The Duty To Decide Vs. The Daedalian Doctrine Of Abstention

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It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty.


I. INTRODUCTION

How unfortunate it is that Congress must enact legislation to impress upon the federal judiciary that it meant what it said over one hundred years ago when it passed the Civil Rights Act of 1871! And yet, in response to what Justice Brennan calls “a series of decisions [which] has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make,” Congress indeed is finding itself prompted to reassert its “belief... that the Federal Government—not the indi-

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vidual States—[is] the primary protector of our basic constitutional freedoms."

On January 10, 1977, Senators Mathias and Brooke initiated their response to "such judicial doctrines as comity, standing, federalism, abstention, and the exhaustion of State judicial remedies, [by which] the Court has significantly curtailed the availability of the Federal courts as a forum," by introducing a bill entitled The Civil Rights Improvements Act of 1977. Congressman Mitchell of Maryland introduced the same bill in the House on March 4, 1977. Principal features of the Civil Rights Improvements Act would expand the definition of "person" under United States Code section 1983 to include states, municipalities, and all their political units and governmental agencies, would render inapplicable the doctrine of abstention in section 1983 actions, and would embody the circumstances within section 1983 when a federal court can interfere in a pending state criminal proceeding.

Although the thrust of this article is not a detailed analysis of the particulars of this proposed legislation, the utility of a brief description of the bill, by way of prefacing this article's thesis, cannot be gainsaid, for the sentiments of the bill's sponsors coincide with the subject of this article: the closing of federal courthouse doors in the face of the federal judiciary's duty to decide those cases where Congress has created jurisdiction and provided a cause of action.

The degree to which the bill directly addresses certain recent

3. Id. That Senators Mathias and Brooke are concerned with the same "series of decisions" which trouble Justice Brennan, see text accompanying note 1 supra, is illustrated by Senator Mathias's quote of the Justice's characterization of those decisions in a speech delivered on January 29, 1977. Remarks by Senator Mathias, Conference on Access to the Federal Courts, sponsored by the Society of American Law Teachers, the American Civil Liberties Union, and the Committee for Public Justice, in Washington, D.C. (Jan. 29, 1977) (on file with the authors).
7. See 123 CONG. REC. S201 (daily ed. Jan. 10, 1977) (remarks of Sen. Mathias). The "brand" of abstention which the bill would abolish is that which leads a federal court to refuse to hear a § 1983 case on the ground that the "action raises, in addition to any question of Federal constitutional or statutory law, a question of State law which has not been previously decided by the highest Court of such State or which, if decided by a State court, could render unnecessary" the decision by the federal court with respect to the federal issues. Id. at S205. See the opening paragraph of Part II infra, for a recognition that there are other types of abstention as well.
pronouncements by the Supreme Court is extensive.\(^8\) As explained by Senator Mathias’s remarks upon the bill’s introduction,\(^9\) the Civil Rights Improvements Act would follow the Court’s cue in *Fitzpatrick v. Bitzer\(^{10}\)* by exercising Congress’s power to make the states amenable to civil rights suits. In *Fitzpatrick*

the Court paved the way for Congress to amend section 1983 to provide for suits against State and State officials. The Court held that the 11th amendment and the doctrine of State sovereignty were limited by the enforcement provision of section 5 of the 14th amendment, and thus justified congressional authorization of suits which would be constitutionally impermissible in other contexts.\(^11\)

The bill, in section 2(e), also sweeps aside the judicial doctrine of abstention in section 1983 actions and replaces it with several legislative provisions which considerably restore the civil rights plaintiff’s access to federal courts. With respect to pending state criminal proceedings, the bill’s section 2(e)(3)(A) generally continues the prohibition on federal intervention in accord with *Younger v. Harris,\(^{12}\)* but modifies the *Younger* rule in at least one crucial respect. Whereas *Younger* allowed only one narrow, restrictive exception to abstention upon a showing that the state criminal proceeding was accompanied with bad faith harassment, one of those “showings probably impossible to make,”\(^13\) Congress is being asked to add a second exception to nonintervention where the civil rights plaintiff alleges, and the district court finds, that the criminal statute forming the basis of the state proceeding is unconstitutional on its face and is likely to deter the exercise of protected first amendment rights. In effect, this second exception

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9. Id. at S201-07.
13. Brennan, supra note 1, at 498. Just how “impossible” it is to demonstrate bad faith harassment to the satisfaction of the Court is illustrated by Hicks v. Miranda, 422 U.S. 332 (1975). The three-judge district court, on the basis of the detailed “objective facts set forth in the first part of” its opinion, found that the plaintiffs fell within even the narrow *Younger* exception by “clearly demonstrat[ing] bad faith and harassment.” 388 F. Supp. 350, 360 (C.D. Cal. 1974). The lower court amplified its reasoning in connection with this conclusion in both its original and supplementary opinions. Id. at 360, 361-62. Yet the Supreme Court brushed aside the finding of bad faith harassment by the district court simply by labeling it “vague and conclusory.” 422 U.S. at 350. To be sure, the Supreme Court quoted the “conclusory” passages from the district court’s opinions, id. at 350 n.19, but failed to discuss, except in the most superficial fashion, the “objective facts” upon which they were based. Id. at 350-51.
would reinstate the holding of *Dombrowski v. Pfister*, a holding discredited by the Court in *Younger*. And this important change in the abstention doctrine results from only the narrowest reading of section 2(e)(3)(A) of the bill. For the wording of that section actually allows federal intervention *whenever* the plaintiff alleges, and the district court finds, "that extraordinary circumstances exist justifying such intervention including" the two exceptions just discussed. A broader, and more sound, reading of the bill thus would treat the two legislatively-mentioned exceptions as merely illustrative of "extraordinary circumstances . . . justifying . . . intervention"—not as limitations on what federal courts may deem to be "extraordinary circumstances." The two exceptions are simply included within the concept of "extraordinary circumstances"—they do not define the limits of that concept.

Moreover, the Civil Rights Improvements Act would reverse legislatively two unfortunate extensions of the *Younger* doctrine. With respect to state criminal proceedings, section 2 (e)(3)(C) would repudiate the Supreme Court's holding in *Hicks v. Miranda* that *Younger* mandates abstention even if the state proceeding is initiated after the filing of the federal complaint, so long as no "proceedings of substance on the merits have taken place in federal court." As Senator Mathias recognizes, echoing the dissent by Justice Stewart in *Hicks*, "this is a particularly troublesome rule—one that invites State prosecutors to file a State suit to preclude Federal jurisdiction." Accordingly, the troublesome rule is replaced in section 2(e)(3)(C) with one explicitly stating that the general nonintervention provision does not apply if the state criminal proceeding is commenced after the filing of the federal complaint.

The bill also "rejects the expansion of . . . *Younger* to civil proceedings first clearly enunciated in *Huffman*" by explicitly

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17. Id. at 349.
18. Id. at 353-57.
stating in section 2(e)(3)(B) that the prohibition on intervention does "not apply where the pending proceeding is civil in nature, even if such proceeding is in aid of and closely related to the enforcement of a criminal statute." 21 The Court's further expansion of Younger and Huffman to the civil area in its March 22, 1977, decision in Juidice v. Vail 22 and its May 31, 1977, decision in Trainor v. Hernandez 23 makes this rejection even more essential.

Those, then, are some of the features of the proposed Civil Rights Improvements Act. Its proponents astutely observe that the bill addresses Supreme Court cases which, despite their frequent invocation of constitutional concepts such as federalism, more accurately are viewed as reflecting "the concerns of the Court's new majority—especially the growing problem of overburdened Federal courts." 24 And the bill's sponsors seek to issue a most appropriate response to those concerns: "Congress cannot fail to heed the concern expressed by the Supreme Court regarding the need to ease the growing burden on the Federal court system," 25 but also when Congress creates jurisdiction and provides causes of action, the federal judiciary cannot fail to perform its assigned duties. Accordingly, the federal judiciary should perform its tasks by fulfilling its duty to decide cases, while Congress should perform its responsibilities by "provid[ing] legislation to help expedite justice in our Federal courts." 26 And even if such legislation is not as forthcoming as the courts would wish, then nevertheless by "reaffirm[ing] Congress's commitment to the vigorous enforcement of our civil rights laws," 27 it is telling the judiciary to exercise its powers and duties while awaiting congressional solution to the problem of overburdened dockets. 28

Only by adherence to such a response can both the courts and Congress legitimately maintain their respective entitlements to serve the sovereign People of the United States. For only by adherence to the Constitution which governs both branches can they acquire the legitimacy required of them in the performance

25. Id. at S204. See Part II infra.
26. Id.
27. Id.
28. Perhaps, in connection with this paraphrase, the reader should glance at the authors' "apology" to the sponsors of the bill appearing in the last paragraph of this Introduction.
of their duties as assigned to them by their ultimate masters, the People. And it cannot be forgotten that the Constitution, that governing document, warmly embraces the principle of fractionalized, separated powers, and that a failure to perform the duties assigned via the separation of powers is as repugnant to the principle as the encroachment of one branch of government into the areas reserved for the operations of another.  

Accordingly, it is the thesis of this article that the growing trend in the federal courts to refuse to exercise their assigned jurisdiction violates the doctrine of the separation of powers, and that the federal judiciary's excuses for refusing to perform their tasks do not pass constitutional muster. Specifically, this article will demonstrate that those excuses either do not rise to a level of constitutional concern sufficient to justify the trend or are based on a perversion of the admittedly-constitutional concept of federalism, a concept affording the individual citizen a structural protection against arbitrary government in addition to the structural protection flowing from separated powers—not a concept that properly can be used to deprive the individual of federal protection. After establishing the inadequacies of the courts' excuses for refusing to decide cases, this article then points to the provisions of article III and article I, section 8, clause 9, of the Constitution to show that, given Congress's power to create within constitutional limits the jurisdiction of the federal judiciary, and given that judiciary's power to decide all cases properly arising pursuant to Congress's constitutional exercise of its powers, the federal courts abrogate the separation doctrine, in effect destroying their own jurisdiction, however the practice is couched in nonjurisdictional rubric, whenever they refuse to exercise such jurisdiction by not deciding those cases which Congress has determined should be decided. In short, the federal courts have a duty to decide.

This conclusion is reached first by portraying in Part II the pervasiveness of the problem embodied in the trend away from the exercise of jurisdiction. That portrayal will show that the problem stretches far beyond the subject of the proposed Civil


30. Congress, of course, is limited constitutionally with respect to those subjects over which it can confer jurisdiction on the federal courts, and those courts have a duty to refuse to exercise jurisdiction when and if Congress exceeds its limits. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); see also Part III.B. infra.
Rights Improvements Act and that the components of the problem are highly interrelated. Components of a nonconstitutional nature are briefly discredited to pave the way for a treatment of federalism and separation of powers in Part III. Part III will demonstrate that those two structural protections not only are not inconsistent with the duty to decide, as could be argued from a comparison of this article’s separation-based thesis with the Court’s superficial treatment of federalism, but that read together they in fact establish the unconstitutionality of the trend away from this duty. As the article progresses, the reader will notice an increasing focus on Younger abstention, as that case and its progeny are perhaps the most obvious manifestations of the trend. Accordingly, not all assertions made in Part III will be applicable to all components of the problem discussed in Part II, but for the most part the general principles discussed in Part III will have application beyond the Younger problem.

With that disclaimer in mind, perhaps a few others are also appropriate. As mentioned earlier, this article does not attempt a further, particularized discussion of the Civil Rights Improvements Act. Suffice it to say, then, that the authors applaud the endeavors of Senators Mathias and Brooke, as well as Congressman Mitchell, and apologize for “using” their bill as a build-up to the statement of the position of this article, a statement which may have gone beyond the stands taken by the bill’s sponsors. Moreover, the reader should be aware that the tone of the statement of this article’s thesis will not slacken. Do not expect the “objective” treatment characterizing most typical, well-researched articles. Rather, expect an impassioned plea which attempts to articulate one of several possible theories which coherently criticize the trend in the federal courts toward their refusal to exercise their jurisdiction. Accordingly, the authors admittedly rely extensively on cases and literature supportive of their criticism, while simply recognizing somewhat superficially the contrary arguments, except to the extent that there is a need to discuss fully the “other side” in order to articulate their theory. The result is an article whose bias is clear not only textually, but also in terms of its embodiment of research. It seeks, via the discussion of general principles, to criticize the ideas “behind” the trend, not to engage in a narrowly-focused or exhaustive case-by-case analysis of the decisions reflecting the trend. Such a case-by-case discussion would add little to the current literature.31

31. Extensive citation to the “current literature” would be a more tedious than gra-
II. The Pervasiveness and Complexities of the Elements of the Problem and Their Interrelations: All Roads Lead (Back) to the Constitution

The problem of federal courts refusing to exercise their jurisdiction, whatever rubric is used to describe the practice, is not of recent origin, but yet is one which increasingly permeates the federal judiciary's decision-making—or lack of it! The problem stretches beyond the subject of the proposed Civil Rights Improvements Act to encompass the other types of abstention, or nonintervention;32 indeed, it stretches even beyond the abstention doctrines as a whole to include seemingly-isolated but conceptually-related cases dealing with such varied subjects as habeas corpus33 and water rights.34

The purpose of this Part is to illustrate this pervasiveness and complexity by examining many, but of course not all, of the concepts, cases, congressional enactments, and policy discussions which bear on the problem. Foremost is an intent to portray the holistic, interrelated nature of these component concepts, cases, enactments, and discussions to pave the way for Part III's examination of federalism and the separation of powers. Specifically,
this intent can be divided into two separate yet consistent goals: first, the authors seek to recognize certain aspects of the problem not discussed further in Part III to ensure that the reader grasps the totality of the problem; secondly, the authors seek in this Part to generalize from the narrow topics and their relationships to the real focus of this article—the federal courts' trend toward refusals to decide and the need to reverse that trend as a matter of federalism and separated powers.

This Part also will begin to address excuses for the trend. Those excuses of nonconstitutional stature will be discredited, leaving the constitutional-based excuses to be dissected in Part III. It may not be inappropriate, then, for the reader to conceptualize this Part as a strainer of sorts, filtering out contaminants of a nonconstitutional nature. Each time a case, concept, statute, or policy discussion is filtered through the strainer, only those elements of a constitutional nature are left for further study. And it therefore should not be surprising, given the biases of those performing the distillation, that each time a topic is filtered through the strainer, only the elements of federalism and/or separated powers remain. Thus a bridge is formed between the recognition of the problem as pervasive, complex, interrelated—indeed chaotic!—and the analysis of the constitutional components of the problem in Part III.

Breaking into a holistic system is often difficult though. A first probing of the frontier of the problem, as exemplified by the Supreme Court's 1976 decision in Stone v. Powell, will ease this initial ingress. The two paragraphs prefacing Justice Brennan's acerbic dissent in Stone present an excellent encapsulation of the decision:

The Court today holds "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial...." But these cases, despite the veil of Fourth Amendment terminology employed by the Court, plainly do not involve any question of the right of a defendant to have evidence excluded from use against him in his criminal trial when that evidence was seized in contravention of rights ostensibly secured by the Fourth and Fourteenth Amendments. Rather, they involve the question of the availability of a federal forum for vindicating

those federally guaranteed rights. Today’s holding portends substantial evisceration of federal habeas corpus jurisdiction, and I dissent.

