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Considerations of comity often require federal courts to defer to state courts when federal issues could be raised in state proceedings. Contexts in which such deference is required include Younger *abstention, habeus corpus exhaustion and procedural default, and* Pullman *and* Burford *abstention. In this Article, Professor Wells demonstrates that the Supreme Court's opinions fail to make a distinction between cases where comity requires restraint and those where it does not. The Court's motive in invoking comity is not to decrease access to federal courts, but instead to strike a compromise between the individual's interest in a federal forum and the state's interest in a state forum. Professor Wells concludes that the Court uses comity as a vague abstraction to shield its arbitrary assignment of some cases to federal courts and some to state courts because it is unable or unwilling to find that one of these interests is generally the stronger.*

Twenty years ago in *Monroe v. Pape*[1] the Supreme Court opened the federal courts to virtually any individual with a constitutional claim against a state officer. In the past decade, however, the Court has increasingly cut back on access to a federal forum for litigation of such claims. In a line of cases beginning with *Younger v. Harris*, it has held that considerations of comity, which it defines as "a proper respect for state functions," often require federal courts to defer to state courts when federal issues could be raised in state proceedings.[2] Even before the development of *Younger* abstention, the Court invoked comity in requiring deference to state courts in other contexts: discretionary dismissal of pendent state claims, habeas corpus exhaustion and procedural default, and *Pullman* and *Burford* abstention.

The Court asserts that it has identified good reasons for deferring to state courts in these cases while continuing to permit access to federal courts in

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1. 365 U.S. 167 (1961).

2. Younger v. Harris, 401 U.S. 37, 44 (1971), quoted in City of Columbus v. Leonard, 443 U.S. 905, 908 n.2 (1979) (Rehnquist, J., dissenting to denial of certiorari). Other cases so holding include Juidice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue Ltd., 420 U.S. 592, 601 (1975); Preiser v. Rodriguez, 411 U.S. 475, 519 (1973) (Brennan, J., dissenting). Some of these cases quote more elaborately from *Younger*, defining comity as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. at 44, quoted in Juidice v. Vail, 430 U.S. at 334; Huffman v. Pursue Ltd., 420 U.S. at 601.

other constitutional cases.[3] Critics of the deferential decisions take a quite different view of comity. They charge that the Court's reasoning in the recent comity cases within the *Younger* doctrine undermines virtually all federal jurisdiction to hear constitutional challenges to the actions of state officers, and they warn that the recent cases lay the foundation for a general shrinking of access to federal courts for such suits.[4] Some of the Court's harshest critics contend that the Court uses comity not only to diminish access to federal courts, but also to restrict substantive constitutional rights.

This Article will argue that both the Court and its critics are wrong. For the most part, the case law will not support the Court's claim that the opinions have made viable distinctions between cases where comity requires restraint and those where it does not. At the same time, the critics take the Court's comity talk too seriously. The Court does not intend to apply the reasoning of the comity cases to bring about a steady decrease in access to federal courts. The role of comity in these cases is not to identify good reasons for federal court restraint in particular areas nor to undermine access to federal court in general. Rather, the Court makes arbitrary distinctions between cases, assigning some to federal courts and others to state courts. It uses comity as a device to obscure the lack of good reasons for those distinctions.

Why does the Court make arbitrary distinctions? The question of whether a case should be assigned to a federal or a state court presents a conflict between the state's interest in having the issues adjudicated in a state forum and the individual's interest in a federal forum. The Court has been unwilling to hold as a general proposition that either of these is the stronger and, consequently, has not articulated a broad rule allocating these cases to either the state or federal court system. It has only partially succeeded in identifying one interest or the other as the stronger at a lower level of generality, in particular kinds of cases. The court has accommodated the competing interests by arbitrarily dividing decision-making responsibility between federal and state courts. It attempts to hide the absence of good reasons for its allocation of the cases by explaining that comity requires deference in some cases but not others and by varying the content of comity as it moves from one case to another. In short, the Court, desiring to accommodate both interests, makes arbitrary distinctions because it cannot find good ones. It employs comity as a vague abstraction in order to avoid having to choose between these interests as a general guide to decision making.

Part I of the Article describes the areas where the Court employs comity and briefly sketches the historical and policy contexts in which those doctrines

3. See, e.g., Moore v. Sims, 442 U.S. 415, 423-35 (1979); Steffel v. Thompson, 415 U.S. 452, 460-63 (1974); Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981).

4. See, e.g., Moore v. Sims, 442 U.S. 415, 435-43 (1979) (Stevens, J., dissenting); Francis v. Henderson, 425 U.S. 536, 550-51 (1976) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 616-18 (1975) (Brennan, J., dissenting); Fiss, *Dombrowski*, 86 Yale L.J. 1103 (1977); Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977); Weinberg, The New Judicial Federalism, 29 Stan. L. Rev. 1191 (1977). See also Field, The Uncertain Nature of Federal Jurisdiction, 22 Wm. & Mary L. Rev. 683, 701-20 (1981).

have evolved. Part II draws a distinction between two kinds of comity cases based on whether the issues are state or federal. In state law cases the Court has substantially resolved the conflict between state and individual interests in favor of the state. Here the Court has successfully generated a principle of comity that unsettled state law issues should be decided in state courts. It has devised no such principle for most of the federal law cases. Part III examines the body of rules the Court has enunciated in the name of comity for allocating federal cases between state and federal courts. It demonstrates that neither the Court's nor its critics' explanations for these rules are persuasive and offers the alternative explanation that many of the Court's rules are pragmatic compromises. Part IV briefly examines the federal courts' occasional use of comity to diminish substantive constitutional protections and concludes that the scattered cases of this sort are deviations from the norm and not harbingers of a trend.

I. THE DEVELOPMENT OF COMITY-BASED RESTRAINTS ON FEDERAL COURTS

The notion of comity surfaced infrequently in the law of federal courts[5] before the 1960s.[6] Comity is invoked as a basis for restraining federal court interference in matters of importance to the state, and the sixties saw a dramatic increase in the occasions for interference. Much of the increase can be traced to two cases decided early in the decade, *Monroe v. Pape*[7] and *Fay v. Noia*.[8] In *Monroe* the Supreme Court construed the Civil Rights Act of 1871,

5. Comity is a sufficiently imprecise word to permit its use in a variety of contexts that have in common little more than the perceived need for such an abstraction to aid in the resolution or avoidance of conflicts between governmental bodies. For a discussion of its origins, see generally Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9 (1966). Comity is used in deciding choice of law issues, whether the choice is between the law of two states, see, e.g., Henry v. Richardson-Merrill, Inc., 508 F.2d 28, 32 (3d Cir. 1975), or between federal and state law, see, e.g., Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 164 (3d Cir. 1976). The term is also used to minimize friction and resolve disputes in the relations: (1) between nations, see, e.g., Pfizer, Inc. v. India, 434 U.S. 308, 319 (1978); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972); (2) between states, compare Hicklin v. Orbeck, 437 U.S. 518, 531-34 (1978) (privileges and immunities clause establishes a norm of comity which states must respect) with Nevada v. Hall, 440 U.S. 410 (1979) (whether one state recognizes another state's claim of sovereign immunity is a matter of comity between them and is not controlled by the Constitution); (3) between branches of the federal government, see, e.g., Iowa Beef Processors, Inc. v. Bagley, 588 F.2d 638, 641 (8th Cir. 1978), cert. denied, 441 U.S. 907 (1979); Washington Research Project, Inc. v. Department of Health, Educ. & Welfare, 504 F.2d 238, 253 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975); (4) between courts and agencies, see, e.g., Sunflower Elec. Co-op. v. Kansas Power & Light Co., 603 F.2d 791, 795 (10th Cir. 1979); Foremost Int'l Tours, Inc. v. Quantas Airways, Ltd., 525 F.2d 281 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); (5) between federal and state agencies, see, e.g., Cleveland Elec. Illum. Co. v. EPA, 603 F.2d 1, 6 (6th Cir. 1979); General Ins. Co. of Am. v. Equal Employ. Opp. Comm'n, 491 F.2d 133, 135 (9th Cir. 1974); (6) between civil and military courts, see, e.g., Schlesinger v. Councilman, 420 U.S. 738, 758 (1975); (7) between courts of the same sovereign, see, e.g., Gregory-Portland Indep. School Dist. v. Texas Educ. Agency, 576 F.2d 81, 82-83 (5th Cir. 1978), cert. denied, 440 U.S. 946 (1979); and (8) between judges of the same court, see, e.g., Bowles v. Wilke, 175 F.2d 35, 37 (7th Cir.), cert. denied, 338 U.S. 861 (1949).

6. It was not unknown, however. See generally Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 Colum. L. Rev. 330, 338-44 (1978).

7. 365 U.S. 167 (1961).

