

Abstract:

This paper, coining the now-common term, "judicial federalism," examined the relation between *Younger v. Harris* and *Mitchum v. Foster*, and considered an extreme example of *Younger* dismissal, *Rizzo v. Goode*. Through this prism the paper pointed out that what was interesting about the Burger Court was procedure, not substance, and that the Court was embarked on what has turned out to be the Supreme Court's long and continuing retreat from Warren Court values.

THE NEW JUDICIAL FEDERALISM*
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By the spring of 1976, court ordered desegregation of northern public schools had become a major election issue. The nation's two great parties were weighing the inclusion of antibusing planks in their platforms. The President had directed the Attorney General to "look out for an appropriate and proper case" to put before the Supreme Court for reconsideration of its position on court-ordered school desegregation.¹ During the next fortnight the Attorney General seemed to vacillate between the views of the Solicitor General, which coincided with the President's, and those of the head of the Justice Department's Civil Rights Division, which did not. Then, unaccountably, there seemed a failure of nerve: Government briefs were not filed, and at the 11th hour the Court pealed forth a carillon of denials of certiorari.²

It might then have been supposed that the school desegregation cases would occupy a fairly secure position, despite the fact that the Court had recently imposed significant limits upon the scope of federal

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1. New York Times, May 19, 1976, at 1. col. 4.

2. Certiorari was denied on June 5, 1976, 44 U.S.L.W. 3179, in *Morgan v. Doherty*, 530 F.2d 431 (1st Cir. 1976); *Morgan v. Boston Home & School Ass'n.*, 530 F.2d 401 (1st Cir. 1976); *Morgan v. White*, 530 F.2d 401 (1st Cir. 1976); *Morgan v. McDonough*, No. 75-1145 (1st Cir. 1976). See *Busing Politics*, N.Y. Times, June 5, 1976, at 24, col. 2.

desegregation decrees.³ But, the election over, the Court has again granted certiorari in two school desegregation cases of some importance,⁴ apparently to consider further limits on the scope of federal desegregation decrees. And it has vacated a comprehensive desegregation plan for Austin, Texas, apparently requiring a clearer showing of discriminatory intent.⁵ The latter showing increasingly has been required in civil rights cases.⁶ Section 1983,⁷ it appears, will protect against official design, but not against official neglect.

3. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (federal trial court may not order second desegregation of school district previously desegregated under court order without fresh proof of discriminatory intent); Milliken v. Bradley, 418 U.S. 717 (1974) (interdistrict remedy for school segregation impermissible absent showing of intentional discrimination on the part of each district within the scope of the decree).

4. Dayton Bd. of Educ. v. Brinkman, 97 S.Ct. 782 (1977); Milliken v. Bradley, 97 S.Ct. 380 (1976).

5. Austin Independent School Dist. v. United States, 97 S.Ct. 517 (1977) (remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976)); see Metropolitan School Dist. of Perry Township v. Buckley, 97 S.Ct. 800 (1977) (Indianapolis) (judgment affirming desegregation decree ordering busing of black children to suburbs vacated, although state was shown to have confined public housing projects to black area and to have set up school district so as to avoid consolidation of black and white areas despite countrywide governmental power).

6. Washington v. Davis, 426 U.S. 229 (1976) (disproportionate adverse impact on racial minority insufficient to authorize relief absent showing of discriminatory purpose in public employees' equal protection suit under fifth amendment due process clause); see Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977) (zoning regulations with disproportionate racial impact sustained absent proof of discriminatory intent); Rizzo v. Goode, 423 U.S. 362 (1976) (officials not liable for negligent failure to supervise discriminatory police misconduct); notes 3 & 5 *supra*. But see Castaneda v. Partida, 97 S.Ct. 1272 (1977) (showing of racial disparities in selection of grand jurors shifts burden to defendant custodian in habeas case to prove lack of discriminatory intent on part of jury selection commissioners); Hills v. Gautreaux, 425 U.S. 284 (1976) (metropolitan remedy permissible when discriminatory intent shown only for inner city, when defendant federal housing authority is empowered by Congress to order metropolitan relief); Keys v. School Dist. No. 1, 413 U.S. 189 (1983) (showing of racial disparities in assignments of schoolchildren to school shifts burden to school board to show lack of discriminatory intent); Wright v. Council of Emporia, 407 U.S. 451 (1972) (effect, not purpose, is focus of inquiry); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disproportionate adverse impact on minority sufficient to shift

The broader perspective on these developments must include not only the desegregation cases but the whole range of public interest litigation in federal courts. It is now widely noted⁸ that a counterassault on federal judicial power has been taking place in the Supreme Court, with real casualties.⁹ Inevitably, the old institutional struggle between the

burden of proof to employer to show business necessity for disputed practice in employees' suite under Title VII); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (civil rights defendants will be presumed to intend the consequences of their acts).