The Court’s opinion does not specify the particular basis on which it denies federal habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners . . . . I can only presume that the Court intends to be understood to hold either that respondents are not . . . “in custody in violation of the Constitution or laws of the United States,” or that “considerations of comity and concerns for the orderly administration of criminal justice” . . . are sufficient to allow this Court to rewrite jurisdictional statutes enacted by Congress. Neither ground of decision is tenable; the former is simply illogical, and the latter is an arrogation of power committed solely to the Congress. 36

The force and accuracy of this description could only be diluted by anything more than minimal additional observation. The very wording of the Court’s holding in Stone compels a federal district court to dismiss a habeas petition where the court finds there has been at the state level a full and fair hearing of the fourth amendment claim—even if the result of that “full and fair” hearing is a substantively erroneous conclusion in favor of the prosecution. 37 So, once a state grants a “full and fair” hearing,

36. Id. at 502-06 (Brennan, J., dissenting; footnotes deleted; emphasis added in the second paragraph).

37. 428 U.S. at 481-82, 494; see also text accompanying note 36 supra. It is most difficult to discern how the Court could have held that the respondents in Stone and its companion case received state hearings which were both full and fair in view of the facts that both of the respondents presented their fourth amendment claims at every stage of their respective state proceedings, id. at 470, 472, that at each stage their claims were rejected by the state courts, id., and that each rejection was at least highly questionable, if not downright erroneous, as a matter of consistency with Supreme Court precedent. Id. at 471 n.2, 473 n.3; see also id. at 528-34 (Brennan, J., dissenting). Indeed, in Wolff v. Rice, 428 U.S. 465 (1976), the companion case to Stone, the respondent based his fourth amendment claim on assertions that the affidavit upon which the police secured a warrant to search his apartment "was clearly deficient under prevailing constitutional standards," id. at 532 (Brennan, J., dissenting), and that the information contained in the deficient warrant had been supplemented at his suppression hearing by testimony not presented to the issuing magistrate. Id. In the face of these assertions, even the Supreme Court majority was forced to admit that it had "several times rejected" the contention that such supplementation is permissible. Id. at 505 n.3. (How ironic that the Wolff case emanated from Nebraska, a state not known for its scrupulous concern for the protection of criminal defendants. Cf. id. at 531-33 (Brennan, J., dissenting); Snowden, A Holistic Jurisprudential View of the Drug Victim, 54 NEB. L. REV. 350, 361-77 (1975).) It is not surprising, in view of the Court’s treatment of the "full and fair" issue, that some lower federal courts have been more hesitant to find "full and fair" opportunities to litigate fourth amendment claims when addressing situations calling for the interpretation and application of Stone and Wolff. See Gates v. Henderson, 45 U.S.L.W. 2374-76 (2d Cir. Jan. 12, 1977); Curry v. Garrison, 423 F. Supp. 109 (W.D.N.C. 1976).
the criminal defendant has lost his ability to question the correctness of the outcome of that hearing: no court in the federal system can review in habeas proceedings the errors of state courts in fourth amendment cases! What has become of article I, section 9, clause 2 of the Constitution?

That is precisely what Justice Brennan asked in his dissent in Stone, and that is precisely the subject of a final observation on the case. Realizing the Court’s dissatisfaction with the exclusionary rule could not mask the true import of the decision, Justice Brennan identified the “real ground of today’s decision—a ground that is particularly troubling in light of its portent for habeas jurisdiction generally—as the Court’s novel reinterpretation of the habeas statutes.”38 This reinterpretation is composed of “a ‘discretion’ judicially manufactured today contrary to the express statutory language.”39 The dissenters justifiably wonder where this discretion will end: what of cases of “double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures?”40 Indeed, are any “grounds of alleged unconstitutional detention”41 immune from this “discretion”? Is it surprising that states already have sought to expand the Stone holding to some of these other areas?42 Can the reader rebut Justice Brennan’s assertion that “the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment”?43

Surely it is no coincidence this statement immediately follows one decrying recent extensions of Younger abstention, and that both statements are used as explanations and examples of how federal courthouse doors are being barred by decisions shaping “the doctrines of jurisdiction, justiciability, and remedy.”44 At least one Justice sees the connection between the habeas cases and other manifestations of the trend away from the duty to decide. Indeed, citing Stone and Hicks v. Miranda45 in the same breath, Justice Brennan stated in his article:

38. 428 U.S. at 515 (Brennan, J., dissenting).
39. Id. at 516.
40. Id. at 517-18.
41. Id. at 517.
42. See, e.g., Greene v. Massey, 546 F.2d 51, 53 n.6 (5th Cir. 1977), where the court, fortunately, rejected one state’s attempt to extend Stone to a double jeopardy setting.
44. Brennan, supra note 1, at 498.
45. 422 U.S. 332 (1975).
Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. Under the banner of the vague, undefined notions of equity, comity, and federalism the Court has con- doned both isolated and systematic violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard indi- vidual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgot- ten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our cit- izens. Federalism is not served when the federal half of that protection is crippled.46

Having thus cut through the verbiage of Stone and properly reduced it to a case embodying perverted notions of federalism, notions addressed in Part III.A. of this article, Justice Brennan has paved the way for a similar analysis of abstention by evoking the hobgoblins of “equity, comity, and federalism.” For those hobgoblins formed the very basis for the Supreme Court’s deci- sion in Younger v. Harris47 and its voluminous progeny. Already described briefly in the Introduction to this article and more thor- oughly in the literature,48 the holding in Younger easily could be deemed to be one of the biggest door-closers: in the absence of a showing of bad faith harassment, a federal court shall not inter- fere in an on-going state criminal proceeding, even in the face of an allegation that the proceeding violates the civil rights and liberties guaranteed the defendant under the Constitution. This holding has been extended both within the criminal context and to civil areas49—and it lies at the very core of the problems ad- dressed both by the sponsors of the proposed Civil Rights Im- provements Act and by the authors of this article.50

46. Brennan, supra note 1, at 502-03 (footnotes deleted).
47. 401 U.S. 37, 43-44 (1971).
48. See note 31 and accompanying text supra.
49. See Introduction supra.
50. Before examining the equity and comity bases for the Younger holding, recognizing that the federalism basis will be addressed in Part III.A., a few words must be said about the Anti-Injunction Act. 28 U.S.C. § 2283 (1970). The appellee in Younger had been indicted by California for a violation of its Criminal Syndicalism Act, a statute held to be constitutional in 1927 in Whitney v. California, 274 U.S. 357, but also a statute which at the time of Younger in 1971 surely would be held to violate the first amendment in light of Brandenburg v. Ohio, 395 U.S. 444 (1969), which overruled Whitney. Seeking to enjoin his patently improper prosecution, the appellee sought and received relief from a three- judge federal court. The Supreme Court’s reversal of that three-judge court could have
Consistent with the approach of this Part, then, these principles of equity, comity, and "Our Federalism" must be put through the strainer. Obviously "Our Federalism" will slip through, warranting further examination in Part II.A. But what of "equity" and "comity"? These grounds will be analyzed to demonstrate that to the extent they conjure nonconstitutional concepts, they do not warrant abstention, and to the extent that they evoke constitutional concerns, they simply reduce to the same federalism concepts discussed in the next section.

Equity, the first of the Younger trio, should prompt the most visceral response. As Justice Brennan said, decisions which prevent one of the sovereign People of the United States from vindicating his constitutional claims in a federal forum "hardly bespeak a true concern for equity."51 Still, for those not content with emotional reactions, a less instinctive response may be appropriate. Such a response is found in the fallacy of the Younger Court's statement that "equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."52 And the fallacy embodied in this statement is at least three-fold.

Initially, it should be noted that until recently the Younger Court's assertions with respect to equity were without precedential support. Professor Burton Wechsler's masterful study53 of the precedential bases for Younger ably details his arguments that "contrary to prevailing mythology, beginning with the last de-

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52. 401 U.S. at 43-44.
cade of the nineteenth century federal trial courts have liberally exerted their power to invalidate state criminal law and enjoin its enforcement' 54 and that accordingly "Younger misconceived legal precedents." 55

Secondly, and apart from precedent, consider whether the moving party does have a remedy at law which is adequate.

In Ex parte Young, the Court made short shrift of the state's argument that contesting the statute's constitutionality as a defense in a state criminal proceeding constituted an adequate remedy at law, the availability of which barred equitable relief. The Court noted wryly that "there would not be a crowd of agents offering to disobey the law," given the possible fine and imprisonment facing railroad employees who charged more than the authorized maximum rates [which were being attacked on due process grounds].

Furthermore, [to] await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court, would place the company in peril of large loss . . . if it should be finally determined that the act was valid. This risk the company ought not to be required to take. 56

If a corporate entity testing a criminal statute should not be required to risk a fine by violating that statute and then defending against prosecution on the grounds of the law's unconstitutionality, and if that entity's employees likewise should not be expected to choose between employment and possible fine or imprisonment, then surely individual citizens should not be re-

54. Id. at 743.
55. Id. at 744. For the authors' own, less complete examination of the precedential basis for Younger, an examination which relies heavily on Professor Wechsler's study, see notes 112-47 and accompanying text infra.
56. Zeigler, supra note 31, at 272, describing and quoting from Ex parte Young, 209 U.S. 123, 164, 165 (1908). One sentence from the footnote appearing before this passage bears reproduction here: "The decision in Ex parte Young has been called 'indispensable to the establishment of constitutional government and the rule of law.'" Id. at 272 n.31, quoting C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48, at 186 (2d ed. 1970).


It does not change the significance of the Court's decision to coat it with the sugar of equity maxims. As we have seen, there is no warrant in the decisions of this Court for saying that the plaintiff has an "adequate remedy at law" merely because he may bring suit in the State courts. An "adequate remedy at law," as a bar to equitable relief in the federal courts, refers to a remedy on the law side of federal courts.
quired to run the gamut of prosecution to vindicate their constitutional rights! Indeed, the Ex parte Young Court's reasoning with respect to the inadequacy of the legal remedy retains its practical vitality today, despite subsequent contrary holdings by the Supreme Court.

Those holdings, beginning with Fenner v. Boykin, carrying through Douglas v. City of Jeannette, and culminating with Younger itself, shifted the analysis away from the adequacy of the legal remedy issue and toward the irreparable injury question. That in itself is not objectionable because the outcome of the inquiry should remain unchanged: legal hair-splitting aside, if the legal remedy is inadequate, then the injury is irreparable, and if the injury is irreparable, then the remedy is inadequate. But what is objectionable about the later cases is that by focusing on the irreparable injury question, the Court somehow became pres-digitator. Where equitable principles once did not prevent the granting of federal relief, they now do!

For example, the Younger Court, hardly mentioning the issue of the legal remedy and glibly assuming its adequacy, claimed that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." But show someone without a "legal" education this statement and the statements from Ex parte Young, and ask him to compare them. How would this citizen respond to the Court's incantation of the "special legal sense" of "injury"? Would it not surprise him to learn that he does not know what "irreparable injury" means? Or ask yourself, those of you with "legal" educations supposedly able to comprehend "special legal sense[s]," whether the financial and mental strains of having to defend a prosecution based on a patently unconstitutional statute, as in Younger, are not "irreparable" in any sense! Who should bear these burdens and inconveniences of making government toe the constitutional line—the popular master or the gov-

57. 271 U.S. 240 (1926).
58. 319 U.S. 157 (1943). Professor Burton Wechsler has demonstrated the fallacies and "glaring defects" contained in the Douglas case, concluding that the decision has not "retained precedential vitality throughout the years." Wechsler, supra note 31, at 814-18. See notes 127-34 and accompanying text infra, for a more complete discussion of the Douglas case.
59. 401 U.S. at 44: "[A] single suit would be adequate to protect the rights asserted."
60. Id. at 46.
61. See text accompanying note 56 supra.
ernmental servant?  

Hopefully, it is not difficult to see that the Court’s reasoning with respect to the application of “equitable” principles in *Ex parte Young* is superior to its legerdemain of later cases. Those principles simply do not dictate abstention. But even if they did, then there is yet a third aspect to the fallacy of the Court’s use of “equity” in *Younger* to destroy jurisdiction. The equitable principles of adequate legal remedy and irreparable harm may well yield satisfactory results in contests between two private parties, or even in nonconstitutional contests between a citizen and his government, but should they even apply in the same manner to disputes between one of the sovereign People and his government when the dispute raises a constitutional question concerning the civil rights of that sovereign citizen? 

Indeed, the Civil Rights Act provides not only for “an action at law” and a “suit in equity,” but also for any “other proper proceeding for redress.” And the jurisdictional grant for civil rights cases removes the amount in controversy requirement which otherwise would apply to federal question cases. These enactments demonstrate Congress’s desire to give redress for constitutional wrongs, and not to allow the federal judiciary to withhold that redress at will! At least Congress recognizes that the governmental servant has little interest in prolonging disputes with its master, even if the cost of rapidly ending such disputes is an occasional duplicative proceeding and some friction between governmental entities. As the only function of government in

62. Of course the very recently enacted Civil Rights Attorney’s Fees Act of 1976, Pub. L. No. 94-559 (Oct. 19, 1976), would relieve some of the financial strain—after the fact. But who will pay for pre-disposition expenses, and who must bear the mental turmoil?  
66. In connection with the disruptive nature of duplicative proceedings, see the discussion of “balancing” the fourteenth amendment against the eleventh in Part III.A. *infra*. And with respect to the friction issue and at the risk of again jumping ahead to the subject of Part III, it here may be appropriate to recall the oft-quoted words of Mr. Justice Brandeis in dissent in Meyers v. United States, 272 U.S. 52, 293 (1926): 

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

These words were later vindicated in Humphrey’s *Ex’r v. United States*, 295 U.S. 602 (1935), and one of the themes of Part III is the applicability of these sentiments not only to the separation doctrine, but also to federalism. See text accompanying notes 184-85 *infra*.  


America is to serve the sovereign People, should the Court blithely assume that the exact same "equitable" principles applicable to purely private suits apply with equal force in the constitutional realm?

If the federal judiciary is to err, should it not do so in favor of the master, rather than another servant, the state? After all, often it is remarked, and with considerable efficacy, that even-handed uniformity with respect to the application of federal rights is a desirable product of having a federal judiciary overseeing the states and that federal courts frequently are more sensitive to federal rights than are state courts.67 Indeed, these observations lie at the very core of Professor Burton Wechsler's precedent-oriented attack on Younger, an attack replete with citations, of discussions of, and reliance on the primacy of the federal judiciary.68 In short, these observations should be no less true today, even though many state courts increasingly are dissatisfied with the restrictive pronouncements of the present Supreme Court and are answering those pronouncements with more liberal interpretations of their own state constitutions to compensate for the very repression prompting the Civil Rights Improvements Act.69

67. Cf. Diamond, What the Framers Meant by Federalism, in A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 24, 32-37 (R.A. Goldin ed. 1961) (describing James Madison's arguments in the Constitutional Convention to the effect that a national government is needed "for the security of private rights, and the steady dispensation of Justice"); Stone v. Powell, 428 U.S. 465, 525-26 (Brennan, J., dissenting); see also Steffel v. Thompson, 415 U.S. 452, 464 (1974); and 123 Cong. Rec. S202 (daily ed. Jan. 10, 1977) (remarks by Sen. Mathias): "These [Reconstruction] enactments also reflected the belief of the Congress that the Federal Government—not the individual States—was the primary protector of our basic constitutional freedoms...[T]he authors of this legislative package intended to establish the Federal Government as the fundamental protector of our constitutional liberties." Professor David Currie also has observed that "the federal courts, independent of most federal as well as state political pressures, are the most impartial repository of the power to arbitrate between the states and the nation." Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 5 (1964).

68. Wechsler, supra note 31, at 744 ("Younger ... underplayed federal judicial primacy"), 771-72 ("the federal courts are the 'primary and powerful reliances for vindicating every right given by the Constitution'"), 839-40 ("The Primacy of the Federal Judiciary"), 848-57 ("National Law and National Judiciary"), 876-77 ("primary guardians of constitutional rights"), 893-94 ("federal courts have the primary responsibility for protecting federal rights").

69. See generally Brennan, supra note 1; Comment, Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?, 8 Loy. Chi. L.J. 186, 195-96 (1976) ("Yet . . . the overwhelming majority of states [still] defer to the United States Supreme Court even when such deference is unnecessary."); Lewin, Avoiding the Supreme Court, N.Y. Times Magazine, Oct. 17, 1976, at 31.
Accordingly, the three-fold recognition that the Court did err "on the wrong side" in Younger by relying on "equitable principles," principles of doubtful applicability which do not demand abstention, leads to an examination of federal-state relations, the subject of Part III.A. But recall that the Younger Court grounded its abstention pronouncement not only in its erroneous perception of "equity," as well as in federalism itself, but also in its view of "comity."