8. 372 U.S. 391 (1963).

now codified at 42 U.S.C. section 1983, to provide a broad federal remedy for violations of constitutional rights by state officers. At issue was the effect of language in the statute providing a federal remedy when unconstitutional action was taken "under color of state law." Should there be a federal remedy when the officer's actions violated state law and could be remedied in state court? Over Justice Frankfurter's dissenting view that values of federalism require state adjudication in such circumstances,[9] the majority ruled that an officer acts under color of state law whenever he is "clothed with the authority of state law."[10]

In *Fay* the Court addressed the scope of the habeas corpus statute, which provides a federal remedy to state prisoners held in violation of their constitutional rights. The Court reaffirmed and elaborated upon an earlier decision that habeas extends to virtually all constitutional violations that take place in state criminal proceedings,[11] and held that those claims could often be brought in federal court even where they had not properly been raised in state court.[12] Justice Harlan's dissent protested that the decision would destroy the effectiveness of state criminal processes and gravely harm the values of federalism.[13]

Added to these expanded federal remedies was a proliferation of newly articulated constitutional rights in the areas of first amendment freedoms, criminal procedure, procedural and substantive due process, and equal protection. The combination of new rights and readily available remedies led to dramatic increases in the habeas and civil rights work of the federal courts[14] and to a corresponding pressure on the balance of decisionmaking between federal and state courts. Suits that once would have been brought under state common or statutory law in the state courts were now recast in constitutional terms and taken to federal court.[15]

The Supreme Court responded to this threat to state prerogatives by invoking comity as a justification for restraints on the exercise of federal jurisdiction. In *Fay* itself the Court conceded that comity would sometimes require federal court restraint in spite of the broad reach of the habeas statute.[16] Thus, when a prisoner fails to exhaust his state remedies before petitioning the federal court, comity will ordinarily bar federal relief until state courts have reviewed the claim,[17] and in some cases when the prisoner fails

9. See 365 U.S. at 202 (Frankfurter, J., dissenting).

10. See 365 U.S. at 184-85 (quoting United States v. Classic, 313 U.S. 229, 326 (1941)).

11. See 372 U.S. at 399-415, aff'g Brown v. Allen, 344 U.S. 443 (1953).

12. See 372 U.S. at 426-35.

13. See 372 U.S. at 448-76 (Harlan, J., dissenting).

14. See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and the Federal System 950 & n.3, 1503-04 & nn.1-5 (2d ed. 1973 & Supp. 1981) [hereinafter cited as Hart & Wechsler]; H. Friendly, Federal Jurisdiction: A General View 75 & n.4 (1973); Friendly, Is Innocence Irrelevant?, 38 U. Chi. L. Rev. 142, 142-44 (1970).

15. See Flynt v. Leis, 574 F.2d, 874, 880 (6th Cir. 1978), rev'd per curiam, 439 U.S. 438 (1979); Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 604 (3d Cir. 1975).

16. See 372 U.S. at 419-20.

17. See Picard v. Connor, 404 U.S. 270, 275-78 (1971). The exhaustion requirement is statutory with respect to post-conviction remedies, 28 U.S.C. § 2254b, but it is nevertheless appropriate to consider it as a judge-made requirement of comity. The statute is a codification of the Court's

properly to raise a claim in state court, comity bars federal relief altogether.[18]

In cases where a state program is challenged on constitutional grounds under section 1983 or otherwise, the Court has invoked comity as a basis for three doctrines. One is the *Pullman* abstention doctrine,[19] which dates from the forties and was given up for dead in the mid-sixties[20] before its revival in the seventies.[21] The doctrine holds that when a federal court is asked to enjoin state officers on constitutional grounds and the constitutional issue might be averted by construction of unsettled state law, the court may stay the case and send the parties to the state court for resolution of the state law issue. For example, a chiropractor may bring a fourteenth amendment challenge against a state law prohibiting the unauthorized practice of medicine.[22] Construction of the state law may reveal that the plaintiff's activities are not prohibited by the statute and, therefore, the constitutional issue need not be decided. The Court justifies *Pullman* abstention in part by reference to the policy against unnecessary decisions of constitutional issues[23] and in part as a matter of comity towards state courts.[24]

A second comity-based doctrine is *Burford* abstention, also dating from the forties.[25] There is some confusion about the scope of *Burford* abstention. It appears to hold either that a federal court should dismiss constitutional challenges to state administrative action concerning matters primarily of local

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comity-based exhaustion requirement. See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 & n.3 (1970). Preconviction exhaustion is not covered by the statute but rests on the Court's decision in Ex Parte Royall, 117 U.S. 241 (1886). See, e.g., Neville v. Cavanagh, 611 F.2d 673, 675 (7th Cir. 1979), cert. denied, 100 S. Ct. 1834 (1980); United States ex rel Scranton v. New York, 532 F.2d 292, 294 (2d Cir. 1976). See generally 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, 884-908 (1965). Federal courts do not treat post-conviction exhaustion as a rigid requirement but continue to consider it as a rule of comity that they may ignore when there are good reasons for doing so. See, e.g., Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam); Codispoti v. Howard, 589 F.2d 135, 140 (3d Cir. 1978).

18. See Wainwright v. Sykes, 433 U.S. 72, 83-87 (1977); Francis v. Henderson, 425 U.S. 536, 541-42 (1976).

19. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). See generally Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974).

20. See Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604, 604 (1967).

21. See, e.g., Bellotti v. Baird, 428 U.S. 132 (1976); Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972); Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).

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

23. See Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972); Field, supra note 19, at 1096-1101.

24. See Harrison v. NAACP, 360 U.S. 167, 176-77 (1961); Field, supra note 19, at 1093-96. Originally the Court justified abstention in these cases by noting that the plaintiff sought an injunction and stressing the broad discretion of a court of equity in devising a just remedy. See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941). As the doctrine has developed over the years, the Court has abstained in cases in which no injunction was sought. See, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959); Field, supra note 19, at 1139-40 & nn. 177-81.

25. See Burford v. Sun Oil Co., 319 U.S. 315 (1943). See also Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951). See generally Comment, Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the *Burford* Doctrine, 46 U. Chi. L. Rev. 971 (1979) [hereinafter cited as Scope of *Burford* Doctrine].

concern, or that it should dismiss cases when its decision might unnecessarily disrupt state policies, or perhaps both. Unlike *Pullman*, the *Burford* doctrine is grounded in comity alone and operates whether or not a constitutional issue in the case may be avoided by decision of an unsettled issue of state law.[26] Also unlike the *Pullman* doctrine, it requires dismissal instead of a stay of the federal action.[27]

The third doctrine, and the source of the recent controversial decisions, grows out of *Dombrowski v. Pfister*[28] and *Younger v. Harris*.[29] It concerns requests for federal injunctions against state court proceedings. In the paradigm case the state has brought or threatened to bring a criminal prosecution against, for example, a movie theater operator for violation of an obscenity statute. The state criminal defendant then becomes a plaintiff in a federal civil rights action seeking to enjoin the prosecution on the ground that the statute violates the first amendment. The Supreme Court has held that comity is often a bar to the federal civil rights suit.

Finally, the Court employs comity to protect state prerogatives in pendent jurisdiction cases, in which the plaintiff brings a federal action and appends to it a related state law claim. Thus, in *United Mine Workers v. Gibbs*,[30] plaintiff claimed that a secondary boycott violated his rights under federal labor law and also amounted to interference with contractual relations under state tort law. The *Gibbs* court held that a federal court has jurisdiction over a pendent claim whenever the federal and state claims derive from the same factual background. In addition, however, the Court warned that district courts should exercise their discretion to dismiss pendent state law claims when the gain in convenience from hearing all of plaintiff's arguments at once is outweighed by considerations of "comity and . . . justice between the parties."[31]

II. COMITY AND STATE LAW ISSUES

At the outset of this Article, it was asserted that the Court often uses comity in a talismanic fashion to dispose of cases without giving good reasons. But it will be useful to begin this study by examining an area where the Court has devised a well-rationalized general principle of comity, the principle that un-

26. See Scope of *Burford* Doctrine, supra note 25, at 974.

27. See, e.g., BT Inv. Managers, Inc. v. Lewis, 559 F.2d 950, 953-55 (5th Cir. 1977); Bezanson, Abstention: The Supreme Court and Allocation of Judicial Power, 27 Vand. L. Rev. 1107, 1122 (1974).

28. 380 U.S. 479 (1965).

29. 401 U.S. 37 (1971). See generally Note, Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274-1330 (1977). As with *Pullman* abstention, see note 24 supra, the Court initially justified abstention in these circumstances by reference to the old equitable rule that a court of equity should not enjoin a criminal prosecution. See, e.g., Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943). See generally Soifer & Macgill, The *Younger* Doctrine: Reconstructing Reconstruction, 55 Tex. L. Rev. 1141, 1155-63 (1977). More recently the Court has emphasized that the "more vital consideration" supporting abstention is federal-state comity. See Younger v. Harris, 401 U.S. 37, 44. See also Trainor v. Hernandez, 431 U.S. 434, 441, 444 (1977); Soifer & Macgill, supra, at 1169-83; O. Fiss, The Civil Rights Injunction 61-68 (1978).

30. 383 U.S. 715 (1966).

31. Id. at 726.

settled state law issues should be decided in state court. Here the Court has balanced the competing state and individual interests, chosen the state interest as generally the stronger, and articulated a principle that implements that choice. This principle justifies the Court's deference to state courts in *Pullman* abstention cases and in discretionary dismissal of pendent state claims. A brief review of the Court's work will provide an instructive contrast to the federal law cases considered in Part III, where the Court has not made such a choice.

A. The Principle that State Law Should Be Made in State Courts

When the substantive issues are governed by state law, the state's interest in a state forum is very strong, and the individual's interest in a federal forum is comparatively weak. The state's interest is based on the institutional advantages of state adjudication. State courts are more familiar with state law and are more sensitive to the policies underlying state law than are their federal counterparts. When a federal court decides a state law issue, its holding has no force beyond the parties at hand. It is at best a forecast of what the state court would do, at worst an error that wrongly decides the case.[32] In contrast, the individual's interest is generally no more than convenience and economy in litigation. In most cases he is in federal court by virtue of a federal claim, but there is a state issue lurking in the case that can conveniently be litigated at the same time.[33] In diversity cases, the individual litigant may assert a different and perhaps stronger claim to a federal forum because the parties are citizens of different states and the only substantive issues are state law questions. In this area the individual is supported by a policy, specifically identified in the Constitution and enforced by a jurisdictional statute, of protecting out-of-staters against the possibility of local prejudice.[34] When this last consideration is not present, the Court has chosen the state interest as the stronger and has enunciated the principle that unsettled state issues should be decided in state courts.