7. Civil Rights Act of 1871, § 1, 41 U.S.C. § 1983(1970). *See* note 96 *infra*.

8. 123 CONG. REC. S95, 201-05 (daily ed. Jan. 10, 1977) (remarks of Sen. Mathias). Officials of the American Civil Liberties Union, Consumers Union and seven other public interest groups distributed a letter at a national conference of judges and lawyers held in St. Paul, Minnesota, on April 7, 1976, under the sponsorship of the American Bar Association and the Association of State Chief Justices, arguing that the Supreme Court has "thwarted the promise of the Constitution" by drastically limiting citizens' access to the federal courts. N.Y. Times, Apr. 7, 1976, at 11, col. 1. *See Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1976) (statement of Sen. Tunney) (arguing that participants in the St. Paul conference had failed "to discuss the broader issues about access to the judicial system"). On October 9, 1976, the Board of Governors of the Society of American Law Teachers issued a memorandum accusing the Burger Court of a double standard in raising procedural barriers in federal litigation to the disadvantage of public interest cases. The Chief Justice replied to these charges at a news conference in Washington, pointing out the increased caseloads of federal courts. N.Y. Times, Oct. 10, 1976, at 31, col. 1. The press has been unusually alert to these developments. *See e.g.*, TIME, July 12, 1976, at 36; Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976, § 6 (Magazine), at 31; Lewis, *The Doors of Justice*, N.Y. Times, Mar. 28, 1977, at 29, col. 5, N.Y. Times, Apr. 11, 1976, § 4, at 9, col. 1.

9. For example, access to federal courts has been limited in class actions. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (notice in class action for damages must be sent at plaintiff's expense to all reasonably identifiable members of the class); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (in injunction suit named plaintiffs must present case or controversy between themselves and defendants or they may not seek relief on behalf of themselves or any other member of class); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (each member of plaintiff class must meet \$10,000 jurisdictional amount); *Snyder v. Harris*, 394 U.S. 332 (1969) (in diversity class action, claims of class may not be aggregated in determining existence of \$10,000 jurisdictional amount). *But see Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (existence of class with continuing stake in controversy saves case moot as to named plaintiff); *Supreme Tribe of Ben-Hur*

nation and the states has become part of this present battle; a new judicial federalism seems to be emerging, requiring deferences to state administration and state adjudication¹⁰ that only yesterday were thought unnecessary or unwise.¹¹

v. *Cauble*, 255 U.S. 356 (1921) (diversity of citizenship of named representative of class sufficient to ground diversity jurisdiction regardless of citizenship of other class members).

Access to federal injunctive power also has been restricted. *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y.* 421 U.S. 240 (1975) (federal courts lack discretion to award attorney's fees in public interest actions for injunctive relief). For other cases restricting access to federal injunctive power, see note 10 *infra*.

Access to federal habeas corpus similarly has been limited. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (wrongs cognizable in federal habeas corpus may not be remedied under Civil Rights Act). For other cases restricting access to federal habeas corpus for state prisoners, see note 10 *infra*.

Denials of access to federal courts through imposition of court fees upon indigents also have been approved. *United States v. Kras*, 409 U.S. 434 (1973) (\$50 fee under Federal Bankruptcy Act upheld against challenge by indigent). A much discussed line of cases splits on the constitutionality of state denials of access to state courts based on fees. *Compare* *Boddie v. Connecticut*, 401 U.S. 371 (1971) *and* *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down the fees as to indigents) *with* *Orrwein v. Schwab*, 410 U.S. 656 (1973) (sustaining the fee).

Standing also has been used to restrict access to federal courts. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (indigents lack standing to challenge charitable tax status of hospitals offering only limited services); *Warth v. Seldin*, 422 U.S. 490 (1975) (broad range of plaintiffs lack standing to challenger exclusionary zoning laws); *United States v. Richardson*, 418 U.S. 166 (1974) (taxpayer lacks standing to challenge concealment of part of governmental budget). *But see* *Singleton v. Wulff*, 428 U.S. 106 (1976) (physicians may challenge medicaid exclusion of abortions); *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayer has standing to challenge federal grants to parochial schools).

10. Of greatest moment is *National League of Cities v. Usury*, 426 U.S. 833 (1976), striking down, for the first time since the 1930's, an act of Congress under its commerce power as an impermissible intrusion upon state sovereignty under the 10th amendment.

State law increasingly has been allowed to govern questions thought preempted by the national lawmaking power. *E.g.*, *De Canas v. Bica*, 424 U.S. 35 (1976) (state may regulate restrictions on employment of illegal aliens); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (state may protect unpatented trade secrets); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (state may impose antipollution regulations upon merchant

vessels in territorial waters); *Goldstein v. California*, 412 U.S. 546 (1972) (state may prosecute piracy of uncopyrighted recordings).

Unconstitutional standards governing federal obscenity prosecutions have been held to be partially determined by local views, *Miller v. California*, 413 U.S. 15 (1973), and it is primarily for the states to say what equal protection of the laws shall mean in the context of allocation of tax resources to the education of schoolchildren, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Neither the Civil Rights Act nor the due process clause of the 14th amendment protects injury to reputation. *Paul v. Davis*, 424 U.S. 693 (1976). *But see Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The 11th amendment, giving states sovereign immunity in federal courts, has been reinvigorated in civil rights cases. *Edelman v. Jordan*, 415 U.S. 651 (1974). *But see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The abstention doctrine also has been revived. *Boehning v. Indiana State Employees' Ass'n.*, 423 U.S. 6 (1976); *Askew v. Hargrave*, 401 U.S. 476 (1971); *see note 11 infra*.