The Court stated that this "notion of 'comity' [consists of] 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." A more distorted view of the concept hardly could be imagined!

Any examination of the concept should begin by recognizing that prior to its distortion it had little to do with constitutional law but much to do with conflicts law. The renowned Professor Beale noted the ambiguity which has attached to the use of "comity" as a general description of the subject called "conflicts of law," and he attacked the notion that courts base their acceptance of the doctrines of conflicts law on comity rather than on the legislative, or political, power of the state. Accordingly, comity "is for the consideration of the government [i.e., the legislature], not of its courts."

An even deeper probe into the nature of comity reveals just how very different the concept is from that employed by the Younger Court. Professor Ehrenzweig sketches the origin of the concept of comity:

The history of conflicts law reflects a struggle between two tendencies . . . one that we may call unitarian, seeking to resolve or avoid conflict by the assumption of a "super law"; the other that we may call pluralistic, denying legal character to any assumed order above each nation's own law . . . . [T]he outright pluralistic nationalism of the newly born Netherlands . . . conceded mere "comity" to other sovereigns.

. . . Dutch legal scholarship, and primarily the writings of Ulric Huber and Johannes Voet, greatly influenced American conflicts law, which thus came to reject the imperial "statutist"

70. 401 U.S. at 44.
heritage of a law "governing" by virtue of its own claim to authority, and to stress mere "comity" as the basis of applying foreign law.

... Citing Huber, Story ... approved the statement in Saul v. His Creditors that conflicts law thus "touched the comity of nations, and that comity is, and ever must be, uncertain."\(^{73}\)

So, far from being the compulsive principle warranting reliance by the Younger Court, comity rather was a "no-law,"\(^ {74}\) merely a civil law conception of the conflicts of law, emerging from the nationalistic Netherlands to transform an "attitude of international courtesy"\(^ {75}\) mandating respect for co-equal sovereign nations "into a 'mere comity' which left to each State complete freedom in scrutinizing the findings of foreign courts."\(^ {76}\) In short, "comity" meant virtually the opposite of what the Younger Court suggested. And it is not surprising, given this history of the concept of "comity," that it is most accurately employed not in cases involving state-to-state or federal-to-state relations, but rather in cases involving international relations.\(^ {77}\)

Accordingly, the Younger Court's use of "comity" as a basis for abstention merits at least three criticisms. First, as has just been explained, the doctrine of "comity" not only signified something quite different from the mandatory principle announced in Younger, but historically it also is rather inapplicable outside of the international relations area. Secondly, even if the doctrine stood for what the Court tried to suggest, and even if it applied beyond the international area, then still it would be highly erroneous to apply it in cases of federal-state, as opposed to state-state, relations. Where, after all, are the co-equal entities?\(^ {78}\) Finally, even if the first two criticisms fail, then still the Court's reliance on "comity" to avoid its duty to decide is erroneous. For just as the "no-law" of comity gave way to, and even facilitated its own conversion into, the doctrine of vested rights, its universalist opposite\(^ {79}\)—so, too, would any use of "comity" in the

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74. See id. at 4.
75. Id. at 161.
76. Id.
77. Cf., e.g., id. at 12 ("international comity"), 53 ("foreign representatives"), 183 ("Courts of foreign countries ... likely to use comity language").
78. As will be stressed again and again in Part III, in the United States there is only one sovereign entity—the People! Neither the federal government nor the states can lay a legitimate claim to sovereignty. See notes 186-93 and accompanying text infra.
79. See Ehrenzweig—Treatise supra note 73, at 321.
federal-state realm necessarily give way to a more rule-bound determinant, namely the constitutional pronouncement embodied in the supremacy clause.80

The supremacy clause, however, reduces "comity" to a matter of federalism. Yet even the Younger Court could not object to that reduction, because immediately after expounding on its view of "comity,"81 that Court itself recognized and referred to the connection: "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism.""82 So the same thing happens to "comity" as happened to "equity" when put through the strainer: aspects of nonconstitutional concern are held back for an analysis demonstrating their inadequacy as bases for abstention, while the remaining aspects lead once more back to the Constitution and its federalistic structural design.

Thus far, the unfortunate trend away from the federal courts' duty to decide has been criticized by analysis of the Stone case in the area of habeas corpus and by analysis of the notions of "equity" and "comity" in the realm of abstention. Both analyses left issues of federalism yet to be discussed in Part III. But, the holistic nature of the trend has yet to be explored satisfactorily, for several aspects of the problem still demand attention. These aspects bear a real relationship to the trend being attacked, because they have contributed significantly to it, but they nevertheless do not merit the same type of criticism as presented above, as they are found in the quite constitutional enactments of Congress. Indeed, the analysis of these congressional enactments will introduce the relevance of the "other" structural protection examined in Part III—the separation of powers. For not only do the enactments and policies of Congress address federal-state relations, but they also illustrate the interactions between the legislative and judicial branches of the federal government. The particular enactments to be discussed were reactions to a decision deemed by many to be necessary to constitutional government in America,83 but they also had the unfortunate side-effect of making the judicial field fertile for such weeds as abstention. Before describing the relationship between the grass and the weeds, however, the seminal decision must be examined.

80. U.S. Const. art. VI, § 2.
81. See text accompanying note 70 supra.
82. 401 U.S. at 44.
83. See note 56 supra.
In 1908 the Supreme Court planted the seed for later confusion when it ushered in a new era in the relationship between the states and the federal judiciary with its decision in the landmark case of Ex parte Young.\textsuperscript{84} No longer need a federal court look behind the named parties when asked to prevent a state official from enforcing an allegedly unconstitutional state statute. A suit against a state officer to enjoin him from enforcing a state statute alleged to be unconstitutional was not to be considered a suit against the state itself for purposes of the eleventh amendment. Enforcement of the challenged statute would be considered "state action," however, for purposes of the fourteenth amendment.

The case arose when stockholders of nine railroads brought an action in federal court to enjoin the railroads from complying with a recently enacted law reducing railroad rates and imposing severe penalties for noncompliance. The court also was asked to restrain another named defendant, Edward T. Young, the Attorney General of Minnesota, from enforcing the new rate law. The plaintiffs claimed that enforcement of the reduced rate schedule would deprive them of their property contrary to the due process provisions of the fourteenth amendment, and also that the penalties for noncompliance were so severe that the railroads, if not restrained, would comply with it. The federal court issued a preliminary injunction restraining Attorney General Young from enforcing the new rate law. The following day Young sought a writ of mandamus in a state court to compel the railroads to comply with the law. For this action he was adjudged in contempt by the federal court, fined $100, and ordered to jail until he dismissed the state proceeding.

Young then petitioned the Supreme Court for a writ of habeas corpus. As the Court perceived the issue, Young was entitled to the writ if the injunction against him was prohibited by the eleventh amendment. The Court held the eleventh amendment did not prohibit such an injunction, and Young's attempt to enforce a state law in the face of a preliminary finding that the law was unconstitutional was held to be "simply an illegal act upon the part of a state official."\textsuperscript{85} The Court continued:

\begin{quote}
[I]f the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped
\end{quote}

\textsuperscript{84} 209 U.S. 123.

\textsuperscript{85} Id. at 159.
of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. 86

The reaction to Ex parte Young drew federal-state relations into sharp conflict. 87 Railroads and utilities were quick to challenge state regulatory policies in federal courts. Often they were successful in having temporary restraining orders issued ex parte, and interlocutory injunctions were sometimes issued on the basis of affidavits only and without formal hearings. These “temporary” orders tied up enforcement of some state regulatory and tax measures for long periods of time, often without any decision on the merits. 88

The discretion vested in judges of the lower federal courts was practically unfettered, and there was widespread belief that this discretion was being exercised unwisely. Particularly objectionable was the fact that discretion—which could be exercised to prohibit the principal law officer of a state from resorting to state courts for enforcement of state statutes—resided in single judges. 89

The resentment of the states was reflected by their representatives in the halls of Congress. There were proposals to eliminate the jurisdiction of federal courts over suits challenging state laws. 90

Significantly, Congress chose not to strip the lower federal courts of jurisdiction to enjoin enforcement of unconstitutional state laws. Instead, in 1910 Congress enacted a bill forbidding issuance of a federal interlocutory injunction against enforcement of unconstitutional state statutes except by a district court composed of three judges, at least one of whom would be a judge of the then-Circuit Courts of Appeals. The bill also provided for direct appeal to the Supreme Court from an order “granting or denying, after notice and hearing, an interlocutory injunction in such cases.” 91

The 1910 statute was later amended to include cases seeking injunction against enforcement of administrative orders made

86. Id. at 159-60.
88. Id. at 147. See also Comment, Limitation of Lower Court Jurisdiction over Public Utility Rate Cases, 44 Yale L.J. 119, 121-22 (1934).
89. Jacobs, supra note 87, at 147.
90. Currie, supra note 67, at 6-7.
under the authority of state statutes, and in 1925 it was again amended to require three judges for the hearing on a permanent injunction as well as on the application for an interlocutory injunction. In 1948 the statute was codified as section 2281 of the Judicial Code.92

Thus, the reaction of Congress to the federal court's intervention in *Ex parte Young* was not to curtail the jurisdiction of the federal courts, but rather to change the *method* by which their jurisdiction could be exercised. Three judges would lend more dignity to a federal trial court decision invalidating state legislation. As stated by Senator Overman, who "opposed . . . allowing one little federal judge to stand up against the governor and the legislature and the attorney general of the State": "[I]f three judges declare that a state statute is unconstitutional the people would rest easy under" that declaration.93 Furthermore, by allowing direct appeal to the Supreme Court, the statute would assure an authoritative response should the three judges erroneously strike down a state statute.

Many southern congressmen, subject to a long tradition of opposing federal judicial authority, as well as congressmen from the western states, would have imposed greater reforms. However, even the rather limited reform embodied in the Three-Judge Court Act passed by a very thin margin in the Senate. Thus, Congress implicitly acquiesced in *Ex parte Young*'s sanction of the asserted authority of the federal judiciary.94

It should be emphasized that the congressional response to *Young* came at a time when Senate membership was chosen by the various state legislatures,95 and thus could be expected to be extremely sensitive to the desires of those deliberative bodies. And yet the deference or courtesy (call it comity if you will) shown by Congress to the state legislatures merely made it more cumbersome for the federal trial bench to overturn state laws. Access to federal district courts for litigants seeking redress against unconstitutional state laws was not diminished by congressional enactment of the Three-Judge Court Act. That Act and its subsequent amendments were merely procedural modifications; they did not restrict the power of federal district courts to restrain enforcement of state laws.

92. WRIGHT, supra note 31, at § 50.
93. 45 CONG. REC. 7256 (1910).
94. JACOBS, supra note 87, at 148-49.
95. U.S. CONST. art. I, § 3, cl. I. The seventeenth amendment providing for popular election of the Senate was ratified on April 8, 1913.
It was not until more than two decades after the Young decision that Congress finally chose to shield some state laws from scrutiny by lower federal courts. The Johnson Act of 1934\(^6\) deprives federal district courts of jurisdiction to enjoin the operation of, or compliance with, any order of a state agency or local rate-making body fixing rates for a public utility when the four conditions of the act are met; the Tax Injunction Act of 1937\(^7\) forbids district court injunctions against "the assessment, levy or collection of any tax under state law." Neither of these acts becomes operative unless there is a plain, speedy, and efficient remedy in the state courts.\(^8\) Confined as they are to the areas of taxation and public utility rates, these two statutes would not seem to warrant federal court refusals to act in other types of cases.\(^9\)

Given these limited congressional responses to Ex parte Young, it is rather difficult to see how the Younger doctrine can be a reflection of congressional policy. Indeed, since the Civil War the policy of Congress has been in the direction of providing the citizenry with a federal forum as an alternative to state courts for the determination of rights, privileges, and immunities under federal law. The strongest expression of that post-war congressional policy is found in the Civil Rights Act of 1871,\(^1\) recently characterized by the Supreme Court as

a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. [In fact], [t]he very purpose

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The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

1. Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

2. The order does not interfere with interstate commerce; and,

3. The order has been made after reasonable notice and hearing; and,

4. A plain, speedy and efficient remedy may be had in the courts of such State.

[Act of May 14, 1934, 48 Stat. 775.]

97. 28 U.S.C. § 1341 (1970): "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." [Act of Aug. 21, 1937, 50 Stat. 738.]

98. See notes 96 and 97 supra.

99. But see Trainor v. Hernandez, 97 S. Ct. 1911, 1918-19 n.8 (1977), where the Court cites the Tax Injunction Act in support of abstention when a district court had been asked to review the constitutionality of an attachment proceeding unrelated to any state tax law.

of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial."\footnote{101}

Other examples of the congressional policy of providing a federal forum to resolve questions of federal law include the general federal question statute,\footnote{102} passed in 1875; the expansion of jurisdiction to remove cases from state to federal courts;\footnote{103} and the 1948 amendment to the Anti-Injunction Statute.\footnote{104}

Yet although Congress has tended to expand the subject matter jurisdiction of lower federal courts over questions of federal law, the Supreme Court has tended to give narrow readings to the legislation. The general federal question statute\footnote{105} has been saddled with the ridiculous rule that the federal question must appear in the "well-pleaded complaint,"\footnote{106} and a similar fate befell the removal provision.\footnote{107} In fact, the "separate and inde-
pendent claim” provision of the general removal statute\(^{108}\) has been given such a narrow construction that it might as well not exist for diversity cases,\(^{109}\) and it is a rare case that qualifies for removal under the civil rights removal statute\(^{110}\) as interpreted by the Court.\(^{111}\) Giving a narrow interpretation to jurisdictional statutes is one thing: the Younger abstention doctrine, however, is quite another. Not only is the Younger doctrine unsupported by congressional policy, it flies in the face of it! Moreover, as we shall attempt to persuade the reader in Part III of this article, the doctrine is unconstitutional. But before proceeding to constitutional objections to the Younger doctrine, allow the authors to examine the legitimacy of abstention, Younger style, from a precedential point of view. Then further allow them to speculate as to the “real” factors that may have prompted the Court to create the doctrine.

The Supreme Court grounded its holding in Younger upon six cases decided during the years spanning 1926 to 1943. With one exception, those cases involved attempts by plaintiffs to enjoin state officials from enforcing statutes designed to regulate business activity through the imposition of criminal (misdemeanor) sanctions.\(^{112}\) From those cases the Court extracted “the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions.”\(^{113}\)

In truth, there never were any such “settled doctrines.” Professor Wechsler demonstrates that fact rather conclusively in his devastatingly brilliant attack on the Younger doctrine.\(^{114}\) As he shows us, lip service has long been paid to the “general rule” that equity will not interfere with a state criminal prosecution. How-

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113. 401 U.S. at 53.
ever, in actual practice, when the constitutionality of a state statute has been challenged, the "general rule" has been the exception and the exceptions have been the general rule.

From 1888 to 1939, a period of 51 years, out of dozens of Supreme Court cases, just two, Fenner [v. Boykin] and Spielman [Motor Sales Co. v. Dodge],\(^\text{118}\) denied federal equity a role when state criminal law was at war with the Constitution. Only the language about the "rule" and the "exception" obscured this remarkable history. The risk inherent in testing criminal law through breach and prosecution provided the raison d'être for the civil remedy. The unique role of the federal judiciary as expositor and defender of constitutional rights justified its prominent participation in the process.\(^\text{118}\)

The Court frequently stated the "general rule" in its opinions, but Fenner and Spielman were the only cases in over five decades of decisions where the rule was actually put into practice. Those two cases, together with four others decided during World War II, would become the foundation for the Younger doctrine.