This principle provides part of the underpinning for the *Pullman* abstention doctrine and for the restrictive aspects of pendent jurisdiction as well.[35] In *Pullman* abstention the Court's justification for delaying adjudication of the constitutional decision until the state issue is decided is its policy of avoiding unnecessary constitutional decisions. But the justification for sending the parties to state court is the principle that unsettled state law issues should be decided by state courts.[36] Likewise, in pendent jurisdiction one of the primary

32. See, e.g., Moore v. Sims, 442 U.S. 415, 428-30 (1979).

33. This is true both of *Pullman* abstention situations, in which the individual brings a constitutional challenge to a state law that might be avoided by the resolution of a state law issue, and of pendent jurisdiction situations, in which federal jurisdiction is based on a federal claim and the court will only take jurisdiction over a state claim that is closely related to that federal claim.

34. See Hart & Wechsler, supra note 14, at 1051-53.

35. See United Mineworkers Union v. Gibbs, 383 U.S. 715, 726 (1966); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

36. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964).

justifications for discretionary dismissal of pendent state claims is that the state issues are unsettled and therefore should be heard in state court.[37]

In recent years the Court has relied increasingly on this principle to extend abstention beyond the standard *Pullman* pattern. The Court has upheld abstention in cases in which there were unsettled state law issues but no difficult federal constitutional issues[38] or in which no request for injunctive relief was made.[39] In an ordinary diversity case, devoid of any federal issues, it approved certification of unsettled state law issues to the state court.[40] Many lower federal courts have abstained in purely state law cases without disapproval from the Supreme Court.[41]

How strong is this principle? Federal courts do sometimes decide state law claims in spite of it. They have developed three limiting glosses upon it. First, the principle is strong only when state law is uncertain.[42] It may be ignored for mere convenience in deciding all aspects of a case at one time if the case concerns routine application of settled law.[43] Only where state law is uncertain is there much danger that the federal court will go wrong. Second, efficiency considerations sometimes prevail of their own weight, as when the federal court has invested much effort in the case before a question arises as to the propriety of pendent jurisdiction.[44] Third, application of the principle requires that a state court be available to hear the claim. When it is not, as when the state statute of limitations has run, the federal court will hear state claims.[45]

Apart from these limits, the contours and strength of this "state law in state courts" principle are somewhat uncertain. The Supreme Court has never wholeheartedly endorsed abstention in diversity cases, perhaps because of the explicit constitutional and legislative authorization of diversity jurisdiction, or

37. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973). Other factors entering into the dismissal decision are the possibility of jury confusion, inconvenience, and the nature of the federal issue. See 383 U.S. at 726-27.

Discretionary dismissal of pendent claims is less often permissible when they are governed by federal rather than state law—for example, when a federal claim does not meet a jurisdictional amount requirement. See Hagans v. Lavine, 415 U.S. 528, 548 (1974).

38. See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (plurality opinion).

39. See Field, supra note 19, at 1140.

40. See Lehman Bros. v. Schein, 416 U.S. 386, 391-92 (1974) (ordering court of appeals to consider certifying unsettled state issue to Florida court in diversity case).

41. See Hart & Wechsler, supra note 14, at 998-1005.

42. See, e.g., Kusper v. Pontikes, 414 U.S. 51, 55 (1973) (abstention); Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973) (pendent jurisdiction); Pride v. Community School Bd., 482 F.2d 257, 272 (2d Cir. 1973) (pendent jurisdiction). See also City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1283-84 (S.D. Fla. 1980). But see Johns-Manville Corp. v. Doyall, 510 F.2d 1196, 1200 (5th Cir. 1975) (dissenting opinion) (federal court should abstain even when state law is clear).

43. E.g., Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958). See Hart & Wechsler, supra note 14, at 991-92.

44. See Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 479-80 (3d Cir. 1979); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 129 (7th Cir. 1972).

45. See O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 64 (7th Cir. 1979).

because it considers the individual interest in avoiding local prejudice stronger than the *Pullman* and pendent jurisdiction interest in litigation convenience. The Court is as yet unwilling to hold that the state interest is stronger in this context. In addition, the Court has left unclear whether the "state law in state courts" principle is grounded wholly on the advantages of state adjudication of unsettled state issues or whether federal court deference may also be based on a characterization of a dispute as peculiarly local in nature.[46] Some of the opinions suggest that disputes concerning eminent domain,[47] natural resources,[48] and domestic relations[49] fall into this category, so that deference may be warranted even when the state issues are routine and not unsettled. Again, however, the Court has not unambiguously endorsed this extension of the principle.[50]

B. Distinguishing Between State and Federal Issues

These questions about the scope and premises of deference to state courts on matters of state law require further attention from the Court, but they can be put aside for purposes of the present inquiry. The central point is that the Court has articulated a principle of comity that state law be made in state courts in the absence of significant countervailing considerations. In this context the Court has weighed the individual interest in a federal forum against the state interest in a state forum and deemed the latter the stronger.

In contrast to the fairly orderly body of law generated by the "state law in state courts" principle, the Court has not articulated any principle that federal constitutional issues should generally be heard in either federal or state courts. The Court sometimes invokes comity as the justification for requiring that they be decided finally in state courts.[51]. Sometimes it says that comity requires federal courts to delay their consideration of federal issues until state courts have heard them.[52] On other occasions it entirely rejects state arguments for federal court deference.[53] The complexity of the Court's approach to these issues shows that the Court finds the choice between state and individual interests more difficult when federal constitutional issues are involved.

There are important differences between the state and federal law contexts that make the choice between the state and individual interests a hard

46. See, e.g., Dome Condominium Ass'n, Inc. v. Goldenberg, 442 F. Supp. 438, 441-46 (S.D. Fla. 1977).

47. See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29 (1959) (plurality opinion).

48. See Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968).

49. See, e.g., Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

50. For example, some of the language in the *Thibodaux* plurality opinion supports this explanation of the case. See 360 U.S. at 28-29. But a concurring opinion explains the case as an application of the unsettled state law principle. See id. at 31 (Stewart, J., concurring). And in *Kaiser Steel* the Court's brief opinion mentions both the presence of unsettled state issues and the peculiarly local nature of the dispute. See 391 U.S. at 594. See also Field, supra note 19, at 1148-53.

51. See, e.g., Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 347-49 (1951).

52. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 491 (1973).

53. See, e.g., Steffel v. Thompson, 415 U.S. 452, 462 (1974).

one in the latter area. With respect to federal issues, the strong institutional interest in state court adjudication of state issues is not present. State courts are not sovereign over these issues. Lower federal courts are more familiar with the operation of federal law and can be expected to approach it with a more national perspective, and consequently, will be more likely to develop a uniformity in its construction and application.[54] Thus, the structure of the federal system suggests that the federal courts are the proper arbiters of federal issues and that the broad argument for federal court deference must look elsewhere for support. That argument rests on the premise that even though these cases are governed by federal law, the state has an interest in state court adjudication of claims concerning federal constitutional challenges to its activities. Only in this way, it is argued, can states oversee the day-to-day administration of state law and construe state statutes in accordance with constitutional standards.[55]

The individual, by contrast, has a much stronger case for federal adjudication here than in the state law context. Not only does the institutional argument on the proper roles of federal and state courts favor him, but he can also rely on the independence of federal judges guaranteed in Article III of the Constitution. This independence is especially important in deciding constitutional claims, as the function of the court is to protect the individual's rights against majoritarian goals. Moreover, it is particularly important that federal rather than state judges decide federal law challenges to state official action, as state judges may overly value state interests and may fear for their reelection or reappointment if they invalidate popular state laws.[56]

III. COMITY AND CONSTITUTIONAL CHALLENGES TO STATE ACTION

The Court has shown substantially more respect in federal law cases for these arguments on behalf of the individual's preference for a federal forum than it has in state law cases. Even so, it has not ignored the state's arguments to the contrary. Instead of pronouncing a broad rule allocating constitutional challenges to one court system or the other, the Court has attempted to accommodate both the state and individual interests by allocating some cases to state courts and some to the federal courts. The Court maintains that in the areas where it requires deference, considerations of comity are especially strong. This part of the Article will examine four doctrinal areas where the Court,

54. See, e.g., Hagans v. Lavine, 415 U.S. 528, 548 (1974); Steffel v. Thompson, 415 U.S. 452, 463-64 (1974); Mitchum v. Foster, 407 U.S. 225, 239-43 (1972); England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 415-17 (1964). See also Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352 (1970); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 170-76 (1953); Neuborne, supra note 4, at 1105.

55. See, e.g., Trainor v. Hernandez, 431 U.S. 434, 441-43 (1977) (applying *Younger* doctrine); Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (applying *Younger* doctrine); Picard v. Connor, 404 U.S. 270, 275-78 (1971) (writ of habeas corpus); Younger v. Harris, 401 U.S. 37, 50-53 (1971). Cf. Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) (writ of habeas corpus, state administrative body). See also George v. Parratt, 602 F.2d 818, 822 (8th Cir. 1979); Insurance Fed'n v. Supreme Court, 489 F. Supp. 89, 91-93 (E.D. Pa. 1980).

56. See Neuborne, supra note 4, at 1127-28.

relying on comity, requires individuals to raise federal constitutional issues in state court rather than federal court. The four areas are *Younger* abstention, *Burford* abstention, habeas corpus exhaustion, and habeas corpus procedural default. In cases falling within the first three of these areas, the Court has not provided convincing reasons why they should be treated differently than other constitutional challenges. Only in the procedural default area has the Court successfully articulated a principle of comity and consistently applied it to the relevant range of cases.

