state involvement, were equally anxious to see the federal courts become directly involved in the enforcement of civil rights.

CONCLUSION

This article has described and assessed the reaction of Second Circuit judges to the Supreme Court's expansion of federal jurisdiction over section 1983 civil rights actions. In particular, it compared the Supreme Court's views with those of lower federal court judges on the question of the federal court adjudication of civil rights within a federal system of government.

Second Circuit judges have resorted to a variety of techniques to mitigate the impact of Supreme Court opinions favoring federal court adjudication in the field of civil rights. Mixed results have followed these attempts to blunt the effects of the Supreme Court's decision to channel more civil rights litigation into the federal courts. While some of the Second Circuit's attempts to carve out exceptions to expanded federal jurisdiction over civil rights have survived, the Supreme Court has clearly rejected others. There has been a "case dialogue" between the various levels of the federal judiciary over what role state and local courts should play in settling civil rights disputes.

A subsidiary question pursued in this article was whether lower federal courts were actually more protective of state participation in civil rights cases than the Supreme Court. From an examination of the case law, it appears that although many lower federal court judges are sensitive to the need to preserve state participation in civil rights cases, other lower federal courts show little or no sympathy for such participation. Lower federal judges, by

favoring greater state participation in section 1983 actions, have kept alive the dialogue concerning the enforcement of civil rights within a federal form of government.