It was in 1941 that the phantom "general rule" was resurrected in Beal v. Missouri Pacific R. Co.\(^\text{117}\) and Watson v. Buck.\(^\text{118}\) But Beal was a diversity case and did not involve any question of constitutional law. The plaintiffs sought an injunction against prosecution, alleging they were in compliance with the statute under which they were being threatened. In effect, they were asking the federal court, in the absence of any federal question, to interpret a state statute that had not been reviewed by the state courts. And in Watson, after paying lip service to the "general rule," the Court went on to hold that a key provision of the challenged statute did "not contravene the [federal] copyright laws or the Federal Constitution."\(^\text{119}\) As to the other portions of the statutes, the Court found "a complete lack of record evidence or information of any other sort to show any threat to prosecute the complainants or any one else."\(^\text{120}\) Is it any wonder, then, that the Court reversed the issuance of the injunction that had been decreed by the lower court? Given that Beal did not

\(^{115}\) See note 112 supra.

\(^{116}\) Wechsler, supra note 31, at 798-99.

\(^{117}\) 312 U.S. 45 (1941).

\(^{118}\) 313 U.S. 387 (1941).

\(^{119}\) Id. at 405. If the Court did not "hold" § 1 of the Florida statute constitutional, we must conclude Justice Black was rendering an advisory opinion in which Justice Frankfurter and the other Justices concurred.

\(^{120}\) Id. at 399.
involve a constitutional question and that Watson decided on the merits the validity of the only provision under which a threat of prosecution was perceived, it is hard to see how those cases lend support to the doctrine announced in Younger.

Professor Wechsler provides another explanation as to why Beal and Watson are not sound precedent for Younger. He theorizes that those two cases were merely part of the process of closing the door on the notion of substantive due process. This may well be true for, as he points out, on the same day the Court decided Beal, it affirmed an injunction against enforcement of a state alien registration act in Hines v. Davidowitz. "Neither the district court nor Supreme Court opinions in Hines disclosed any threats on the part of public officials to prosecute." Perhaps the "general rule" against injunctions was not so general after all.

The fifth case cited by the Court in support of its Younger decision was Williams v. Miller, a suit challenging the constitutionality of a California contractor-licensing statute. A three-judge district court had dismissed the case for lack of jurisdiction because there was no allegation raising a substantial constitutional question. The Supreme Court affirmed "on the ground that the bill does not allege facts which would warrant the granting of equitable relief by a federal court to restrain enforcement of the state statute." The brief per curiam opinion then cited Beal, Watson, and Spielman without further comment. Hardly a bedrock decision.

The final, and perhaps best known, precedent cited by the Younger Court as representing the "general rule" against enjoining state criminal proceedings was Douglas v. City of Jeannette. It was the only case among the six that involved the first amendment. The city had convicted members of a religious sect for selling their literature door-to-door without having paid a license tax. Other members of the sect were being threatened with prosecution for the same reason. While those convicted were appealing, these other members sought injunctive relief against further prosecutions. The state appellate court upheld the convictions, but

122. 312 U.S. 52 (1941).
123. Wechsler, supra note 31, at 809.
126. 317 U.S. at 599.
a federal district court enjoined city officials from further enforcement of the ordinance. The United States Court of Appeals for the Third Circuit reversed the district court on the merits. The Supreme Court then granted certiorari in both cases and decided them as companions. In *Murdock v. Pennsylvania*, the Court reversed the state criminal convictions on the ground that the city ordinance was unconstitutional. The Court then affirmed the court of appeals in the federal injunction suit in *Douglas* on two grounds. The Court found no reason to believe that the city would not "acquiesce in the decision of [the] Court holding the challenged ordinance unconstitutional as applied to petitioners." In view of the decision it had just rendered in *Murdock* there was "no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, [would] be either necessary or appropriate." The holding in *Murdock* was reason enough to refuse the requested injunction in *Douglas*. However, the Court also gave another reason, invoking the "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." The cases of *Fenner, Spielman, Beal, Watson*, and *Williams* were duly cited to buttress the "familiar rule," and so *Douglas* became precedent that the Court would draw on twenty-eight years later in *Younger*.

Starting with *Beal* and ending with *Douglas*, the Court thus had invoked the "general rule" that equity will not ordinarily enjoin state criminal prosecutions four times in a period of less than twenty-eight months. Perhaps the "general rule," which had really been the exception, actually had become the general rule. And so it had, for forty-two whole days, until the Court upheld the decree of a three-judge district court enjoining enforcement of a regulation of the West Virginia State Board of Education requiring children in public schools to salute the American flag. The challenged regulation was backed by criminal sanctions, and parents of children refusing to salute the flag had been prosecuted while others had been threatened with prosecution for "causing

131. 319 U.S. 105 (1943).
132. 319 U.S. at 165.
133. *Id*.
134. *Id. at 163*.
135. *See text accompanying notes 114-16 supra*.
delinquency.’”137 The opinion of the Court made no mention of the “general rule.”

Had the Court forgotten the “general rule” after only six short weeks? Apparently they had because, as Professor Wechsler points out: “Younger was the first Supreme Court case in 28 years to invoke the moribund Beal-Watson abstention doctrine.”138 “During that 28-year period between Douglas and Younger, the Court steadfastly refused to invoke Beal-Watson in at least 25 cases.”139 It is true that most of those cases did not involve injunctions against pending criminal proceedings, but then neither did five of the six cases cited in support of the holding in Younger, and in the sixth case, Douglas, proceedings were pending against some plaintiffs, but not against others.140

It accordingly appears that, prior to Younger, the “general rule” forbidding injunctions against state criminal proceedings was the “rule” only from 1941 to 1943.141 Even then, with the exception of Douglas, in which the need for an injunction had disappeared,142 the rule was invoked only in cases involving economic regulations. Of those three cases, one did not involve a federal question of any kind;143 in another the constitutional question was decided on the merits;144 and the third was a per curiam opinion from which very little can be gleaned.145

In fact, during the subsequent years between 1943 and 1971, the “general rule” was laid to rest soundly and the injunctive powers of the federal courts were put to the work Congress had intended when it enacted the Civil Rights Act of 1871. A “Second Reconstruction” took place. Integration of the schools started; federal injunctions struck down state criminal laws compelling blacks to ride in the backs of buses; and the right to associate freely in the cause of civil rights was vindicated.146 Many of the cases of that era, including one of those consolidated in Brown v.

137. Id. at 630.
139. Id. at 866 n.562. Professor Wechsler lists the cases in his footnote for those who wish to count them.
140. Id. at 817 n.320.
141. Fenner v. Boykin, 271 U.S. 240 (1926), and Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935), were isolated instances of application of the “general rule” during the decades in which they were decided.
142. See text accompanying notes 127-33 supra.
144. See text accompanying note 119 supra.
146. See Wechslers, supra note 31, at 822-26.
Board of Education,¹⁴⁷ involved state criminal laws, but that did not deter the Court. Beal, Watson, and Douglas became the exception in practice.

What was it, then, that prompted the Court to revive this not-so-general "general rule" in 1971? Why did the Court, in effect, remove the lower federal courts from their role as the primary enforcers of the Civil Rights Act? Why were precedents involving economic regulations with misdemeanor sanctions suddenly used to deny a federal court injunction to a man facing a felony charge and a possible fourteen year prison term under a state statute that clearly violated the first amendment? What motivated the Court to decide Younger the way it did?

We know that the announced motives were equity, comity, and "Our Federalism." Was there another? We think so, and, although it involves a good deal of speculation and conjecture, shall endeavor to explain.

A commentator recently stated that, "[i]n a sense, Younger is a child of Young."¹⁴⁸ We prefer to think of Younger as the illegitimate grandchild of Young. A grandchild because Ex parte Young gave birth to the Three-Judge Court Act,¹⁴⁹ and we strongly suspect it was the Three-Judge Court Act that gave birth to Younger; moreover, as we contend in Part III of this article, the birth was illegitimate because it contravened the Constitution.

Recall that, in enacting the Three-Judge Court Act, Congress did not reduce the power of lower federal courts under the doctrine of Ex parte Young.¹⁵⁰ But the act did place the burden of paying deference to the states on the federal judiciary by requiring three judges to enjoin enforcement of state laws. Federal courts did not shoulder this new burden without complaint. Justice Frankfurter once described the Three-Judge Court Act "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."¹⁵¹ By saying this, Justice Frankfurter helped to make it so, and his dictum was often quoted as the Court spewed forth an increasingly complex body of precedent interpreting the act.¹⁵²

¹⁴⁹ See text accompanying notes 87-95 supra.
¹⁵⁰ See text accompanying notes 91-94 supra.
¹⁵¹ Phillips v. United States, 312 U.S. 246, 251 (1941).
It is easy to understand why the courts did not like the act. It was frequently difficult, particularly in less populated areas, to summon a second district judge and a judge of the court of appeals. The rules relating to appellate review were so complex that it was often difficult to tell whether an appeal was to go to the court of appeals or to the Supreme Court. Prudent attorneys filed appeals in both courts in doubtful cases. Perhaps the most significant problem with the act, for purposes of this discussion, was that it provided for direct appeal from the district court to the Supreme Court in many cases. This was "contrary to the general scheme giving that Court substantial control over its own docket." Despite these docket-oriented burdens, Professor David Currie, writing in 1964, observed that "[w]hen the actual extent of the burden on the federal courts is considered, the price for the palliative does not seem too high." Indeed, in 1964 there were only twenty-one civil rights cases invoking the jurisdiction of three-judge federal courts, and in the previous year there had been only nineteen such cases.

But in 1965 the Supreme Court handed down its decision in the case of Dombrowski v. Pfister and thereafter came a dramatic upsurge in the number of civil rights cases before three-judge federal courts. The year 1966 saw a doubling of the 1963-64 average of twenty cases per year. In 1969 there were eighty-one such cases, and the following year that number had doubled.

In Dombrowski the Court held that a three-judge court had erred in refusing to grant injunctive relief against a threatened state criminal prosecution said to have a "chilling effect" on the constitutional right of freedom of expression of civil rights workers in Louisiana. Justice Brennan's "partially vague opinion" generated a "wave" of petitions, most presented to three-judge courts.

The six-year period from 1964 to 1970 thus had produced an eightfold increase in the number of three-judge cases, and the effect on the Supreme Court's docket was telling. In 1972 Chief Justice Burger called for the total elimination of three-judge

153. WRIGHT, supra note 31, § 50 at 213.
154. Id.
158. ANNUAL REPORT, supra note 156, at 229.
courts, complaining that "appeals from three-judge district courts now account for one of five cases heard by the Supreme Court."\textsuperscript{160} The Court had lost its discretionary control over a substantial portion of its own docket. Although three-judge court cases amounted to less than three percent of all cases docketed in the Court, they consumed a disproportionate amount of time for argument. "In the period from October, 1969, through November, 1971, the Court heard argument of 366 cases. Of these, 80, or 22 percent, were from three-judge courts."\textsuperscript{161}

In 1976 Congress heeded the call of the Chief Justice and eliminated the requirement of a three-judge court in all but a few categories of cases,\textsuperscript{162} virtually eliminating the numerical burden plaguing the Supreme Court. A three-judge court is now mandated only when otherwise required by an act of Congress or when an action is filed challenging the constitutionality of the apportionment of congressional districts or of any statewide legislative body.\textsuperscript{163}

The diminished three-judge court requirement thus should no longer present many problems for the federal judiciary. But the \textit{Younger} doctrine is still present, bigger and broader than ever. It has been expanded to preclude federal injunctions in civil action; it extends to certain activities of state executive officers not involving state court proceedings; and although the Court has held that \textit{Younger} does not preclude declaratory relief when no state proceedings are pending, state prosecutors nevertheless can now avoid the possibility of an adverse declaratory judgment by prompt initiation of criminal proceedings \textit{after} the federal declaratory suit has been filed!

Consider such actions by state prosecutors more fully. While most of the case precedent relied on in \textit{Younger} did not involve pending criminal proceedings,\textsuperscript{164} the Court has held that when there is no state proceeding, considerations of equity, comity, and federalism have "little vitality"\textsuperscript{165} and that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made

\textsuperscript{163} The "otherwise required" provision is discussed in \textit{Wright, supra} note 31, § 50 at 214.
\textsuperscript{164} See text accompanying note 140 \textit{supra}.
\textsuperscript{165} Steffel v. Thompson, 415 U.S. 452, 462 (1974).
on the constitutionality of the statute on its face or as applied." 166 Hence, it may be appropriate for the district court to issue a preliminary injunction to preserve the status quo while the court considers whether to grant declaratory relief. 167 Such a preliminary injunction could be crucial in avoiding abstention because equity, comity, and federalism apparently regain their vitality and even declaratory relief is precluded if the state prosecutor commences his criminal action while the federal litigation is still in an "embryonic state." 168 Thus, the state can invoke Younger and avoid the possibility of an adverse declaratory judgment by making a dash to file its charge with the state criminal court shortly after commencement of the federal action. If the door of the state courthouse is reached before the federal court has any "proceedings of substance on the merits," whatever they may be, the state wins the game and the federal court must abstain. 169 Track shoes may become a part of every well-dressed state prosecutor's wardrobe.

In Rizzo v. Goode, 170 the Court further extended the Younger doctrine beyond state criminal proceedings to shield members of an executive agency of state government from federal injunctive power. But this was hardly surprising because the Court already had abandoned the requirement of a criminal proceeding.

Recall that it was a "general rule" of equity that forbade injunctions against criminal proceedings. In Younger, the Court also invoked comity and "Our Federalism" in aid of equity. Having built up a new set of precedent, the Court could afford to drop the "equitable" principle, which applied only to criminal proceedings, and concentrate on comity and federalism for venturing into state civil proceedings. In a series of cases beginning with Huffman v. Pursue, Ltd., 171 the Court invoked the concepts of comity and federalism to justify abstention where state civil proceedings were pending. Despite existing subject matter jurisdiction in Huffman, the Court held that the district court "should not have entertained this action . . . unless [plaintiff] estab-

166. Id. at 475. However, according to Justice Rehnquist and the Chief Justice, a declaratory judgment might not aid the federal plaintiff if the state decides to prosecute in spite of an adverse declaratory judgment. Id. at 478-85 (concurring opinion).
168. Id. at 927.
lished that early intervention was justified under one of the exceptions recognized in Younger."

Exceptions to Younger, however, are hard to come by, as the Court recently demonstrated in another case involving a state civil proceeding. A state agency had filed an attachment complaint resulting in attachment of the federal plaintiffs' funds in a credit union without affording the plaintiffs a hearing. Claiming that the state attachment statute violated the principles established by recent Supreme Court cases, the plaintiffs sought declaratory and injunctive relief from a three-judge district court and were granted an injunction. On appeal it was urged that the case was an exception which the Younger opinion allowed in cases where a state statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Because the district court had merely found that "the challenged statute is patently and flagrantly violative of the constitution," the Younger exception was held not to apply. Is a patent and flagrant violation not enough?

Where will all of this abstention end? How far will the Court go in deciding that lower federal courts should not decide cases, even where Congress has accorded them jurisdiction over the subject matter of the suit? These are questions we cannot answer. Decisions not to decide seem to be the current vogue. One recent case does not meet any of the current abstention doctrines and, as far as we know, has yet to be branded with a doctrinal label. We discuss the case, not because it relates to the Younger doctrine, but rather as a further indication of what we consider to be an undesirable, indeed dangerous, trend toward abdication of the duty to decide cases falling within the subject matter jurisdiction of the federal courts.

There is a well known rule of law counseling courts to yield jurisdiction in an in rem action when another court has first acquired jurisdiction of the res. Now picture, if you will, a state court seizing control of the mighty Colorado River. You say it

172. 420 U.S. at 611.

The three abstention doctrines, Pullman, Burford, and Younger, are described by the Court at 814-17.
could never happen? We agree, and yet it is on this analogy that we are supposed to accept relinquishment of jurisdiction in the case of Colorado River Water Conservation District v. United States. As Justice Stewart pointed out in his dissenting opinion, the district court had jurisdiction, a related act of Congress did not diminish that jurisdiction, and none of the abstention doctrines justified dismissal of the case. Nevertheless, a majority of the Court upheld dismissal by the district court! Let the state courts decide. Never mind that Congress has chosen to give the litigants the alternative of choosing a federal forum.