A. The Younger *Doctrine and the Pending/Non-Pending Distinction*

In 1961 *Monroe v. Pape*[57] broadly construed the civil rights act to grant access to federal court to virtually any individual with a constitutional claim against a state officer, even where an adequate remedy is available in the state courts. The plaintiffs in *Monroe* were permitted to bring a federal suit against police officers for an unconstitutional search of their home even though the search also violated state law and could have been remedied in a state tort suit. Beginning in 1970 with *Younger v. Harris*,[58] however, the Court has substantially limited the impact of *Monroe*. In a series of cases it has held that comity requires deference when the constitutional claims could be raised in a pending state proceeding. In *Younger* the federal plaintiff challenged the constitutionality of a California statute proscribing subversive activities. At the time of the federal suit, he was a defendant in a state criminal prosecution brought under that statute, and in his federal suit he sought to enjoin the prosecution. The Court held that comity required the federal court to show respect for the pending state proceeding by dismissing the federal suit.[59] In subsequent cases the Court has extended the dismissal requirement to include pending state court civil proceedings, at least when they are instituted by the state,[60] and state appellate review as well as trials.[61] In addition, it has held that an issue decided in the state proceeding cannot be relitigated in a later federal section 1983 suit,[62] so that the effect of the original dismissal often is to assign the case to the state courts for final resolution.

Why should attacks on pending state proceedings be treated differently than other constitutional challenges? The Court addressed this question in *Steffel v. Thompson*.[63] Steffel had distributed anti-war handbills at a private shopping center, in violation of a state criminal trespass statute. He was

57. 365 U.S. 167 (1961). See Hart & Wechsler, supra note 14, at 947-51. See generally Shapo, Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond, 60 Nw. U.L. Rev. 277 (1965).

58. 401 U.S. 37 (1971).

59. Id. at 43-54.

60. See, e.g., Moore v. Sims, 442 U.S. 415, 423 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977) (state not a party but had a substantial interest in the outcome).

61. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). See Soifer & Macgill, supra note 27, at 1183.

62. Allen v. McCurry, 101 S. Ct. 411 (1980).

63. 415 U.S. 452 (1974).

threatened with prosecution if he continued his conduct, and a companion who did not heed the warning was prosecuted. Steffel sought a federal declaratory judgment that the statute violated his first amendment rights.

The Court permitted the suit. It explained that the comity considerations underlying *Younger* were not present here. According to the *Steffel* Court, comity was important in *Younger* because it is insulting to the state court for a federal court to take away issues that bear directly on a case before the state court, because federal intervention would disrupt the ongoing state judicial process, and because the individual interest in a federal forum is weak when a pending state proceeding is available to hear the federal issues.[64] None of these factors is present where there is no pending state proceeding.

The rationale for the *Younger* doctrine offered by the Court in *Steffel* is a state interest narrower and stronger than the general interest in state court adjudication of federal challenges to state activity. This narrower interest is strong enough to prevail against the individual's interest in a federal forum even though the general state interest might not be sufficient to support federal court deference in the broad run of cases. Accordingly, when the Court invokes comity as the basis for its deferential rulings in *Younger* cases, the Court seems to have in mind a principle that "a proper respect for state functions" requires federal deference to pending state proceedings. Taken on its own terms, this may be a viable basis for distinguishing between the two groups of federal plaintiffs represented by *Younger* and *Monroe*. While a critic might value the state and individual interests differently than the Court, it would be hard to show that it is illegitimate to value the state interest in the integrity of pending proceedings as strongly as does the Court.[65]

But the Court in later cases has not applied the *Younger* doctrine in the

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64. The Court said:

> 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. In addition, while 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 forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Id. at 462. See also Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975); Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 509-10 (1972).

65. It might be argued, however, that the Court is unconvincing in its attempt to show that the state interest in pending proceedings is especially important. The Court's contention that the federal plaintiff will have no opportunity to raise his federal claims where there is no pending state proceeding ignores the potential availability of state declaratory, injunctive and tort remedies. See 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, 678-79 (1975). Disruption and insult attendant upon interference with pending proceedings will be of concern in the rare case in which the federal marshall walks into the crowded state courtroom and serves the parties or the judge with a federal injunction. In the majority of cases, however, federal relief will consist of removal of a state case from a list of unheard cases kept in the clerk's office. There will be no more disruption than if the state case had been settled, and state judges may scarcely be aware of the insult visited upon them.

limited way suggested by *Steffel*. Although the Court has not forthrightly abandoned the *Steffel* argument or articulated some other principle to replace or supplement it, the Court in *Hicks v. Miranda*,[66] *Huffman v. Pursue, Ltd.*,[67] and *Moore v. Sims*[68] has ordered deference in circumstances where *Steffel* would permit federal adjudication.

In *Hicks* the Court held that the federal court must dismiss on *Younger* grounds, even when the federal suit is filed before the state proceeding, if the state case is brought before there have been substantial proceedings on the merits in the federal court.[69] The opinion in *Hicks* neither distinguishes nor overrules *Steffel*, but *Hicks* seems at odds with the *Steffel* rationale for federal deference. *Hicks* suggests that it is not so much the narrow state interest in the integrity of state proceedings that underlies the *Younger* doctrine as it is the more general interest in state court adjudication of constitutional challenges to state law.

The Court in *Hicks* said that strict adherence to a pending/non-pending rule at the date of the filing of the federal case would "trivialize" *Younger*. But it could have that effect only if the primary basis for *Younger* is the state interest in reviewing federal claims, for in that event the state's interest would be the same regardless of the fortuity of who won the race to the courthouse.[70] By contrast, strict adherence to a pending/non-pending rule fully serves the policies of avoiding disruption and insult relied on in *Steffel*. On the facts of *Hicks*, the *Steffel* argument, which is based on respect for other courts' proceedings, would suggest that the state court and not the federal court should exercise self-restraint.[71]

The tensions between *Huffman* and *Moore* on the one hand, and *Steffel* on the other, are more subtle. In *Huffman* the Court held that the individual not only must raise federal claims at the state trial level but must also pursue state appellate remedies as well. The argument that federal relief disrupts the state's system of justice carries less weight in the appellate context.[72] When the individual foregoes appeal in favor of a federal suit, there is no interference with any state court proceeding. The state interest implicated here is not disruption of state proceedings but the broad state interest in hearing federal challenges to state law. This interest may be stronger on appeal than at trial, for one of its premises is that state courts should have an opportunity to construe state law to fit constitutional standards. Appellate courts have broader authority and can perform that function more effectively than trial courts.[73] Thus, *Huffman* can be justified on the broad state interest in state review of

66. 422 U.S. 332 (1975).
67. 420 U.S. 592 (1975).
68. 442 U.S. 415 (1979).
69. 422 U.S. at 349-50.
70. See Fiss, supra note 4, at 1109, 1135.
71. See 422 U.S. at 357 (Stewart, J., dissenting) ("Younger v. Harris and its companion cases reflect the principle that the federal judiciary must refrain from interfering with the legitimate functioning of state courts. But surely the converse is a principle no less valid.").
72. See Fiss, supra note 4, at 1139-40. But see 420 U.S. at 608.
73. See 420 U.S. at 609. See also Moore v. Sims, 442 U.S. 415, 426-27 & n.10 (1979).

federal claims, but not on the narrow interest in avoiding disruption of pending state proceedings.

Moore concerned pending trial proceedings, but it undermines *Steffel's* rationale in another way. The case arose after state officials, in response to complaints of child abuse, took away Sims' children and commenced state court proceedings to determine their future custody. Sims and his wife then brought a federal suit challenging the constitutionality of the original seizure and detention of his children without a prompt hearing at which its grounds could be challenged. The claim was offensive rather than defensive. Framing the issue as "whether [Sims'] constitutional claims could have been raised in the pending state proceedings," the Court examined state law, found that they could have been raised in a permissive counterclaim,[74] and barred the federal suit. It was irrelevant, the Court said, that the federal claims were not cognizable as *defenses* in the original state custody suit.[75]

Steffel's disruption and insult arguments, however, rest on the premise that disrespect is a danger and that deference is appropriate when a federal issue may be raised as a defense to state law in a state enforcement action, and not whenever there happens to be a state proceeding at which federal claims can be raised. Only in the former circumstances would it be unseemly for the federal court to take an issue away from the state court.[76] Accordingly, even though there was a pending proceeding in *Moore*, the Court could not rely on *Steffel's* insult and disruption arguments. Instead, it grounded its decision on the broad state interest in hearing federal challenges to state law.[77] The dissent noted the departure from the customary rule with respect to plaintiffs asserting claims offensively: "If there is no requirement that federal plaintiffs initiate constitutional litigation in state rather than federal court in the first instance—and this Court has repeatedly held that there is not—then the coincidence of an unrelated state proceeding provides no justification for imposing such a requirement."[78]

Hicks, *Huffman*, and *Moore* undermine the *Steffel* Court's distinction between the *Moore* and *Younger* plaintiff. These cases all suggest that it is not the presence of a state proceeding that justifies federal court deference, but rather the state interest in state review of any constitutional challenge to state law. That state interest is broad enough to cover both types of federal plaintiffs. If it is strong enough to support restraint in the one situation, it should have the same implication in the other. Indeed, in *Moore* the federal plaintiff was like the plaintiff in *Monroe* in that he was required to raise his federal claim in state court not because it was a defense to the state proceeding against him, but merely because there happened to be a state proceeding where it

74. 442 U.S. at 425-26 n.9.