Is it proper for the federal courts, having been chosen as a forum, to abstain from the exercise of jurisdiction granted by Congress for reasons manufactured by the Court? We think not. Examination of nonconstitutional concepts fails to support the trend away from the duty to decide. Furthermore, when the courts refuse to exercise jurisdiction granted by Congress, they violate an ancient doctrine that pervades our Constitution—the doctrine of separation of powers. For as the Supreme Court recognized 132 years ago, it is Congress which possesses the sole power to define and delimit the jurisdiction of the federal judiciary. The courts are not empowered to make such political decisions. But before proceeding to our analysis of such constitutional issues, a brief summary of this Part is in order.

Our examination of Congress's responses to Ex parte Young, together with the federal judiciary's reactions to Congress's responsive enactments, culminates in Younger, the most familiar manifestation of the federal courts' door-closing trend. This examination accordingly serves to demonstrate further the complexities of and interrelations among the myriad components of the increasingly pervasive problem of federal courts refusing to exercise their jurisdiction. Moreover, the circularity established by the congressional and judicial responses reaching their climax in Younger further heightens our sense of the holistic nature of the problem, as well as our recognition that the true crux of the

177. Id.
[The judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.
problem lies in the Court's (mis)perceptions of two constitutionally-embodied structural protections—federalism and separation of powers. For just as the earlier analysis of Stone and the nonconstitutional elements of abstention reduced those manifestations of the trend to issues of federalism, so too did the later analysis of Ex parte Young, the congressional responses to it, and the judiciary's reactions to those responses demonstrate that those aspects of the problem also reduce to issues of federalism and separation of powers. All roads indeed do lead back to the Constitution! And it is the purpose of Part III to show that the constitutional elements of federalism and separated powers, rather than justifying the federal courts' refusal to decide cases, in fact establish the duty of those courts to decide those cases where Congress has granted jurisdiction and created a cause of action. In order to depict the ground covered by Part II and to anticipate the conclusions of Part III, the flow diagram on the next page suggests one visual conceptualization of "the duty to decide."

III. THE CONSTITUTIONAL CORE OF THE PROBLEM

Having filtered out and discounted nonconstitutional contributors to the trend toward refusals to decide, the argument now can focus on the real crux of the problem—the Court's misuse of "Our Federalism" as an excuse for avoiding decisions, as well as its ignoring the doctrine of separated powers as a mandate to the federal judiciary to decide cases. The core of the problem accordingly becomes simplified. As Congress has been given the power to create jurisdiction in the federal courts, it simply is not within those courts' province to destroy that jurisdiction by refusing to decide cases, whatever nonjurisdictional nomenclature is used to describe the practice: such refusals violate the separation of powers doctrine. Were that the only thrust of the constitutional argument, however, one could hypothesize that the practice is nevertheless acceptable. For if federalism admonishes the federal courts to refuse to decide, while separated powers counsels against such refusals, then one could suggest that courts should be free to justifiably choose vindication of federalism over strict adherence to separated powers. But the thrust of the constitutional argument does not rest solely with separated powers, and so that hypothesis would be false. For as Justice Brennan aptly asserts: "Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty."179

179. Brennan, supra note 1, at 503.
Instead of resulting in the imaginary conflict which the hypothesis would suggest, an analysis of federalism leads to a result quite consistent with that flowing from the separation doctrine. Federalism is not a sword to be used against the individual citizen, a sword to guard the closed doors of federal courthouses, a sword to deprive the individual of his ability to present and vindicate his constitutional rights in a federal forum. No, indeed! Fed-
eralism, rather, should be conceptualized as a structural arrangement embodied in the Constitution as a protector of that citizen in addition to the structural safeguards afforded by fractionalized powers. In short, courts should use both federalism and separation of powers as protective facilitators of individual rights and liberties.

This dual protective scheme is one of the major themes running throughout Part III. It is a theme permeating the literature. Professor Dorsen of New York University observes that although federalism and the separation doctrine "both ... are customarily viewed as structural arrangements for the allocation of governmental authority, they are also deeply rooted in the need to enhance personal liberty." And Dean Strong, long known for his study of and the distinctions he draws between the "indirect" structural safeguards embodied in the Constitution and the more "direct" due process-type protections, recently noted that James Madison in fact articulated this kinship of federalism and separated powers:

[In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.]

In much of what follows his quote, Dean Strong decries the recent insensitivity to federalism’s original purpose "as a device of indirect limitation operating for the benefit of the individual."

Indeed, in the passage immediately following his quote from Madison, Dean Strong prompts recognition of a second and re-


183. Id. at 136; see also, e.g., id. at 130 ("disregarding the ... function [of the indirect limitations] as affording protection of the individual against governmental intrusion upon guaranteed private right"), 133 ("The clear concern is for the state as a polity, not for a division of governmental powers in the interest of indirect protection for individual rights"), 136 ("Absent is the traditional conception of federalism as dividing the spheres of national and state authority to effectuate the limitation of power that would thereby flow derivatively for the benefit of the individual. It is now a matter of the states’ defense of their own political integrity"), 137 ("the emphasis is on protection of the state, not the individual").
lated major theme which flows throughout Part III. This theme asserts the desirability of friction between state and national governments, rather than the necessity of avoiding such friction, as postulated by the door-closing decisions which eschew the duty to decide:

The manner in which “security arises” from these power distributions has never been more vividly explained than by Justice Louis Brandeis in his celebrated dissent in Myers v. United States. Referring to the doctrine of separation of powers he stressed that its incorporation into the basic structure of the Constitution of 1787 was “not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

... Both federalism and separation of powers achieve protection of the individual from Government Unlimited as a by-product of the friction induced by articulated power allocations in the structure of government.184

And Professor Dorsen echoes these thoughts: “Here we return to first principles—that separation of powers and federalism are, intrinsically, the instruments of neither efficiency nor effectiveness, but rather means to assure liberty.”185 Thus, like subservient gladiators in the arena, each seeking life-and-death approval from his masters, the state and federal governments should not avoid friction and conflict; rather, friction should be encouraged, so that the popular sovereign can judge intelligently the performances of each. The refusal of one gladiator, here the federal judiciary, to perform for its masters simply will not do.

Reference to the People as sovereign masters evokes yet a third and final related major theme permeating the ensuing analysis. That theme is the tremendous significance of constantly recognizing the People of the United States as the only sovereigns in this country.186 More than lip-service must be paid to this essential foundation of American Constitutionalism!

William Anderson, one scholar who pays proper deference to the concept of popular sovereignty, begins his analysis by explaining that:

184. Id. at 126-27 (emphasis added).
185. Dorsen, supra note 180, at 70.
186. See generally Abrahams & Snowden, supra note 29, especially at 22-31. For a detailed discussion of popular sovereignty as “the most novel and crucial American innovation in political thought,” see id. at 22, and as “the cornerstone for an adequate understanding of separation of powers in the American Constitution,” see id. at 29.
[t]he authority behind the Articles of Confederation was an agreement among the thirteen state legislatures, each acting for its own state . . . .

There is no mention of the people of the United States. The Articles did not depend upon or receive any popular sanction or approval. Instead it was the legislatures as the governing bodies of their respective states that authorized the whole procedure and approved the document as an agreement among themselves. 187

But whereas "[t]he Congress under the Articles was a mere superstructure, as Washington called it, built upon and dependent upon the thirteen state legislatures, without direct connection with the people," 188 it quickly became clear that a national government, were it to be created, would have to rest upon the populace. 189 Such recognition of the Constitution's basis in popular sovereignty, together with the popular election of the national legislature, worked a profound departure from the Article's dependence upon state legislatures, and returned the nation to the popular sovereignty theory articulated in the Declaration of Independence. Accordingly, the Articles of Confederation may be viewed as a straying from the mainstream of American constitutional thought, and the Constitution may be seen as a return to it. 190

Indeed, the importance of popular sovereignty is particularly acute in connection with the trend away from the federal courts' duty to decide, because not infrequently that trend is excused by

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188. Id. at 62.
189. Anderson identifies four provisions reflecting the popular basis of the Constitution as follows:

The preamble declared that "We, the People of the United States . . . do ordain and establish this Constitution for the United States of America." The word "for" seems to suggest a united people standing above the United States and making a contribution for them.

One house of Congress was to be apportioned among the states according to the numbers of their people . . . .

Congress was to have power to make laws directly for and applicable to the people . . . without the intervention of the states.

The Constitution was to be submitted to special conventions of the people in the several states, not to state legislatures, and was to go into effect when approved by these popular conventions in nine states, not in all thirteen as was required for the amendment of the articles.

Id. at 62-63.
190. Id. at 63-64.
references to “a proper respect for states' rights.” Such invocation of “states' rights” is a reflection of an erroneous conception of the states as sovereign. As such, it is patently make-weight: “In this conception it is the rights of the state per se that are considered; there is no accommodation for the original view of federalism as a device of indirect limitation operating for the benefit of the individual.” After all, how can political entities have “rights”? People have rights. States have duties, responsibilities, obligations, even powers and interests—but “rights”?

William Anderson’s writings once again clear up such muddled thinking by showing what happened to the rights of states per se:

One of the most notable clauses in the Articles of Confederation reads: “Article II. Each state retains its sovereignty, freedom, and independence”.

This seems to imply that the states were separately sovereign and independent before the Articles were adopted, that by their act of confederating they delegated to Congress whatever powers it was to have, and that all powers not expressly so delegated, plus the essence of sovereignty and independence, were retained by the states. This clearly put or left the states in the driver's seat.

The framers of the Constitution left out the word "sovereignty" entirely. It does not appear at all, to describe either the nation or the states. Since other words from the Articles were included in the Constitution, the presumption must be that the framers purposely and deliberately omitted the idea that the states were sovereign.

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192. Strong—Court vs. Constitution, supra note 182, at 136. See also Wechsler, supra note 31, at 877:

As the dissenting member of the three-judge district court panel in Dombrowski, Judge Wisdom delivered a statement on federalism which has yet to be surpassed:

"States' Rights" are mystical, emotion-laden words . . . . But the crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.

When the wrongful invasion comes from the State, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not new. It did not start with the School Segregation Cases. It is close to the heart of the American Federal Union. It is implicit in the replacement of the Articles of Confederation by the Constitution. It makes federalism workable.
[Article VI] illustrate[s] the completeness of the overturn in authority that took place when the Constitution replaced the Articles of Confederation. The former residual "sovereignty" of the states was eliminated, and in place of it the people of the United States established the Supremacy of the United States Constitution and of the proper laws and treaties of the United States government.\textsuperscript{193}

This incessant reminder of the importance of popular sovereignty as more than merely a rebuttal of "states rights" rubric combines with the recognition of the vital "kinship" of and pur-

pose linkage between federalism and separation of pow-
ers—components of a dual constitutional scheme for protecting individual liberties, encouraging rather than deterring federal-

state tensions and friction—to pave the way for more detailed considerations of the respective applications of federalism and separated powers to the trend toward federal courts' refusals to decide cases.

\subsection*{A. Federalism}

The three themes which will continue to hover above Part III should prompt skepticism concerning the propriety of such door-closing doctrines as abstention. To use federalism as a basis for such doctrines "involve[s] a tragic abdication by the federal courts of their responsibilities to protect individuals from uncon-

stitutional state action."\textsuperscript{194} Indeed, continuation or expansion of this tragic trend "would emasculate an important congressional grant of jurisdiction to the lower federal courts."\textsuperscript{195} This presenta-
tion accordingly seeks to establish that "Our Federalism," rather than evoking a "sensitivity to the legitimate interests of both State and National Governments" which in turn requires abstention,\textsuperscript{196} in fact counsels against such refusals to decide cases by the federal courts.

The development of federalism concepts has been chronicled so well\textsuperscript{197} that only those aspects of that evolution relevant to the duty to decide need to be discussed here. The analysis will focus

\begin{itemize}
\item \textsuperscript{193} Anderson, \textit{ supra} note 187, at 71-72, 75 (emphasis added).
\item \textsuperscript{194} Zeigler, \textit{ supra} note 31, at 288.
\item \textsuperscript{195} Bartels, \textit{ supra} note 31, at 30.
\item \textsuperscript{196} Younger v. Harris, 401 U.S. at 44.
\item \textsuperscript{197} See generally Anderson, \textit{ supra} note 187; Diamond, \textit{ supra} note 67; Diamond, \textit{The Federalist's View of Federalism}, in \textit{ESSAYS IN FEDERALISM} 21 (1961); Elazar, \textit{Federalism}, 5 INT'L ENCYC. SOC. SCI. 353 (1968); S. MOGI, \textit{THE PROBLEM OF FEDERALISM} (1931); Roche, \textit{Distribution of Powers}, 3 INT'L ENCYC. SOC. SCI. 300 (1968).
\end{itemize}
on three successive stages in the development of American federalism to demonstrate that at no stage has the doctrine compelled refusals to decide questions of constitutional liberties: the development during the Constitutional Convention and at the time of the Constitution’s ratification, centering on the victory of federal (national) supremacy; the development at the time of and since the adoption of the eleventh amendment until the Reconstruction period; and the development since the adoption of the fourteenth amendment.

America’s pre-eleventh amendment experience with federalism is detailed carefully in the magnificent writings of Professor Martin Diamond. The following discussion, providing background essential to any study of the subject, draws heavily from his work. As Professor Diamond explains, today the forms of government are commonly identified as confederal, federal, and national or unitary, with confederations and nations defining the extremes. In confederations the associated states retain all sovereign power, and the central body depends entirely on their will; in nations the central entity is sovereign, and the local units depend entirely on its will. Federal systems, exemplified by the United States, fall between the two extremes by modifying and combining the characteristics of the two other forms.198

Yet despite this standard delineation, Professor Diamond laboriously explains that the Framers, and their contemporary exposition found in The Federalist, did not conceptualize the forms of government as we do today. To them, the three-fold distinction was unknown; for them, only two possible modes existed: confederal or federal, on the one hand, and unitary or national, on the other. “In short, they had a very different under-

198. Diamond, The Federalist’s View of Federalism, supra note 197, at 22. Professor Diamond, consistent with the writings upon which he expounds, occasionally refers to sovereignty in America as being found in both the national and state governments. See, e.g., id. at 22, 25, 48. To the extent that these references are inconsistent with this article’s stressing of exclusive popular sovereignty, see notes 186-93 and accompanying text supra, the authors express their disagreement with any aspect of any view finding any scintilla of sovereignty outside of the People. However, the inconsistency probably is more apparent than real. It is true that the Framers at times referred to American governments as “sovereign,” but given their deliberate omission of that concept with reference to governmental bodies in the Constitution together with their strong assertions of popular sovereignty, see text accompanying note 193 supra, it seems more reasonable to conclude that, whenever they did refer to states or the national government as “sovereign,” the Framers simply meant to use that term as a label for those powers, commonly associated with sovereignty, which the sovereign People had delegated to those governments. See text accompanying note 211 infra. After all, these were young revolutionaries seeking and sometimes misusing old words to describe new ideas—ideas never before found in political thought! See note 186 supra.
standing than we do of . . . federalism . . . .” Accordingly, The Federalist “emphatically does not regard the Constitution as establishing a typically federal, perhaps not even a primarily federal system of government.” Rather, The Federalist treats the new government as significantly departing from a truly federal mode by combining federal with national features. In essence, what today is deemed a unique and separate principle was in The Federalist regarded as simply a compound.