75. Id. at 430 n.12.

76. See id. at 436-37 (Stevens, J., dissenting). See also Note, supra note 29, at 1317-19.

77. See 442 U.S. at 429-30. The Court also thought that the policies in favor of state courts deciding state law issues and against hearing issues that are not ripe favored federal dismissal. See id. at 427-29.

78. Id. at 440 (Stevens, J., dissenting).

could be brought. These cases show that the Court has now abandoned the narrow comity argument of *Steffel*. But it has neither replaced *Steffel* with some other rationale for its division of cases between federal and state courts nor applied the reasoning of the later cases to the ordinary *Monroe*-type plaintiff. So extended, that reasoning would require the overruling of *Monroe*.

Will the rejection of *Monroe* be the next step in the Court's development of judicial federalism? One reading of the cases gives an affirmative answer to that question. Professor Fiss, writing in 1977, examined *Huffman* and *Hicks* and concluded that *Monroe* "may soon be but a formal vestige of another era."[79] Fiss and other critics[80] argue that the reasoning of cases like *Huffman* and *Hicks* signal a rejection of the individual interest in a federal forum in favor of the state interest in a state forum as the general guideline for resolving allocation issues. *Moore*, decided in 1979, certainly supports that view of the Court's actions, and perhaps the Court of the 1980's will prove its critics right.

There is, however, significant evidence that the Court is not moving toward a general contraction of federal adjudication of constitutional challenges on all fronts. Several important and somewhat surprising decisions of the past few years have broadened access to federal court for such claims. In 1978 *Monell v. Department of Social Services*[81] held for the first time that municipalities are "persons" within the language of section 1983 and therefore may be sued in federal court. It is noteworthy that this ruling is one the Court could easily have avoided. *Monroe v. Pape* itself had said that the term "persons", as used in the statute, did not include cities.[82] To reach its expansive result in *Monell*, the Court had to expressly overrule this aspect of *Monroe*. Two 1980 cases further increased the individual's access to federal court and the chances of success once there. *Owen v. City of Independence*[83] held that the good faith defense provided to individual defendants in section 1983 suits is not available to municipalities. *Maine v. Thiboutot*[84] held that individuals may bring section 1983 suits to redress not only constitutional violations but also a wide variety of statutory violations.

While these developments in section 1983 law do not bear directly on the allocation issue, they do substantially augment the federal remedies available to individuals with claims against state and local governments. They are cast as constructions of the statute, but it is a statute that leaves plenty of room for judicial creativity. Were the Court truly bent on generally constricting access to federal court for individuals with complaints against state and local governments, it surely would have avoided these expansive rulings. *Monell*, *Owen*, and *Thiboutot* call into question the "general narrowing of federal remedies"

79. Fiss, supra note 4, at 1142.

80. E.g., Neuborne, supra note 4, at 1118 n.48; Soifer & Macgill, supra note 27, at 1142-43; Weinberg, supra note 4, at 1205; Comment, Post-*Younger* Excesses in the Doctrine of Equitable Restraint: A Critical Analysis, 1976 Duke L.J. 523, 570-71.

81. 436 U.S. 658 (1978).

82. 365 U.S. at 187-92.

83. 445 U.S. 622 (1980).

84. 448 U.S. 1 (1980).

interpretation of *Hicks*, *Huffman*, and *Moore*. Just as important, they once again highlight the question of how to account for these recent developments in the *Younger* doctrine.

Both the Court's and the critics' explanations for the *Younger* line of cases are inadequate. The Court's *Steffel* rationale does not account for *Hicks*, *Huffman*, and *Moore*. The critics' forebodings about the demise of access to federal court is belied by the other recent developments in section 1983 law. An alternative explanation of the cases, and in my view the most nearly accurate, is that the Court's pending/non-pending distinction draws a pragmatic and unprincipled line between classes of federal cases in an effort to make a rough political compromise between the values of state autonomy and individual access to federal court. The Court is unwilling to choose between a general requirement that individuals first take their claims to state court and a general rule that they need never do so. Nor has it managed to develop more specific standards by identifying one or the other interest as the more important in particular circumstances.[85] The division between *Monroe* plaintiffs and *Younger* plaintiffs that is enforced by the pending/non-pending distinction makes no sense in terms of the broad state interest in review of federal challenges to state policies. It is, however, a practical compromise that permits both state and individual interests to prevail some of the time.[86]

If this reading of the cases is correct, then comity does not stand for any principle but is a slogan used to obscure the absence of good reasons for treating the cases differently. In *Steffel* the Court says that comity is important in *Younger* cases because the state interest in the integrity of state proceedings is a strong one. In *Hicks*, *Huffman*, and *Moore*, the Court continues to rely on *Younger* and comity in explaining its results, but the referent of comity seems to change. It no longer signifies respect for state court proceedings but rather respect for state court review of federal challenges to state law. The Court never confronts *Steffel* directly, however, and the result is two lines of cases that seem inconsistent with each other. One treats comity as a narrow interest in state proceedings while the other treats it as a broad interest in state adjudication. With the justifications for federal restraint left uncertain, the federal

85. It might, for example, have adopted a principle that, on account of their fragility or importance, first amendment claims should be heard in federal court. See Thoms v. Heffernan, 473 F.2d 478, 483 (2d Cir. 1973), vacated and remanded, 418 U.S. 908 (1974); Machesky v. Bizzell, 414 F.2d 283, 291 (5th Cir. 1969); Redish, The Doctrine of *Younger v. Harris*: Deference in Search of a Rationale, 63 Cornell L. Rev. 463, 486-87 & n.117 (1978); Shapo, supra note 57, at 329. In another vein, it might have made a rule that, because federal interference with the internal processes of state courts is especially likely to create friction, federal deference is especially favored in connection with such matters as bail determinations. See, e.g., Finetti v. Harris, 609 F.2d 594, 600 (2d Cir. 1979); Wallace v. Kern, 520 F.2d 400, 405 (2d Cir. 1975), cert. denied, 424 U.S. 912 (1976); Brown v. Fogel, 395 F.2d 291, 293 (4th Cir. 1968). Such deference might also be appropriate for cases involving attorney discipline. See, e.g., Gipson v. New Jersey Supreme Court, 558 F.2d 701, 704 (3d Cir. 1977); In re Abrams, 521 F.2d 1094, 1105 (3d Cir.) (concurring opinion), cert. denied, 423 U.S. 1038 (1975), Silvers v. Dowling, 495 F.2d 1126 (5th Cir. 1974).

86. Compare the rule that federal jurisdiction over cases "arising under" federal law must be determined from the face of the complaint, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908), a rule that draws a similarly arbitrary line for pragmatic reasons. See Cohen, The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 890, 893-94 (1967).

courts can defend the arbitrary pending/non-pending distinction against attacks from either side. Arguments against it on the side of the state can be met by citing *Steffel*, ignoring the later cases that conflict with *Steffel*, and adding some rhetoric on the strong individual interest in a federal forum for federal claims.[87] Arguments against it on behalf of the individual, in cases where the *Steffel* policies are weak or absent, can be met by citing *Hicks* or *Huffman* and adverting to the strong state interest in a state forum.[88]

B. Burford Abstention

Younger and *Monroe*, taken together, produce the general rule that in the absence of a pending state proceeding, individuals may bring federal claims against state officers in federal court. Under *Burford*, federal courts are required to defer to state courts on constitutional questions even when there is no pending state proceeding, on the ground that the subject matter of the lawsuit is one peculiarly suited to state court adjudication.[89] Courts often state that in such circumstances comity requires federal deference. These cases typically, but not always, concern challenges to the actions of state administrative agencies, such as the granting of a permit to drill for oil or the refusal of a common carrier's request to terminate service to a small town.

Why are these cases accorded special treatment? From time to time the Court has given two explanations, neither of which withstands scrutiny. One approach is to characterize the subject matter of the lawsuit as peculiarly local, and offer this characterization, coupled with a reference to comity, as justification for dismissal. The unarticulated premise underlying cases adopting this approach appears to be that the state interest in state adjudication of these local matters is different from and stronger than the state interest in other cases and is sufficient to warrant allocation of final decision-making to the state court. This argument rests on an elusive distinction between the peculiarly local and the not peculiarly local that is an unsound basis on which to decide these issues.

Consider *Alabama Public Service Commission v. Southern Railway*.[90] The railroad sought to discontinue service to a small town but was turned down by the Commission. The railroad then sought to challenge the Commission's action in federal court on the ground that its property had been taken without due process of law because it was forced to maintain an unprofitable route. The Court held that the district court should have dismissed, relying in part on its characterization of the problem of balancing the loss to the railroad against

87. See, e.g., Septum, Inc. v. Keller, 614 F.2d 456, 461 (5th Cir.), cert. denied, 101 S. Ct. 527 (1980); Ealy v. Littlejohn, 569 F.2d 219, 231-34 (5th Cir. 1978). See also Tovar v. Billmeyer, 609 F.2d 1291, 1294 (9th Cir. 1979).

88. See, e.g., Corpus Christi Peoples' Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1107-09 (S.D. Tex. 1979), aff'd, 621 F.2d 438 (1980).

89. See, e.g., Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943); see generally Scope of *Burford* Doctrine, supra note 25.

90. 341 U.S. 341 (1951). See also Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233 (1st Cir. 1979); Simmons v. Jones, 478 F.2d 321, 328 & cases cited at 327-28 n.5 (5th Cir. 1973), modified, 519 F.2d 52 (5th Cir. 1975).

the harm caused by the loss of service as "essentially local."[91] The Court did not explain why this problem was more local than any other activity regulated by state law with an overlay of federal constitutional law. Nor was an explanation forthcoming when, without adverting to *Alabama PSC*, the Court in *McNeese v. Board of Education*[92] held that the *Burford* doctrine did not apply to a school desegregation case concerning an administrative agency because there was "no underlying issue of state law controlling [the] litigation. The right alleged [was] as plainly federal in origin and nature as those vindicated in *Brown v. Board of Education* . . . ."[93] However, the same was true of the right asserted in *Alabama PSC*.