The significance of this analysis should affect our present interpretations of that revered document. Professor Diamond in fact refines his analysis further, and in so doing points in the proper direction:

How The Federalist speaks of federalism must be understood in the light of its task and its audience. It sought to influence the ratification of the Constitution. It chose to do so by means of a careful commentary on the Constitution which would emphasize the error or irrelevance of the criticisms being made against it. Foremost among those criticisms was the charge that the Constitution had departed grievously from the true federal form, indeed was “calculated ultimately to make the states one consolidated government.” The author of that phrase has come to be identified as one of the leading anti-federalists. But it must be remembered that in the article quoted from he signed himself “Letters of a Federal Farmer.” The men we have come to call the anti-federalists regarded themselves as the true federalists. And we must remember that the choice of The Federalist as the title of the essays was regarded by many as a shrewd and unwarranted usurpation of that term. As the issue was fought in 1787-89, The Federalist (and the Constitution it defended) was attacked as covertly consolidationist [sic], while the opponents of the Constitution fought as the true defenders of the federal principle. Everything that The Federalist says about the federal aspects of the Constitution must be understood, therefore, in the light of its great necessity: the demonstration that the Constitution should not be rejected on the grounds of inadequate regard for the federal principle.

. . . Indeed it could be argued that the modern understanding of federalism results largely from the effort of The Federalist to allay the fears of the “true federalists.” However well The

200. Id. at 22.
201. Id. at 22-23.
Federalist succeeded with its contemporaries, it succeeded surpassingly with modern political science.202

It should be clear by now that the authors of The Federalist were seeking to support their contraction of the states' roles, rather than preserve the niceties of what then was called federalism. Indeed, in several carefully documented passages, Professor Diamond explains the arguments used by Alexander Hamilton to address Montesquieu's oft-intoned view that republics must be small, a view used to support the position of those who would retain the states as the loci of power. Hamilton argued that the orbit within which popular systems may revolve could be enlarged safely, so long as the basic attributes of confedralism are preserved:

A distinction, more subtle than accurate, has been raised between a confederacy and a consolidation of the States . . . . The definition of a confederate republic seems simply to be, 'an assemblage of societies,' or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, . . . fully corresponds, in every rational import of the terms, with the idea of a federal government.203

Professor Diamond's commentary on this excerpt from Federalist 9 notes that those who employed the distinction which Hamilton attacked, and who insisted that a confederacy must possess those features which Hamilton denied were essential, simply were employing the then common understanding of federalism. That view is supported by reference to the dictionaries employed by Hamilton and Madison as well as their audience:

Dr. Johnson makes clear that the then common understanding of federalism involved no distinction between confederation and federalism. The Federalist similarly makes no such distinction. This is evident in the long passage from Hamilton and is true of the entire work; federal and confederal are used as completely interchangeable terms. The Federalist agrees fully with the then common usage at least in seeing but one kind of federal mode.204

202. Id. at 23-24.
203. Id. at 24-25.
204. Id. at 26.
This historical background, together with the earlier quoted expositions of William Anderson,205 elucidate several points relevant to the Court's misuse of "Our Federalism" to compel refusals to decide. The anti-federalists were the true federalists; the Federalists actually were anti-federalists in the sense that they sought to depart from federalism, then the equivalent of confederalism, by introducing strongly national features into the Constitution. These nationalists even used the title of The Federalist as a calculated misnomer to mask the degree to which they sought to deviate from the truly federalistic scheme of the Articles of Confederation.

The writings of Anderson and especially Diamond continue by describing in painstaking detail the eventual victory of the Federalists (nationalists). The very political, agrarian, and monetary injustices which had demonstrated the weaknesses of the Articles of Confederation, which had prompted the calling of the Constitutional Convention, and which had even led to Shays' armed rebellion206 also had provided the nationalists with their most effective weapon. Pointing to these injustices, the nationalists overcame Montesquieu's view that republics must be small, and having rebutted that view, they then were able to argue effectively that a strong national government was necessary "for the security of private rights, and the steady dispensation of Justice":207

Tyranny is hard for the people to resist in a small state, easier to resist in a larger state.

. . . Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized! 208

Consideration of this passage is particularly appropriate with regard to the trend away from the federal courts' duty to decide.

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205. See text accompanying notes 187-89, 193 supra.
207. See note 67 supra.
For when the states exceed their bounds, the People cannot throw themselves onto the national side of the scale to use the federal government as an instrument of redress if the federal courts refuse to be so used. In this light, doctrines such as abstention, rather than being required by "Our Federalism," instead violate the very purpose of that protection as envisioned by the Framers!

As further evidence of just how strong a national government was intended, Professor Diamond describes how Alexander Hamilton and James Madison contemplated that, given the advantages which would flow from the central government, popular loyalty would turn from the states to it.²⁰⁹ And as if all of the foregoing were not enough, the Framers built one final articulation of the nationalists' victory into the express language of the Constitution—the supremacy clause!²¹⁰ Nothing in the Constitution or its history better manifests that victory than the concept of national supremacy.²¹¹ To paraphrase Professor Diamond, so

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²⁰⁹. Id. at 46-51.
²¹⁰. U.S. Const. art. VI, cl. 2.
²¹¹. Anderson, supra note 187, at 769:

To maintain the supremacy of the national government over the states in any conflict of authority, the original framers took these steps:

They included in the Constitution the "supreme law of the land" clause already quoted, which made the Constitution, laws, and treaties of the United States binding on the judges in all states.

They required all state officers and judges to take an oath to support the United States Constitution, including the supremacy clause.

They provided for a national guarantee of a republican form of government in each state, which implies the right of the national government to intervene in state governments.

And they permitted Congress to override state laws for the election of members of Congress.

In addition, judicial review of state legislative acts in the federal courts was evidently expected to help keep the states in line, while the provisions against the states' engaging in war, or making treaties or compacts without the consent of Congress, and other similar restrictions, were clearly designed to keep the states within a range of primarily internal functions.

In addition to the provisions of the Constitution, there are evidences of a general intention to subordinate the states to the national government in Washington's letter transmitting the Constitution to Congress, in the writings of the friends and framers of the Constitution, and in the angry protests of the Anti-Federalists who saw what was coming.

There is a little confusion in the evidence, because even Hamilton and Madison spoke of the "sovereignty" of the states at the same time that they were stressing state subordination (see The Federalist, no. 31). Apparently they used the term "sovereignty" rather loosely, sometimes to refer to the position of the states under the Articles, and sometimes to mean no more than their autonomy or right to initiate and carry on their own governmental functions under the Constitution.

See also text accompanying note 193 supra.
far had the “true” federalists, those originally opposed to the new Constitution, been driven that they agreed to a central government and agreed to its supremacy.\textsuperscript{212}

The relevance of the battle between the “true” federalists and the nationalist Federalists, a battle which culminated in the latter’s victory as embodied in the supremacy clause, has not gone unnoticed by opponents to the trend away from the duty to decide. Justice Brennan, in the habeas corpus context of his dissent in \textit{Stone v. Powell},\textsuperscript{213} notes:

Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims . . . .

. . . Insofar as this jurisdiction enables federal courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law.\textsuperscript{214}

Indeed, not a scrap of evidence in pre-eleventh amendment history supports the mindless deference to the states exhibited by the federal courts’ unfortunate door-closing decisions. Far from requiring such deference, our federalism—the People’s Federalism—mandates that the federal courts exercise their jurisdiction and fulfill their duty to decide. In no other way, to use once again Hamilton’s metaphor,\textsuperscript{215} can the People throw themselves onto the scale to outbalance state usurpations of their rights, for when the federal courts jump off the scales, the People cannot even climb aboard. In no other way can meaning be attributed to the supremacy clause.

Having fared terribly with respect to the first stage of American federalism’s development, perhaps the door-closers can rely more profitably on the subsequent adoption of the eleventh amendment. It certainly cannot be gainsaid that this bulwark of “states’ rights,” hastily drafted to reverse the Supreme Court’s decision in \textit{Chisolm v. Georgia},\textsuperscript{216} throws a wrench into the federalistic works. \textit{Chisolm} had held that the federal courts had jurisdiction over a suit by the executor of a South Carolina citizen.

\textsuperscript{212} Diamond, \textit{What the Framers Meant by Federalism}, supra note 67, at 40.

\textsuperscript{213} 428 U.S. 465 (1976).


\textsuperscript{215} See text accompanying note 208 supra.

\textsuperscript{216} 2 U.S. (2 Dall.) 419 (1793).
against the State of Georgia for war debts incurred by the state in 1777.\textsuperscript{217} The youthful states reacted quickly to protect their shaky treasuries from foreign creditors audacious enough to seek payment of state debts, and the eleventh amendment resulted.\textsuperscript{218}

Stewart Baker’s recent article concerning the amendment and its relation to federalism\textsuperscript{219} depicts a portion of the Constitution whose history, interpretation, and application are so rife with uncertainty, ambiguity, and double talk that he hypothesizes its function to be simply to force courts to “balance federal and state interests in an appropriate fashion.”\textsuperscript{220} His fine work will not be reproduced here; it is an accurate and painstaking treatment of an admittedly-muddled subject. However, where prescription diverges from scholarly description, Mr. Baker openly advocates an explicit balancing approach. With this approach the authors take issue.

Superficially, the authors of course disagree with Mr. Baker’s brief, though not critical, references to abstention, particularly Younger nonintervention, as reflective of the courts’ not inappropriate balancing of state and federal interests.\textsuperscript{221} More fundamentally, however, they disagree with Mr. Baker’s conception of sovereignty in America, a concept permeating his article. On the one hand, he quite accurately states, in the context of his perceptive criticism of the use of the sovereign immunity doctrine to help interpret the eleventh amendment, that “[c]ertainly the transplanted [sovereign immunity] theory made little sense in a democracy where the people are sovereign.”\textsuperscript{222} But with that glancing nod to the fundamental pretext of American constitution- alism,\textsuperscript{223} Mr. Baker proceeds, on the other hand, to refer constantly to the states as sovereign and to treat them analytically as such. For example, he distinguishes South Dakota v. North

\textsuperscript{217} See Baker, supra note 148, at 141-42.

\textsuperscript{218} See generally id. at 142-43. The amendment reads: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Note that by its literal terms, the amendment does not preclude a suit by a citizen of State X against State X; nevertheless, in Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court held that the amendment did bar such suits. That decision, rendered well after the ratification of the fourteenth amendment, will be discussed infra.

\textsuperscript{219} See Baker, supra note 148.

\textsuperscript{220} Id. at 140.

\textsuperscript{221} See id. at 174.

\textsuperscript{222} Id. at 154.

\textsuperscript{223} See notes 186-93 and accompanying text supra.
From *Hans v. Louisiana* by relying on a specious and inconsistent conceptualization of sovereignty. In the latter case the Court held that the eleventh amendment precluded a suit by a citizen against his own state without the state's consent, whereas fourteen years later the Court held in *South Dakota* that the amendment did not prevent a suit by one state against another. Given all the various reasons for the differing results, ironically Mr. Baker chose to differentiate between the two decisions on the basis of sovereignty: "the result was different when the problem of competing sovereignties was raised" in *South Dakota*. In other words, to him the suit between two states involved two battling sovereigns, while *Hans* involved a contest between a mere citizen and his sovereign state: a distorted perception—especially in view of his earlier recognition of popular sovereignty. Would it not have been more consistent—and more accurate—to view *South Dakota* as a dispute between two governmental servants and *Hans* as a disagreement between one governmental servant and one of the sovereign People?

Recognition of Mr. Baker's misconception of sovereignty, an accurate view of which is so crucial to any understanding of federalism, lays the foundation for a critique of his central thesis that eleventh amendment issues ought to be resolved by resort to an explicit balancing model. Initially one might ask: if the determinant is a balance between state and federal interests, then where and when do the People's interests come into play? How, in this scheme, can the People throw themselves onto the scales as the Framers intended? Mr. Baker's proposal admittedly contemplates the federal judiciary as the governmental body performing the balancing in an independent fashion, so that refusals to decide are not necessarily dictated by his thesis; moreover, he further anticipates that the actual balancing would involve placing the "thumb on the scales" such that "when the national government has a substantial interest in federal jurisdiction over

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224. 192 U.S. 286 (1904).
227. See generally Abrahams & Snowden, supra note 29, at Part II.A.
228. At least he does not refer to "states' rights." See notes 201-03 and accompanying text supra.
229. See text accompanying note 208 supra.
231. See id. at 175-80.
232. Id. at 177.
the states, that interest should normally prevail." But how would this mode of analysis apply in the context of the duty to decide?

The two-fold answer would seem to mandate federal court decisions in all cases. These decisions may not always be favorable to the citizen, but nevertheless they would be decisions—not refusals to decide! For if the citizen is attacking a state statute as unconstitutional on its face, then surely national interests (plus the individual's interest) would predominate: the degree of inconvenience visited upon the state by what usually would be a summary judgment proceeding would be minimal when compared to the burdens on the individual and his federal interests were a decision refused. On the other hand, if the citizen is attacking a state statute as it applies to him or her, then still the national-plus-individual interests would seem to predominate. True, "as applied" attacks involve more protracted proceedings than do "facial" attacks, but the results of the former are less pervasive than the latter. Whereas "facial" attacks can result in ruling a state statute unconstitutional for all purposes, "as applied" attacks can result in rulings adverse to the states only in the particular contexts of the suits in which they arise. Neither stare decisis nor res judicata would prevent the states from preserving their interests in other contexts. Accordingly, once again the state interests should not be deemed to overpower the federal-plus-individual interests. In short, Mr. Baker's balancing approach retains little relevance when the question is whether the federal courts ought to decide a case.

Additionally, there are historical reasons why the law after the adoption of the eleventh amendment but prior to the fourteenth does not support the trend away from the duty to decide. The eleventh amendment, coming as it did after the ratification of the Constitution, with its inclusion of the supremacy clause and the concomitant victory of the (nationalist) Federalists might well have been viewed as a modification of federal supremacy in the context of the duty to decide if the issue had arisen

233. Id. at 180. Actually, one might question whether this system involves balancing at all! Is it not more in the nature of a general rule (the antithesis of balancing) in favor of federal court action, with the courts being receptive to the creation of more or less ad hoc exceptions when the federal interests are less than substantial?

234. "Facial" attacks generally require no great expenditure of time or energy in the development of a factual record.

235. See notes 51-69 and accompanying text supra. Reread especially the discussion of "adequacy of legal remedy" and "irreparable injury."

236. See notes 198-212 and accompanying text supra.
before the fourteenth amendment’s adoption. But the issue never arose during that period. The reasons were historical, as even Mr. Baker recognizes.\textsuperscript{237} Simply stated, during this period the lower federal courts lacked jurisdiction over those cases which today typically are subject to the abstention doctrine.\textsuperscript{238} Thus, even though the concept of nonintervention would have found its most fertile and receptive ground after the eleventh amendment but before the fourteenth, the doctrine was never planted then because Congress had fenced off the field.

Indeed, this lack of opportunity stemmed from political rather than constitutional sources. The Federalists, those nationalists who had won so soundly during the constitutional debates,\textsuperscript{239} had succeeded in structuring the government, but soon lost the political power to implement it, as Professor Wechsler further explicates:

> Until 1875 Congress had been very reluctant to grant jurisdiction to the federal courts over cases “arising under” the Constitution, laws and treaties of the United States. When the Federalists lost the 1800 presidential election to Jefferson, they attempted to mitigate their defeat by packing the federal judiciary while simultaneously extending its jurisdiction. This they did by enacting the Midnight Judges Act of 1801 . . . . The Court packing, of course, led to Marbury v. Madison . . . . In granting federal question jurisdiction to the federal judiciary in § 11 of the Act . . . Congress lifted the statutory language

\textsuperscript{237} Cf. Baker, supra note 148, at 152: “The question presented most directly by the text of the [eleventh] amendment is whether a state can be sued in federal court by its own citizens. The answer was long in coming, perhaps because the issue seldom arose before federal question jurisdiction was granted to the lower federal courts.”

\textsuperscript{238} Wechsler, supra note 31, at 744-45:

> It is . . . surprising that it took almost a hundred years after the first Congress created the inferior federal courts for the Supreme Court to consider the wisdom of permitting federal courts to enjoin state criminal prosecutions. The most plausible explanation for this delay is that lower federal courts were without jurisdiction in such cases. A person threatened with prosecution by state officials was most likely a citizen of the same state as the local law enforcement officers. Thus, diversity jurisdiction did not exist. Moreover, there was no federal question jurisdiction because Congress did not choose to grant it to the federal courts until 1875. This is probably why, in the first three-quarters of the nineteenth century, the Supreme Court did not question the propriety of federal trial court invalidation of state criminal law. The short answer is that the restrictive federal court jurisdiction in that era provided little opportunity for such action.