The Ninth Circuit, in *International Brotherhood of Electrical Workers Local 1245 v. Public Service Commission*,[94] recently made a similar point in denying *Burford* abstention in a case in which the plaintiff claimed federal preemption of state law:

> A preemption claim alleges in essence that Congress has determined that particular matters are of national concern and should be administered by national, rather than local, institutions. If a preemption claim is well-founded, therefore, *Burford* abstention cannot be appropriate. Hence, a court cannot abstain under *Burford* in a preemption case without implicitly ruling on the merits of the action.[95]

In short, the presence of a federal issue negates characterization of a problem as peculiarly local, for it necessarily indicates a federal interest in resolution of the dispute.

Some cases offer a more sophisticated explanation of *Burford* abstention than the local interest label. Thus, the Supreme Court recently characterized *Burford* as expressing a policy against disruption of state programs.[96] If federal adjudication would unnecessarily disrupt state policies, particularly if state policies are carried out through an intricate administrative scheme with judicial review confined to a particular court, the federal court should dismiss. An example of this approach is a recent First Circuit case, *Allstate Insurance Co. v. Sabbagh*.[97] An automobile insurer brought a federal challenge to insurance rates set by the Massachusetts Insurance Commissioner, arguing that the rates were confiscatory in violation of the federal and Massachusetts constitutions. Stressing the state's designation of a single court to review the determinations of the Commissioner, the extraordinary powers of that state court, and the expertise it would necessarily acquire in examining insurance rate issues, the court held that federal review would disrupt this scheme and dismissal was

91. 341 U.S. at 347.

92. 373 U.S. 668 (1973).

93. Id. at 674. See Scope of *Burford* Doctrine, supra note 25, at 978-79. It is noteworthy that when it suits the Court's purposes, the Court is capable of characterizing education as a peculiarly local matter. See, e.g., Ingraham v. Wright, 430 U.S. 651, 680-83 (1977); San Antonio Indep. School Dist. v. Rodiguez, 411 U.S. 1, 40-44 (1973).

94. 614 F.2d 206 (9th Cir. 1980).

95. Id. at 212 n.1. See also Hart & Wechsler, supra note 14, at 996.

96. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814-15 (1976).

97. 603 F.2d 228 (1st Cir. 1979).

appropriate.[98]

Closer examination calls this disruption argument into question. If a federal decision is to have an *unnecessarily* disruptive impact on a state program, the federal decision must be wrong, otherwise the disruption is warranted. As the *Sabbagh* court acknowledged, "[t]he state has no right to an unconstitutional policy . . . ."[99] Thus, federal restraint would be warranted only if the federal court were more likely to err than the state court. While the federal court might be more likely to err on state issues, one premise behind Article III and the federal jurisdictional statutes is that the federal courts are as good as, if not better than, state courts at deciding federal issues. Therefore, an argument can be made for abstention on state but not federal issues. If the purpose of abstention is to avoid incorrect decisions of state law, then *Pullman* abstention, which allocates unsettled state law issues to state courts but takes account of the plaintiff's interest in a federal forum by retaining control of federal issues, is the appropriate federal response.[100]

A third explanation of the Court's *Burford* cases, although unarticulated in the opinions, is more plausible. The *Burford* doctrine is generally invoked in business regulation cases.[101] The Court allocates these cases to state courts while assigning other constitutional cases to federal courts, even though the issues in a *Burford* case may be analytically identical to those in a race discrimination or employee firing case. Perhaps the Court's special treatment of business cases can best be understood as a pragmatic compromise like the pending/non-pending distinction in the *Younger* doctrine, a distinction between business cases and other constitutional cases that makes practical sense, but cannot be justified in terms of principle. The Court's unarticulated argument on behalf of this distinction may be that few of the constitutional challenges presented in these cases are likely to be successful in any court, given the relaxed attitude toward business regulation in modern due process and equal protection law.[102] Most of the important issues in the cases, therefore, will be governed by state law and are best left to state courts.[103]

Again, these pragmatic judgments are made possible by the Court's fail-

98. See id. at 233-34.

99. Id. at 232.

100. See, e.g., IBEW Local 1245 v. Public Serv. Comm'n, 614 F.2d 206, 212 (9th Cir. 1980). The *Sabbagh* court obliquely takes issue with the argument in the text. It asserts that the state court "with its special powers and expertise, could protect [the federal plaintiff's] federal rights as well as, if not better than, a federal court could." 603 F.2d at 233-34. But see Scope of *Burford* Doctrine, supra note 25, at 994-96 ("The potential for state court bias in *Burford* abstention is substantial in comparison with other forms of abstention.").

101. Bezanson, supra note 27, at 1125.

102. See, e.g., New Orleans v. Dukes, 427 U.S. 297 (1976); Ferguson v. Skrupa, 372 U.S. 726 (1963).

103. This reasoning suggests a corollary: When a federal claim concerning business regulation is not based on the fourteenth amendment, the generalization that it is likely a weak one does not hold true and *Burford* abstention may not be appropriate. For example, in IBEW Local 1245 v. Public Serv. Comm'n, 614 F.2d 206 (9th Cir. 1980), the federal claim was that a federal statute preempted state law and the court rejected *Burford* abstention. Under the analysis suggested in the text this result would remain good even if the case cannot be distinguished from other *Burford* cases under the "peculiarly local" or "disruption" tests the courts purport to use.

ure to identify its "principles of comity" with enough precision to permit confident criticism. When the Court adverts to comity, it sometimes associates the term with its local interest argument and sometimes with its disruption argument. But it never fully develops either one, leaving its critics to box at shadows.

C. *Exhaustion of State Remedies: The Distinction Between Habeas and Section 1983*

The great majority of constitutional challenges are brought to federal court under either the Civil Rights Act, 42 U.S.C. § 1983, or the Habeas Corpus Act, 28 U.S.C. § 2254. There are several significant differences between these federal remedies. First, federal habeas corpus is available only for state prisoners who claim they are held in custody in violation of their constitutional rights.[104] Section 1983 is available to anyone with a constitutional claim against a state officer,[105] except those who may petition for habeas.[106] Second, the Court, in contravention of the traditional principles of collateral estoppel, has construed the habeas statute to permit relitigation of issues already decided in the state criminal proceeding that led to the petitioner's incarceration.[107] It has held that relitigation is precluded in section 1983 suits, explaining that the individual's special interest in freedom from unjust confinement accounts for the habeas exception and that this interest is not present in the section 1983 context.[108]

Comity is not a significant factor in either of these differences between the two remedies,[109] but it does bear on a third difference between them. The habeas petitioner must exhaust his state judicial and administrative remedies before taking his claim to federal court,[110] but a section 1983 plaintiff may bring his case in federal court without first pursuing state remedies.[111] The exhaustion requirement on habeas is now included in the habeas statute, but it began in 1886 in *Ex parte Royall*[112] as a rule imposed by the Supreme Court based on comity. Today, courts still treat it as a flexible judge-made principle

104. 28 U.S.C. § 2254(a) (1948). The Court extends a rather broad construction to the term "custody." See, e.g., Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner in "custody" even when he is released on his own recognizance awaiting sentence); Jones v. Cunningham, 371 U.S. 236 (1963) (petitioner in "custody" when he is released on parole).

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

106. Preiser v. Rodriguez, 411 U.S. 475 (1973).

107. See, e.g., Fay v. Noia, 372 U.S. 391, 422-23 (1963). See also Allen v. McCurry, 101 S. Ct. 411, 417 n.12 (1980).

108. Allen v. McCurry, 101 S. Ct. at 417, n.12, 420 (1980).

109. In the section 1983 collateral estoppel case the Court adverts to comity as one of several policies supporting claim preclusion. Id. at 415. But the Court's reasoning in support of its conclusion that claim preclusion applies to section 1983 suits does not rely on comity. It stresses the differences between habeas and section 1983 and the Court's interpretation of the legislative history of section 1983. See id. at 416-20.

110. 28 U.S.C. § 2254b(c) (1948). See, e.g., Picard v. Connor, 404 U.S. 270 (1971).

111. See Preiser v. Rodriguez, 411 U.S. 475, 477 (1973); Monroe v. Pape, 365 U.S. 167, 183 (1961).

112. 117 U.S. 241 (1886).

rather than a rigid statutory requirement.[113] Courts explain why comity requires exhaustion with arguments similar to those employed in *Younger* cases.[114] Exhaustion avoids disruption of the state criminal process and gives state courts an opportunity to apply constitutional standards to the construction and application of state law and the conduct of state officers.[115] These state interests are generally strong enough to overcome the individual's interest in immediate access to federal court.

This explanation of exhaustion is inadequate to distinguish habeas from section 1983. The first part of the argument—that exhaustion avoids disruption of the state criminal process—does not account for the requirement that the habeas petitioner exhaust state appellate remedies. No state proceeding is disrupted if after his criminal conviction a prisoner chooses to abandon any further entreaties to the state courts.

The second part of the argument—that exhaustion gives state courts an opportunity to apply constitutional standards to the administration of state law—is a plausible reason for requiring exhaustion. The problem with it is that it seems equally applicable to section 1983 cases. For example, an individual might claim that the police tortured him in order to extract a confession. If he is tried for the crime, he cannot obtain federal habeas until the state trial and appellate process has run its course. If the same individual is not tried for the crime, he may bring a damage action under section 1983 without ever presenting his claim to the state courts. Yet the conduct of the state officer is the same in both cases. If comity requires deference to the state interest in review of the actions of state officers in the first case, why not in the second as well?

One answer might be that the first case differs from the second because the decision of a state judge is at issue in the one but not the other, and it is especially important that higher state courts be given the opportunity to oversee the actions of state judges. Perhaps it would be especially disrespectful for a federal court to review the actions of a state judge before other state judges have done so. This argument, stressing a distinction between the acts of state judges and those of other state officers, fails because the habeas exhaustion requirement is not limited to state review of judicial acts. A state prisoner awaiting trial, who seeks federal review of the statute under which he is charged, is precluded by the exhaustion rule even though he does not seek review of the act of a state judge.[116] Also, where the state remedy available to a prisoner seeking release is administrative rather than judicial, he must still exhaust it before petitioning for habeas.[117]

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113. See note 17 supra.

114. See, e.g., United States ex rel. Scranton v. New York, 532 F.2d 292, 295-96 (2d Cir. 1976).

115. See, e.g., Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973); Picard v. Connor, 404 U.S. 270, 275-78 (1971).

116. See, e.g., Hillegas v. Sams, 349 F.2d 859 (5th Cir. 1965), cert. denied, 383 U.S. 928 (1966). See also Neville v. Cavanagh, 611 F.2d 673, 675 (7th Cir. 1979), cert. denied, 446 U.S. 908 (1980); United States ex rel Scranton v. New York, 532 F.2d 292, 294 (2d Cir. 1976).

117. Preiser v. Rodriguez, 411 U.S. 475 (1973).

The Court gives a different answer for the variant treatment of habeas and section 1983 cases stating that the distinction is a simple matter of congressional prerogative. The habeas statute requires exhaustion and section 1983 does not.[118] This answer is inadequate because it misstates the present law on habeas exhaustion and ignores the history of the statutory requirement. As noted earlier, the requirement did not originate in the statute but in the Court's opinion in *Ex parte Royall*, where the Court justified it on comity grounds.[119] When Congress codified exhaustion, it merely adopted the Court's rule. Even today, the requirement remains in part solely a judicial one. Congress did not codify pre-trial exhaustion,[120] yet the Court still requires it.

Judge Friendly offers yet a third explanation for the Court's distinction. Noting that collateral estoppel applies in section 1983 suits but not in habeas, he points out that an exhaustion of judicial remedies requirement in section 1983 cases would effectively bar the plaintiff from a federal forum altogether, a result the Court does not wish to reach.[121] Judge Friendly goes on to argue, and lower courts have occasionally agreed,[122] that exhaustion of state administrative remedies ought to be required in section 1983 cases because administrative decisions do not have collateral estoppel effect.

This argument like the other two does not satisfactorily distinguish between habeas and section 1983 cases. Judge Friendly does not dispute that the considerations favoring exhaustion are present in section 1983 cases. Indeed, those considerations are the basis for his recommendation that administrative exhaustion be required. His argument, restated as an analysis of the competing interests, is that the individual's interest in a federal forum should prevail in cases where recognizing the state interest in exhaustion would have the effect of precluding rather than merely delaying access to a federal forum. This distinction between delay and preclusion of a federal forum is superficially attractive but runs into difficulties on closer examination.

The argument suggests that the state's interest in exhaustion is strong enough to warrant delay but not preclusion of access to a federal forum. This much is unobjectionable. But then it leaps to the conclusion that this difference between preclusion and delay can distinguish habeas from section 1983. It skips over the fact that the state's interest in preclusion is based not on the exhaustion policies that would put the case in state court, but on the quite different policies of economy and repose that underlie the doctrine of collateral estoppel. The Court held in *Allen v. McCurry*[123] that these policies are strong enough to warrant preclusion in section 1983 cases. If habeas and sec-

118. See id. at 492-93 n.10 (1973).

119. See note 17 supra.

120. See Amsterdam, supra note 17, at 890-91.

121. See H. Friendly, supra note 14, at 100-03.

122. See, e.g., Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). It is not clear whether Judge Friendly would approve these decisions, as he casts his proposal in the form of a recommendation to Congress.

123. 101 S. Ct. 411 (1980).

tion 1983 cannot be distinguished in terms of the exhaustion policy, as Judge Friendly's argument concedes, and if collateral estoppel policies outweigh the interest in a federal forum and require preclusion once the case is decided in state court, as *Allen* holds, then it follows that the exhaustion and preclusion policies taken together are strong enough to wholly deny access to a federal forum. The logic of exhaustion and preclusion once again threaten the survival of *Monroe v. Pape*.

Yet the Court is content to retain both *Monroe* and the exhaustion and preclusion principles that challenge it. In my view the Court's serenity in the face of these conflicting principles can be explained only by abandoning the search for viable distinctions between habeas and section 1983. Instead, the Court's decisions once again should be viewed as pragmatic compromises. Just as preclusion of federal review in *Younger* cases serves the state interest in state adjudication, so does the absence of an exhaustion requirement in section 1983 cases help accommodate the individual interest in a federal forum. The habeas exhaustion requirement coupled with a special exemption from collateral estoppel tries to accommodate state and individual interests at the same time, granting access, but not immediate access, and permitting state review, but not the final say. While the lines between the three groups of federal challenges are largely arbitrary, those lines do serve the Court's goal of accommodating both the state and individual interests.

The habeas/section 1983 distinction on exhaustion once again belies the Court's claim that it rests its decisions on principles of comity. In the habeas exhaustion cases, comity seems to refer to a strong state interest in the supervision of state officers. It figures prominently in the Court's explanation of its rules. But when the focus shifts to section 1983 cases, these concerns are suddenly ignored, even though the state interest in exhausting section 1983 claims seems similar to its interests in habeas exhaustion. Comity is best characterized not as a principle that provides good reasons for the distinctions it draws, but as a rhetorical tool to be introduced into an opinion when the case falls on the deference side of the Court's arbitrary line and ignored in cases that fall on the federal access side of that line.

D. Procedural Default

The Court relies on comity as the basis for its doctrine of procedural default in habeas corpus cases.[124] Here, comity is not a talismanic word that the Court invokes to reach a result it cannot justify with good reasons, nor a term whose meaning shifts from one case to the next, nor a rhetorical tool employed when it is useful and ignored when it is not. In this area the Court has articulated a principle that the state's strong interest in the integrity of its procedural rules requires federal courts to refuse to hear certain claims raised on habeas.

124. See Wainwright v. Sykes, 433 U.S. 72, 83-84 (1977). See also Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum. L. Rev. 1050, 1056-59 (1978). Professor Hill argues, with no apparent support from any member of the current Court, that the Court errs in resting its procedural default doctrine upon comity instead of the habeas statute.

Procedural default arises when the state criminal defendant fails to assert a federal constitutional claim in accordance with a valid state procedural rule. *Wainwright v. Sykes*[125] is illustrative. At Sykes's murder trial the prosecutor placed in evidence a damaging statement Sykes had made to the police. Sykes's lawyer made no objection, but later Sykes sought to raise a *Miranda* claim on habeas. A state rule required contemporaneous objection to the introduction of evidence to avoid waiving the objection. Mindful of the state interest in enforcing its procedural rules, the Court held in *Sykes* that the *Miranda* claim could not be raised on habeas absent a showing of cause for not objecting at trial and a showing of resulting prejudice to defendant's case.[126]

The Court's justification for its procedural default rules is that the state's interest in the integrity of procedural rules is very strong and the individual interest against them is generally weak. A rule like the contemporaneous objection rule at issue in *Sykes* enables errors to be corrected at an early date while the evidence is still fresh and substantial resources have not been invested in a tainted proceeding. In addition, it helps assure the perception of the trial "as a decisive and portentous event" where the defendant should face the charges against him and raise all available defenses.[127] Other procedural rules serve similar goals.[128]

The individual, in the Court's view, has few good excuses for not complying with a valid procedural rule. His lawyer may prefer not to present a claim to the state courts because he wishes to avoid delay in getting before a federal court or to avoid the possibility that the federal habeas court will defer to a state court factual determination. But these reasons are not sufficient to overcome the state's interest in enforcing its procedural rules.[129]

The Court's procedural default doctrine is open to several criticisms. The Court announced its "cause" and "prejudice" standard in *Sykes* without explaning precisely what the terms mean.[130] It promised to explicate them in later cases but has not yet fulfilled its promise. The Court may fairly be faulted for failing to define these terms adequately. One might also disagree with the Court's weighing of state and individual interests. While the content of "cause" is unclear, *Sykes* seems to hold that the individual is barred by his lawyer's incompetence from litigating constitutional issues on habeas.[131] The effect of the rule is to deny the individual any opportunity to raise constitutional claims. It has been forcefully argued that such a rule purchases the integrity of procedural rules at too great a price to the individual's interest in a federal forum and that punishing the individual for his lawyer's lack of acu-

125. 433 U.S. 72 (1977). See also Francis v. Henderson, 425 U.S. 536 (1979).

126. 433 U.S. at 87. See generally Hill, supra note 124, at 1050.