(Footnotes deleted.)

\textsuperscript{239} See notes 198-212 and accompanying text supra.
squarely from Article III of the Constitution. The Act was short-lived; the Jeffersonians repealed it the following year.240

Accordingly, just as there was no evidence to buttress the trend away from the duty to decide in the pre-eleventh amendment era, so too is there scant support for refusals to decide during the period after the eleventh amendment but before the fourteenth. The eleventh amendment’s confused history, leading perhaps to a balancing analogue prior to the fourteenth’s advent, does not support the trend, nor does the political history, demonstrating as it does the absence of any opportunity for the development of abstention-like notions. In fact, just as pre-eleventh amendment history instead led to a recognition of the duty to decide, so also does the duty find strong support during the subsequent period. The federal courts, jealous of what jurisdiction they did possess, were not about to give it away by refusing to decide cases. Witness Chief Justice John Marshall’s emphatic statement made in the 1821 case of Cohens v. Virginia:241

When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not.

Finally, then, having stumbled over pre-fourteenth amendment analysis of federalism, the door-closers arrive at the Reconstruction and later years. Their stumbling becomes a fall, one candidly offering them some glimmers of hope here and there prior to their refusals-to-decide pronouncements, but a fall nevertheless. For whatever support they can gather from cases arising after the fourteenth amendment’s adoption is quickly overshadowed by a careful dissection of those cases and a study of other contemporaneous events. Indeed, that dissection-and-study already has been expressed in Professor Burton Wechsler’s compe-

240. Wechsler, supra note 31, at 745 n.12 (citations omitted).
241. 19 U.S. (6 Wheat.) 264, 382-83 (1821). See also the Cohens quote which prefaces this article. In Cohens the Court held that the eleventh amendment does not bar appeals to the Supreme Court by state criminal defendants seeking to defend on the basis of federal law; the state had contended that the appeal constituted a suit “prosecuted” against it and therefore was barred by the eleventh. See Baker, supra note 148, at 148.
tent and thoroughly detailed analysis of the precedential basis for Younger.\textsuperscript{242} Recall his well-documented thesis that Younger and its kindred spirits in fact are not supported by the very authorities and (mis)conceptions upon which they rely.\textsuperscript{243} Only the high points need be recounted here.

Initially one must recognize the profound changes worked by the Reconstruction Congress:

Out of the agony of the Civil War were wrenched the thirteenth, fourteenth and fifteenth amendments to the Constitution, but only after congressional debates which in passion, rhetoric and sheer volume of words dwarfed anything heard in the halls of Congress before or since. In seven civil rights acts between 1866 and 1875, Congress challenged the nation to undo the savagery it had visited upon its black population ever since 1619, when the first slave ship set anchor off American shores. In 1871, Congress created a cause of action against state public officials who violate constitutional rights and provided the federal courts with jurisdiction to hear such cases. Finally, in 1875, Congress accomplished what the Federalists, for entirely different reasons, had endeavored to do as early as 1801—to invest federal trial courts with extensive jurisdiction to hear a sweeping category of cases arising under the Constitution and laws of the nation.

The war, the amendments, the Civil Rights Acts and the vast grants of jurisdiction to the federal courts all had one common historical denominator—a metamorphosis in the relationship between the federal government and the states. A vital component of that metamorphosis was the enormously increased role of the federal judiciary. In that respect, the years between 1860 and 1875 constituted the second American revolution—a revolution in federalism.\textsuperscript{244}

Little could be added to this forceful description. Still, rather than viewing the years from 1860-75 as a "metamorphosis" and "second American revolution . . . in federalism," allow the authors to suggest that those years instead should be seen as a return to original principles of federalism. The eleventh amendment had introduced a discordant note of uncertainty in federal-state relations, an uncertainty potentially threatening the hard-fought victory of the nationalistic Federalists. The supremacy clause and its philosophy had been briefly eclipsed by the elev-

\textsuperscript{242} See generally Wechsler, supra note 31.
\textsuperscript{243} See generally id.; text accompanying notes 53-55 supra.
\textsuperscript{244} Wechsler, supra note 31, at 750-52 (footnotes deleted).
enth amendment, and the darkness had been deepened by the political events which deprived the federal courts of federal question jurisdiction. But now, in the wake of the Civil War, Congress recognized the dire social, political, and indeed constitutional necessity of reasserting the original conception of national supremacy. In this sense, the fourteenth amendment, so often viewed narrowly in terms of due process and equal protection, can be viewed additionally as a structural provision which reestablished the structural protections of "federalism" as they originally had been envisioned by the Framers!

Consider the Civil Rights Act of 1871 and Professor Wechsler's treatment of it:

That Act later became the keystone of constitutional litigation against state and local public officials. Its purpose was to enforce the fourteenth amendment. Referring to state officials, Representative Perry observed: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; . . . grand and petit juries act as if they might be accomplices."

Congress did not entrust enforcement of this Act solely to the state judiciary but simultaneously granted jurisdiction to federal courts for that purpose. This was the highest accolade. It reflected the ultimate interconnection between the Civil Rights Act and federal judicial primacy, a relationship skillfully capsuled by Justice Douglas:

The choice made in the Civil Rights [Act] of . . . 1871 . . . to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Here has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

Does this explication of the motivation behind and the importance of the Act not sound reminiscent of the history of the nationalists' victory at the constitutional and ratification conventions? Recall James Madison's assertion of the necessity for a strong national government "for the security of private rights, and the steady dispensation of Justice." Recall also that

245. See notes 236-40 and accompanying text supra.
247. See note 67 supra.
the supremacy clause—the emblem of the nationalists’ victory—was born of political injustices visited upon the citizens of the new country by the putative states so loosely bound together by the Articles of Confederation. Surely the “metamorphosis” to which Professor Wechsler refers returned the organism to its original form.

Given the return to prominence which federal supremacy enjoyed as a result of the fourteenth amendment, it is somewhat surprising that the eleventh amendment’s shield of the states not only remained undented for some years, but indeed was at times strengthened by decisions such as *Hans v. Louisiana*. At a time when the nation’s Civil War wounds were still relatively fresh, the Court should have recognized the modifications which the fourteenth amendment had worked; instead, it went beyond the literal wording of the eleventh amendment in *Hans* to extend its prohibition to suits brought by a citizen against his or her own state. That expansion of the terms of the amendment perhaps would have been defensible prior to the fourteenth amendment, but given the 1890 date of *Hans*, the result was absurd. Why increase the ambit of a provision so clearly modified by a later amendment? How could a citizen effectively redress unlawful state action without resort to suit against his or her state?

Clearly “an expansive reading of the eleventh amendment would debilitate the fourteenth.” The Court soon was forced to recognize this and therefore to reassess its view of the eleventh amendment. Witness Justice Shira’s 1903 opinion in *Prout v. Starr*:

*It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, . . . or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment...*
Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the statutory provisions of the Fourteenth Amendment have been disregarded by state enactment.\footnote{252}

The final correction came, of course, in the landmark case of Ex parte Young.\footnote{253} Both reviled for its sophistry and hailed for its necessity, the case "probably did more to shape the next generation of constitutional law than [even] Lochner \textit{v. New York}."\footnote{254} Simply stated, the Young Court held that the eleventh amendment does not bar suits against state officials to enjoin the enforcement of unconstitutional state laws, because such officers, when attempting to effectuate such laws, are stripped of their character as representatives of the state.\footnote{255} Professor Burton Wechsler eloquently captures the ambivalence thus created by Young:

The ratio decidendi in \textit{Young} is hoist by its own petard. For if an unconstitutional law strips a public official of his garb under the eleventh amendment, how can the enforcement of such a law constitute state action under the fourteenth? This paradox has never been resolved. Nor can it be . . . .

With all its tortured reasoning, \textit{Ex parte Young} is one of the pillars of the American legal system . . . . \textit{[If Ex Parte Young had been decided otherwise, freedom itself would have suffered a terrible blow, for federal courts are the "primary and dominant instruments for vindicating rights given by the Constitution."} As Justice Brennan has reminded us:

\textit{Ex parte Young} was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution . . . .

Professor David Currie agrees:

Behind the outlandish conceptual justification concocted to support [the] holding [in \textit{Young}] lay the not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity; therefore the philosophy of immunity had to yield.\footnote{256}

\footnote{252. \textit{Id.} at 543 (emphasis added).}
\footnote{253. 209 U.S. 123 (1908).}
\footnote{254. \textit{Baker, supra} note 148, at 157.}
\footnote{255. \textit{See} notes 84-86 and accompanying text \textit{supra}, for a more detailed discussion of the facts and holding of the case.}
\footnote{256. \textit{Wechsler, supra} note 31, at 764 (footnotes omitted, emphasis added). Professor Wechsler also states: "Allusions to \textit{Ex parte Young} are invariably directed to the eleventh
Perhaps the most succinct statement that can be made about Young is: given the post-fourteenth amendment absurdity of Hans, Young was essential for the preservation of the fourteenth amendment, the supremacy clause, and indeed the Framers' conception of federalism.

So still the history of federalism, now in its post-fourteenth amendment stage of development, reveals no support for the door-closers. Unfortunately, however, that did not stop them. This century began with Young's reaffirmation of the principle of national supremacy as necessary to popular sovereignty—a reaffirmation of the duty to decide. But seventy-five years later, in cases epitomized by Younger and Stone,257 the Supreme Court increasingly shirks that duty.258

This trend is all the more shocking in view of the present Court's apparent recognition that the fourteenth amendment effected a partial repeal of the eleventh. In Fitzpatrick v. Bitzer,259 for example, the Court held that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."260 The facts and issue which provoked this holding were relatively simple. Present and retired male employees of the State of Connecticut sued for violations of Title VII of the Civil Rights Act of 1964, alleging sex discrimination in the state's statutory retirement benefit plan; they requested an award of retroactive monetary benefits in addition to prospective injunctive relief and attorney's fees. The lower federal courts allowed the grant of the prospective remedy, but denied the award of past benefits, holding that such an award would constitute the recovery of money damages against the state in contravention of the eleventh amendment. The Supreme Court reversed, reasoning that the eleventh amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"261 and that "[w]hen Congress acts pursuant to §

amendment as if this were its sole theme. Discussion of its other motif, state prosecutions and federal courts, is often mired in a footnote or, more frequently, omitted altogether." Id. at 765. Hopefully, the authors of the present article do not fit his description; recall the discussion of Young's treatment of equity issues in Part II supra.

257. See Part II supra.

258. See notes 112-47 and accompanying text supra, for a discussion of precedential developments after Young but before Younger.


260. Id. at 456.

261. Id.
5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.\textsuperscript{262}

The Fitzpatrick case, based on such reasoning, was correctly decided. But just as the spirit of Hans was demonstrably inconsistent with the spirit of Cohens, its predecessor, and Young, its successor—so, too, is the spirit of Fitzpatrick manifestly inconsistent with the spirit of Younger and its progeny. Fitzpatrick is not simply a case which balances the fourteenth amendment against the eleventh, as Stewart Baker perhaps would suggest;\textsuperscript{263} rather, it is a clear pronouncement that the former modifies the latter. And yet, as Mr. Baker aptly observes, "the hard question—what laws can be justified as 'enforcement' measures—went unanswered."\textsuperscript{264} This question is particularly important in light of the judicial creation-by-interpretation of constitutional rights, as manifested most vividly in the return to prominence of the "substantive due process" concept.\textsuperscript{265} It is one thing to say, as in Fitzpatrick, that Congress, under section 5 of the fourteenth amendment, may create rather specific causes of action against the states which may be vindicated pursuant to the jurisdictional provisions of sections 1343 or 1331 of the Judicial Code. But can the federal courts implement judicially-created rights by resorting to the same jurisdictional provisions and then pointing to the general authorization of civil rights causes of action in section 1983? Our affirmative answer is supported by two-fold reasoning.

First, as Mr. Baker observes, the question is distilled to simple form, rather easily resolved:

Because the jurisdiction of the lower federal courts is entirely within Congress's control, damages cannot be awarded against a state in the absence of some statute authorizing them—however vague or general the authorization may be. The problem, then, is simply put: How clear must the congressional statement be? . . . . [S]ome national interests have become the preserve of the judiciary. The Federal courts needed only a broad grant of jurisdiction to create these rights, and the same

\textsuperscript{262} Id.
\textsuperscript{263} Baker, supra note 148, at 171-72, 187-88.
\textsuperscript{264} Id. at 171.
\textsuperscript{265} See, e.g., Roe v. Wade, 410 U.S. 113 (1973).
broad grant should be "clear" enough to permit the federal courts to enforce them. Fitzpatrick v. Bitzer opens another route to independent judicial restrictions on the states' immunity. That case held that passage of the fourteenth amendment limited the scope of the eleventh amendment, so that Congress' enforcement power under section five of the fourteenth amendment was undiminished by the states' immunity from suit in federal court. But by far the more important aspect of the fourteenth amendment is the content given to it by the judiciary. In addition to every important provision of the Bill of Rights, the broad guarantees of "due process" and "equal protection of the laws" have been held to include a complex grouping of judge-made doctrines. A broad reading of Fitzpatrick would permit the federal courts to develop these doctrines free from the constraints of the eleventh amendment.266

A distinct reason for concluding that section 1983 is broad enough to grant the needed powers to the federal courts uses (unnecessarily) the first reason as a springboard. Recall from the Introduction to this article that several congressmen have taken the cue provided by Fitzpatrick to introduce legislation which would, inter alia, make states amenable to suit directly under section 1983; at the same time, the bill would abolish legislatively the abstention doctrine in such cases.267 As those congressmen quite clearly view their proposal as a corrective reassertion of the original conceptions behind the fourteenth amendment as enforced by the Civil Rights Act of 1871,268 surely there should be no objection to the courts reading section 1983 as presently written to be an authorization broad enough to allow them to enforce even judicially-created rights as contemplated by the proposed rearticulation. Perhaps congressional correction of the trend away from the duty to decide is desirable—but is it necessary?269 We think not. We think, rather that the courts themselves are quite capable of reversing their own unwarranted trend toward refusals to decide.

Accordingly, as our study of federalism—pre-eleventh amendment, post-eleventh but pre-fourteenth, and post-

267. See notes 1-29 and accompanying text supra.
269. The situation as described here would be somewhat analogous to the arguments of those who view the equal rights amendment as a measure necessitated only by the Court's refusal to read the equal protection clause of the fourteenth amendment as embodying the concepts of the ERA. According to these arguments, the amendment is desirable but not really necessary.
fourteenth amendment style—has demonstrated, there is no valid support for the Court’s use of “Our Federalism” as a basis for refusing to decide cases brought in federal forums by citizens seeking to vindicate constitutional liberties infringed by the states. Indeed, rather than exhibiting support for the door-closers’ trend, a careful analysis of federalism manifests the continued vitality of that doctrine as a structural protection for those very individual citizens who comprise the popular sovereign. And that vitality, at every stage of federalism’s development, has counselled not against the federal courts’ exercise of their jurisdiction, but instead has dictated the duty of those courts to decide cases brought by one of their sovereign masters—cases in which the Congress has provided a cause of action as well as granted jurisdiction.

This invocation of Congress’s crucial role in the continued maintenance of the original and, at least after the adoption of the fourteenth amendment, still-potent conception of federalism implicates yet another structural argument against the trend toward refusals to decide. For the invocation reminds us that it is not only a consideration of federalism’s assignment of roles between the states and national government which mandates reversal of that trend. Rather, there is also the constitutional assignment of responsibilities between the legislative and judicial branches which must be vindicated. Given Congress’s plenary power to create and destroy jurisdiction in the lower federal courts, the doctrine of separation of powers, a doctrine providing yet a second and perhaps more efficacious structural protection to the People than even federalism, also is at stake. And that doctrine, with its purpose consonant with that of federalism, requires a result also consistent with that provided by our analysis of federalism: the federal courts’ destruction of their own jurisdiction via refusals to decide violates the principle of fractionalized power; therefore, separation of powers is an additional, and perhaps more persuasive, reason for reversal of the trend away from the duty to decide.