127. See 433 U.S. at 88-90.

128. See, e.g., Francis v. Henderson, 425 U.S. 536 (1976).

129. See 433 U.S. at 88-91.

130. See id. at 90-91.

131. See id. at 101-05 (Brennan, J., dissenting). But see Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979).

men will do little to enforce compliance with procedural rules.[132]

For present purposes, however, the important question is not whether the Court's choice of values is the wisest or whether its rule could be more fully explained. The relevant question is whether the Court has articulated a principle of comity or drawn an arbitrary line between cases that are not significantly different. Justice Brennan argues that the Court has drawn an arbitrary line. He notes that comity ordinarily supports delay of federal adjudication in habeas cases by the requirement that state remedies be exhausted. Here, however, the Court invokes comity to preclude federal review altogether. If comity is only strong enough to delay federal access in the exhaustion area, it should have no greater impact in the procedural default context.[133]

This argument fails because it incorrectly assumes that the state's interest in a procedural default rule is the same as its interest in an exhaustion rule. In fact, the two areas are quite different. Exhaustion protects the state interest in reviewing the actions of state officers. That interest can be adequately served without precluding later federal review. Procedural default is based on the state interest in effectively enforcing its procedural rules, and a major purpose of these rules is to assure that the case is disposed of at one trial. Only by precluding federal review can this aim be achieved. In *Sykes*, for example, the alternatives to preclusion would be to permit a litigant who had violated a contemporaneous objection rule to raise his claim for the first time in federal court or to raise it in a retrial in the state courts. But the objective of the rule is to avoid more than one trial, and either of these approaches would wholly undermine that purpose.

How has the Court succeeded in devising a principle of comity in the procedural default cases when it has failed in other federal law areas? The reason may be that procedural default features a state interest, the integrity of procedural rules, that is both strong (at least in the Court's view) and limited to a narrow range of cases. Because procedural default is a narrower problem in which the state and individual interests are different from other areas, it is possible here to fashion a principle whose internal logic and natural boundaries do not expand to cover the whole field of constitutional challenges.

IV. SUBSTANTIVE COMITY

The cases discussed in Part III allocate adjudication between state and federal courts, but they do not provide much support for the critics' argument that the Court is trying to abolish individual access to federal court. The Court's aim in those cases is to serve both state and individual interests by permitting individual access in some kinds of cases and denying it in others. Perhaps the Court can be faulted for drawing arbitrary lines between groups of cases that are alike in all significant respects, but it cannot be faulted for using comity to undermine all access to federal courts.

132. See 433 U.S. at 99-118 (Brennan, J., dissenting).

133. See Francis v. Henderson, 425 U.S. 536, 551 (1976) (Brennan, J., dissenting).

The critics' argument finds more support in another class of cases where the Court invokes comity not to delay federal adjudication or to allocate cases to state courts but to deny substantive rights. The most infamous example is *Rizzo v. Goode*.[134] There the plaintiffs complained of various police practices in Philadelphia. The district court granted an injunction ordering the mayor and officials of the police department to take certain remedial steps. The Supreme Court reversed, relying on, among other reasons, "principles of federalism"[135] developed under the rubric of comity in the *Younger* line of cases.

The Court, through Mr. Justice Rehnquist, said that those principles restrain federal courts not only from enjoining judicial proceedings but also from interfering with state executive officers:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local government such as petitioners here.[136]

In addition, it seems to make no difference whether the plaintiffs' claim could be raised in state court. The Court does not indicate that an adequate state remedy is a condition of federal court deference. Federalist values here do not postpone federal review, nor do they allocate decisions to state courts. Instead, holding that federalism requires deference to the mayor and police officials is a roundabout way of holding that individuals have no federal rights that protect them from the mayor's and police officials' conduct.[137]

Comity and federalism are not used in this way very often.[138] *Rizzo* itself may be explained on other grounds, such as a ruling that the causal connection between the official's conduct and the plaintiffs' harm was too tenuous to war-

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134. 423 U.S. 362 (1976).

135. Id. at 379.

136. Id. at 380.

137. See Fiss, supra note 4, 1159-60; Comment, supra note 4, at 1220-21; Comment, supra note 80, at 570-71. See also Cox, Federalism and Individual Rights Under the Burger Court, 73 Nw. U.L. Rev. 1, 17-18 (1978).

138. *Rizzo* has sometimes been used to limit substantive rights. See, e.g., Carmona v. Ward, 576 F.2d 405, 414 (2d Cir. 1978) (comity bars federal review of state parole decisions), cert. denied, 439 U.S. 1091 (1979); Abbot v. Thetford, 534 F.2d 1101 (5th Cir. 1976) (adopting Judge Gewin's originally dissenting opinion, reported at 529 F.2d 695, 702 (5th Cir. 1976)) (comity forbids federal review of state judge's dismissal of probation officer on his staff), cert. denied, 430 U.S. 954 (1977). Other examples of substantive comity may be found in Vecchione v. Wohlgemuth, 558 F.2d 150, 158 (3d Cir.) (rejecting argument that comity bars contempt decree against state officers who violate federal court order), cert. denied, 434 U.S. 943 (1977); Stevenson v. Board of Educ., 426 F.2d 1154, 1157 n.2 (5th Cir.) (reserving the question whether comity requires deference to secondary school officials on haircut regulations), cert. denied, 400 U.S. 957 (1970); Popow v. City of Margate, 476 F. Supp. 1237, 1244 (D.N.J. 1979) (comity bars liability for simple negligence but not for gross negligence in committing constitutional tort).

rant injunctive relief.[139] Yet, the substantive comity reading of the case has historical analogues. Before the fourth, fifth, and sixth amendments were incorporated into the fourteenth, courts sometimes adverted to comity as the reason why states were held to lower standards than the federal government with respect to constitutional guarantees in criminal procedure.[140] Before *Procunier v. Martinez*[141] and similar cases held to the contrary, courts used comity to justify refusal to interfere in the conduct of state prisons.[142] These illustrations show that comity is a "spacious concept; it can serve whatever values are infused into it."[143] Advocates of substantive comity value the state interest in autonomy so much that they would deny the individual not only a federal forum but any federal right at all.

If the Court valued this state interest highly enough, it could dismantle as much as it pleased of the fourteenth amendment law developed in the past thirty years. It bears emphasis, however, that most of the case law rejects such a lofty valuation of the state interest in freedom from federal interference. With the possible exception of Justices Burger[144] and Rehnquist, no member of the present Court seems interested in using comity as a vehicle for undermining substantive rights. Accordingly, it seems precipitous to draw the inference that *Rizzo* is a harbinger of such a development.[145] More likely, *Rizzo* is just an awkward case. The Court was uncomfortable with an injunction that ordered affirmative remedial steps on the part of officials who had not been adequately linked to the unconstitutional conduct. Its broad references to comity and federalism helped bolster its reversal of the injunction, but they were too vague to indicate any commitment on the part of the Court to the general proposition that values of federalism can place limits on substantive constitutional rights.

CONCLUSION

Comity sometimes stands for a principle, such as "state law in state courts" or deterrence of procedural default. Occasionally, as in *Rizzo*, the Court may use comity to restrict substantive constitutional protections. More often, comity is the Court's tool for avoiding a choice between two competing values: state court adjudication of constitutional challenges to state law and individual access to federal court for constitutional claims. By choosing one of

139. See 423 U.S. at 372-77; Lewis v. Hyland, 554 F.2d 93, 98 (3d Cir.), cert. denied, 434 U.S. 931 (1977). See also Monell v. Department of Social Serv., 436 U.S. 658, 694 n.58 (1978); Cox, supra note 137, at 16; Eaton, Causation in Constitutional Torts (forthcoming).

140. See, e.g., Scoleri v. Banmiller, 310 F.2d 720, 736 (3d Cir. 1962), cert. denied, 374 U.S. 828 (1963). See also Beck v. Winters, 407 F.2d 125, 127 (8th Cir.) (rejecting the state's argument), cert. denied, 395 U.S. 963 (1969).

141. 416 U.S. 396, 400, 404-05 (1974).

142. See, e.g., Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) (per curiam). See generally Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.), cert. denied, 419 U.S. 838 (1974).

143. Fiss, supra note 4, at 1124.

144. On the Chief Justice, see Brewer v. Williams, 430 U.S. 387, 427 (1977) (Burger, C.J., dissenting).

145. One distinguished commentator does take that view of the case, however. See Fiss, supra note 4, at 1159-60.

the two values as its guiding premise, the Court could create a consistent body of principles for deciding allocation issues. But because the Court wishes to promote both of them, it has instead made a pragmatic compromise. It assigns some constitutional challenges to state court under *Younger* and *Burford*, some to federal court under *Monroe*, and some to both through the habeas exhaustion rules.

The problem with the Court's solution is that there are often no significant differences among the cases it assigns to each of these three categories. As a result, the Court faces a hard tactical problem when it is asked to explain the distinctions it draws. It is unwilling to admit outright that its distinctions are arbitrary. Instead, it pretends that they are sound, explaining that they are supported by principles of comity. But attempts to identify good reasons behind the invocation of comity end in frustration, for the Court changes the content of the term in moving from one case to another. Critics of federal-state comity say that comity is not a helpful concept because it is "vague,"[146] "talismanic,"[147] and "uncertain."[148] These charges overlook the subtlety of the Court's approach to the allocation problem, and they are not without irony. The shapelessness of comity is precisely what makes it useful to the Court.

146. See, e.g., Juidice v. Vail, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting). See also New Jersey Educ. Ass'n v. Burke, 579 F.2d 764, 767 n.9 (3d Cir.) ("less than clear cut"), cert. denied, 439 U.S. 894 (1978); Hufstedler, Comity and the Constitution: The Changing Role of the Federal Judiciary, 47 N.Y.U.L. Rev. 841, 867 (1972) ("undefined").

147. Francis v. Henderson, 425 U.S. 536, 551 (1976) (Brennan, J., dissenting); Vickers v. Trainor, 546 F.2d 739, 746 (7th Cir. 1976).

148. Tang v. Appellate Div., 487 F.2d 138, 143 (2d Cir. 1973) (Hays, J., concurring), cert. denied, 416 U.S. 906 (1974). See also Fiss, supra note 4, at 1124 ("a spacious concept . . . [that] can serve whatever values are infused into it").