B. Separation of Powers

The doctrine of separated, fractionalized powers is so engrained in American constitutionalism that it probably is second only to popular sovereignty as a fundamental bedrock of our gov-

270. See notes 179-85 and accompanying text supra.
ernment. In fact, while the battles raged over federalism at the Constitutional and state conventions, there was near-universal agreement that separation of powers would be built into the very structure of the new Constitution. Indeed, the only real dispute over the separation doctrine revolved around whether the inclusion of checks and balances would unacceptably weaken the fractionalization of power which separation dictated.

The ensuing analysis of the bedrock separation doctrine as it relates to the duty to decide will be, as the reader may notice, somewhat more truncated than the preceding discussion. Three reasons counsel this restraint. First, the key principles underlying the doctrine already have been articulated in the opening passages of this Part III. Recall that those principles were (1) the embodiment of separation of powers in the Constitution as a structural device for the protection of the citizenry against governmental usurpations of liberty, (2) the inevitable friction among the departments of government contemplated by the separation doctrine, and (3) the indispensable importance of the concept of sovereignty of the People to any understanding of separation of powers.

A second reason for a less-lengthy treatment of separation in the context of the duty to decide is that, although the cases and literature invariably discuss federalism vis-a-vis abstention, they almost just as invariably omit consideration of the separation doctrine as it applies to the problem. Accordingly, there is simply less material requiring responsive criticism.

Finally, the authors deem it inappropriate to delve as deeply into the basic philosophy of separation as they did with federalism, as one of them recently co-authored an article containing a lengthy discussion of the jurisprudential and historical development of the doctrine of fractionalized powers. Repetition of that discussion is unnecessary for the purposes of this article.

How, then, does this touted doctrine of separation of powers bear on the problem of federal courts refusing to decide cases in which Congress has not only provided a cause of action, but also

271. See Part III.A. supra.
272. See generally Abrahams & Snowden, supra note 29, at Part II.A.
273. See id.
274. See id. The authors here wish to thank Professor John Snowden, the principal writer of Part II.A. of the Abrahams-Snowden piece, for what they consider to be not only an exhaustive, but also highly authoritative treatment of the development of separation of powers. Without his work neither the earlier nor the present article would have been possible.
has granted jurisdiction? The answer is two-pronged, the first prong relying on the spirit\textsuperscript{275} of the doctrine and the second relying on its letter.

The spirit of fractionalized powers admittedly is not articulated in the text of the Constitution. But how appropriate it is for this structural protection to be built into the structural framework of the document. In article I, the People delegated the legislative powers of government to Congress; article II contains their delegation of executive power to the Presidential branch; article III, of course, embodies their delegation of judicial power to the Supreme Court and those lower federal courts which Congress may create. And yet this explicit delineation of function is violated by the trend toward refusals to decide—indeed, its applicability to that trend is ignored!

That applicability is simply stated. Congress has legislated both causes of action and jurisdiction in abstention cases; the courts, without ruling such legislation to be unconstitutional, in effect have destroyed such jurisdiction by refusing to even decide those cases; the separation doctrine accordingly is violated not only by the courts’ refusals to perform their judicial duties, but also by their encroachment into the legislative realm by refashioning the very statutes Congress has enacted. Perhaps this violation is ignored by the cases and literature because it is so basic. Still, writers more distinguished than the present have recognized the problems which are implicated.

Dean Frank Strong has carefully distinguished between what he calls “\textit{constitutional judicial review}” and “\textit{ordinary judicial review}.”\textsuperscript{276} The former is judicial action which involves “court review of the constitutionality of governmental acts,”\textsuperscript{277} whereas the latter “consists of judicial reconsideration of legislative and executive action, as it bears upon a given individual, before governmental sanction . . . becomes final as to that person.”\textsuperscript{278} The most familiar aspects of this ordinary form of judicial review, “which has nothing to do with enforcement of constitutional limi-
tations," 279 are statutory interpretation, fact finding, and law application. 280

Unfortunately, one is hard pressed to determine just which type of review is being performed by Younger-type cases. Indeed, the abstention cases hardly are couched in terms of their necessary relationship to statutes, specifically those congressional enactments which create causes of action and grant jurisdiction. Rather, they speak in the broad-brushed policy phraseologies of "equity" and "comity" and "federalism." Reference to federalism, suggesting as it does the interplay between state and federal governments, might indicate that the refusal-to-decide cases are performing constitutional judicial review. If so, then they are performing that type of review erroneously, because analysis of the federalistic bases for the decisions renders, as we have seen, results totally at odds with their outcomes. In short, as a matter of constitutional decision-making, the cases are wrong in their reliance on federalism to close the courthouse doors.

On the other hand, the abstention cases may not involve what the Court perceives to be decisions of a constitutional magnitude at all. After all, the Court has never treated the question as one bearing on the constitutionality of legislative enactments such as section 1343 of the Judicial Code or section 1983, although possibly the Court views its decisions as narrowing the scope of those enactments to avoid problems of constitutional significance. Either way, the likely conclusion is that the refusal-to-decide cases actually involve not constitutional review, but rather ordinary judicial review, the interpretation and application of statutes, a task clearly conceded to the courts under the separation of powers. 281 And yet if this be the task which the courts are performing, then once again their behavior is deficient. When interpreting statutes, the most familiar dogma—though admittedly not the only lesson to be followed—is that courts should seek to effectuate the legislative purpose. 282 But how far from the purpose of enactments such as sections 1343 and 1983 has the Court strayed! Those statutes, with their well-documented purpose of opening the federal courts as forums for actions against state intrusions on liberty, hardly are effectuated by the door-closers' decisions. Indeed, they increasingly are being emascu-

279. Id.
280. Id.
281. Id. at 250-76.
lated by the practice embodied in those decisions. In fact, the extent to which the Court has deviated from the purpose of Congress in reformulating the latter's enactments constitutes a gross violation of the separation of powers doctrine. For, as Professor Reid Dickerson aptly contends in his recent treatise on statutory construction, the doctrine of fractionalized powers is one of the basic "assumptions" which must be followed when interpreting statutes: the courts abuse their designated role when, rather than construing and applying statutes, they rewrite them. 283

Thus, whether the door-closing courts are performing constitutional or ordinary judicial review, the results of their behavior are sufficiently erroneous to be not merely "wrong decisions," but indeed wrong decisions which violate the very spirit of the Constitution's embodiment of separated powers. It is simply not the province of the courts to refuse to perform their tasks or to substitute their own versions of the legislative functions of Congress in their stead. But even if alone this spirit-oriented analysis is not persuasive enough, there is more. For in the context of the subject of federal court jurisdiction, there is support in the very text of the Constitution for the position that refusals-to-decide violate the separation doctrine. In order to comprehend this second, textual argument, one initially must understand what is meant by a "political question."

This concept is but one of many aspects of the separation of powers. If a case involves a "political question," it is said to be non-justiciable, and the courts will not decide the question even if it involves an actual controversy. 284 Professor Bickel has described the political question doctrine as "potentially the widest and most radical avenue of escape from adjudication." 285 Because the existence of a political question means that the courts will not decide the case, how can that doctrine be at odds with the practice of abstention? The short answer is that the judicially-created policy of abstention involves a decision not to decide, but that very decision of whether or not to decide cases is one to be made not by the Supreme Court, but rather by Congress pursuant to its clearly-articulated article I powers to define and control jurisdiction in the lower federal courts. Just as relations with foreign governments are committed by the Constitution to the political

284. WRIGHT, supra note 31, § 14, at 52.
departments, the jurisdictional relationship between the federal courts and the states is committed by the Constitution to Congress. Just as the question of what constitutes a republican form of government is a political question, so too are questions involving "Our Federalism" and comity. And even assuming that some principle of equity forbids the courts from using that power to intervene between states and the citizenry, Congress nevertheless has chosen not to limit the federal courts to traditional legal and equitable remedies.\textsuperscript{286} A more specific application of these notions to the duty to decide question is in order.

Younger supposed was based on principles of equity, comity, and "Our Federalism." Later, when the Younger doctrine ventured into the field of civil litigation, reliance on equity was dropped and the Court concentrated on comity and federalism. Yet those two concepts as used by the Court are just two different ways of expressing the same notion. Justice Black even equated the two terms in his opinion in Younger.\textsuperscript{287} As employed by the Court, "Our Federalism" is concerned merely with the proper respect or deference to be paid to state governments.

But questions concerning the amount of respect or deference to be paid to the states are questions to be answered by Congress, at least as far as those questions concern the jurisdiction of federal courts. Congress is given the power to provide the answers to those questions by articles I and III of and the fourteenth amendment to the Constitution, and it has exercised that power frequently in the past, at times choosing to withdraw the federal courts' power of intervention,\textsuperscript{288} and at other times choosing to authorize such intervention, even into state court proceedings.\textsuperscript{289} Recall, too, that enactment of the Three-Judge Court Act was a means chosen by Congress to pay deference to state governments without withdrawing the power of federal courts to intervene. The basic course chosen by Congress when it enacted the Civil Rights Act of 1871 has not been altered by legislation. It should not be altered by judicial fiat. And the question of whether to alter that course is political and, therefore, should be made by the proper political branch of government—Congress.

In \textit{Baker v. Carr}\textsuperscript{290} the Supreme Court enunciated six tests

\textsuperscript{287} See 401 U.S. at 45.
\textsuperscript{290} 369 U.S. 186 (1962).
for determining when a question is political, and therefore non-justiciable. They are:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\(^{291}\)

A question meeting any one of these tests is deemed political and is not to be decided by the courts.

The question(s) of "Our Federalism," that is, the respect or deference to be paid to state governments in determining when the federal courts may intervene in their operation, certainly meets the first of those tests. It is highly probable that it also meets the second, and it is at least arguable that it meets some of the others.

*Baker*'s first test, a "textually demonstrable commitment of the issue" of the scope of the jurisdiction of the federal courts to Congress, is met beyond question. The Constitution gives Congress the power ""[t]o constitute [t]ribunals inferior to the [S]upreme Court"\(^{292}\) and vests the judicial power of the United States in the Supreme Court ""and in such inferior [c]ourts as the Congress may from time to time ordain and establish.""\(^{293}\) It also gives Congress the power to regulate the appellate jurisdiction of the Supreme Court\(^{294}\) and to ""enforce, by appropriate legislation, the provisions of"" the fourteenth amendment.\(^{295}\) The ""wide power in Congress to regulate the jurisdiction of the federal courts has never been challenged,""\(^{296}\) and the Supreme Court has stated time and time again that it is Congress which possesses ""the sole power of creating the tribunals . . . for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction"

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\(^{291}\) Id. at 217.

\(^{292}\) U.S. Const. art. I, § 8, cl. 9.

\(^{293}\) U.S. Const. art. III, § 1.

\(^{294}\) U.S. Const. art. III, § 2.

\(^{295}\) U.S. Const. amend. XIV, § 5.

\(^{296}\) *Wright*, supra note 31, § 11 at 27.
from them in the exact degrees and character which to Congress may seem proper for the public good." Yet the trend toward federal courts' refusals to decide has the effect of "withholding jurisdiction" from the district courts. It alters their jurisdiction just as surely as if Congress had legislated the change. It is a usurpation of power committed to Congress by the Constitution and on that ground alone is unconstitutional.

Yet there is another reason why questions of comity and "Our Federalism" are political. The second test from the Baker case brands them as such. If anyone doubts that there is "a lack of judicially discoverable and manageable standards" for resolving those questions, let him read the opinions of the two courts that decided the litigation in Trainor v. Hernandez. Of the twelve federal judges involved in the decision, seven thought abstention was inappropriate and five thought it was appropriate. The minority prevailed because of higher judicial rank. The dissenting opinion of Justice Stevens responded, branding the doctrine of abstention as "increasingly Daedalian."

Finally, although Professor Burton Wechsler did not attack the Younger doctrine on the ground that it involved a political question, his article gives substance to the argument that at least the values protected by the first amendment provide "an unusual need for unquestioning adherence to a political decision already made." That political decision is embodied in the enactment of the Civil Rights Act and the legislation giving district courts jurisdiction to enforce it. Thus, the Younger doctrine also may fail the fifth test in Baker.

So much for comity and "Our Federalism." Clearly those concepts, as they are used by the Court in Younger, involve political questions that are to be answered by Congress. But what about equity? Does it save the Younger doctrine as applied in criminal cases? We think not. Part II of this article attempted to show that there never was a "general rule" forbidding equitable intervention into criminal proceedings. However, even if there were such a rule it would make no difference, for in making the political decision to give the federal courts power to enforce the fourteenth amendment, Congress provided for more than tradi-

297. Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (emphasis added); see also cases cited in Wright, supra note 31, § 11 at n.28.
299. Id. at 1931. Daedalus was the legendary figure who built the labyrinth in Crete for King Minos and was then imprisoned in it with his son Icarus.
300. Wechsler, supra note 31.
tional legal and equitable remedies. The Civil Rights Act allows “an action at law, suit in equity, or other proper proceeding for redress,”\textsuperscript{301} and because we know that the Act was intended to enforce the provisions of the fourteenth amendment “against State action, . . . whether that action be executive, legislative or judicial,”\textsuperscript{302} we must assume that Congress contemplated injunctions against state court proceedings.

Under the political question doctrine the federal courts accordingly have a constitutional duty to decide, on the merits, cases falling within the jurisdiction which Congress has seen fit to provide for the public good. And because the Constitution grants Congress the power to determine the scope of the judicial power, it implicitly creates a duty on the part of Congress to provide the federal courts with the manpower and wherewithal to perform their duties. So if both departments, the courts and Congress, perform their respective chores, there should be neither a desire by the former to whittle away at its own responsibilities, nor a need for the latter to enact legislation to prevent such carving-up of the federal judiciary’s jurisdiction. If both branches adhere to their roles as assigned by the sovereign People, then neither the spirit nor the letter of the separation of powers doctrine will be violated.

IV. Conclusion

Having explored the length and breadth of the problem of federal courts refusing to exercise their jurisdiction in Part II, the analysis turned in Part III to a consideration of the constitutional dimensions of the problem. In the former, the nonconstitutional aspects of the trend away from the duty to decide were examined and found insufficient to support that trend; in the latter, the constitutional concept of federalism was described not as an excuse for the door-closers, but rather as an affirmative reason for rejection of their position. Finally, Part III closed with arguments that the refusal-to-decide cases violate both the spirit of separation of powers and its embodiment in the text of articles I and III of the Constitution. In short, cases like \textit{Younger} are based on groundless reasoning, constitute violations of the Constitution, and should be rejected—if not by judicial reconsideration, then by legislative correction.

The portrait need not be so bleak, however. Even at a time when the Supreme Court constantly is expanding the reaches of the Younger “doctrine,” Congress is considering a corrective statute: the Civil Rights Improvements Act. And lower federal courts hardly are unanimous in their welcome of the Supreme Court’s door-closing pronouncements. Witness the following protest by one of those lower courts, one apparently comprehending the duty to decide:

Abstention is a formidable doctrine in the federal forum comprised of medusan components that, absent the most meticulous inspection, will transfix and render powerless both litigants and jurists. Its application should be grounded upon fixed principles, strictly applied to the facts of the federal litigation, for an equally formidable doctrine obligates the federal judiciary as much to exercise jurisdiction properly invoked as to dismiss a proceeding where jurisdiction is wanting. Abstention must rest on sound jurisprudential underpinnings; it must not be a label for a visceral aversion to our article III obligation to adjudicate.303

Given the absence of “sound jurisprudential underpinnings” and lack of “fixed principles” for its application, the abstention doctrine together with the other manifestations of the trend away from the duty to decide should be laid to rest.