Federal injunctions against pending state proceedings, have been restricted. *Younger v. Harris*, 401 U.S. 37 (1972) ("Our Federalism" requires denial of injunctive relief from prosecution under unconstitutional statute); *see Giudice v. Vail*, 97 S.Ct. 1211 (1977) (federal injunction against state contempt proceeding may not issue although proceeding itself is challenged on due process grounds); *Hicks v. Miranda*, 422 U.S. 332 (1975) (state may deprive federal court of jurisdiction in action for injunction against threatened prosecution by filing prosecution before proceedings of substance on the merits take place in the federal court); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) ("Our Federalism" bars federal injunction against state civil nuisance proceeding under unconstitutional statute, although the Anti-Injunction Act would not); *Samuels v. Mackell*, 401 U.S. 66 (1972) (federal declaratory relief against state tax barred by "Our Federalism"). *But see Gerstein v. Pugh*, 420 U.S. 103 (1975) (injunction available where federal defense could not be raised in state prosecution); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (injunction possible where state forum biased). *See generally notes 87-147 infra* and accompanying text.

Federal injunctions against state officials have been restricted in availability and narrowed in scope. *Rizzo v. Goode*, 423 U.S. 362 (1976) (principles of federalism bar injunction ordering improved grievance machinery in police misconduct case); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (credible threat of future harm to named plaintiff, as well as to class, must be shown to warrant federal injunction). Taken together, *O'Shea* and *Rizzo* render federal courts powerless to enjoin widespread police misconduct in most cases. In *Rizzo* and in other cases the scope of federal decrees has been strictly confined to the violation proved. *Metropolitan School Dist. of Perry Township v. Buckley*, 97 S.Ct. 800 (1977); *Austin Indep. School Dist. v. United States*, 97 S.Ct. 17 (1976); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Milliken v.*

In the recent case of *Rizzo v. Goode*,¹² the Supreme Court has fashioned a crude weapon for use in that battle, one capable of an unacceptable degree of destruction. There, the Supreme Court struck down a federal injunction in a police misconduct case. While relying in part upon limits on the scope of federal equity and in part on insufficiency

Bradley, 418 U.S. 717 (1974). Finally, in injunction cases heavy new burdens of proof have been placed on civil rights plaintiffs. *See* notes 5 & 6 *supra*.

Civil rights actions for damages also have been weakened by recognition of new immunities defenses. *E.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for state prosecutors within scope of their discretion). Other absolute official immunities were recognized previously. *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators). Other officials recently have been afforded qualified defenses of good faith. *E.g.*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (schoolteachers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor and high state executive officials). The qualified immunity of good faith and probable cause enjoyed by police officers in civil rights damage actions was recognized by the Warren Court. *Pierson v. Ray*, 386 U.S. 547 (1967). For discussion of these and the doctrines of municipal and sovereign immunity, see generally notes 210-59 *infra* and accompanying text.

Federal habeas corpus for state prisoners also has been eroded. *Compare* *Stone v. Powell*, 428 U.S. 465 (1976) (when state provides opportunity to raise the issue, claims that evidence seized in violation of the fourth amendment should have been excluded are not cognizable in federal habeas corpus) *and* *Francis v. Henderson*, 425 U.S. 536 (1976) (state prisoner may not relitigate in federal habeas corpus issues fairly litigated in the state prosecution) *with* *Fay v. Noia*, 372 U.S. 391 (1963). Nevertheless, state prisoners seeking release may not employ the Civil Rights Act, but must rely on habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

11. *E.g.*, *Zwickler v. Koota*, 389 U.S. 241, 248 (1976); *Battett v. Bullitt*, 377 U.S. 360, 375-90 (1964); *see* *Damico v. California*, 389 U.S. 416 (1967) (exhaustion of state administrative remedies unnecessary); *McNeese v. Board of Educ.* 373 U.S. 668 (1963) (exhaustion of state judicial remedies unnecessary in civil rights cases); *Fay v. Noia*, 372 U.S. 391 (1963) (exhaustion of state remedies unavailable at time of petition not required for access to federal habeas corpus for state prisoner; state procedural default no bar unless prisoner made conscious waiver of known right); *Monroe v. Pape*, 365 U.S. 167 (1961) (availability of state remedy does not mean that trespassing officials did not act under color of state law for purposes of liability under the Civil Rights Act); *Wechsler, Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948) (abstention inappropriate in civil rights cases); *Note, Federal question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

12. 423 U.S. 362 (1976).

of proof of intent,¹³ the Court also based its decision on one further factor, and in so doing poses a far greater challenge to federal civil rights jurisdiction — the desegregation cases included — than is posed by recent cases on intent and scope of relief. By a *coup de main* the *Rizzo* Court transplanted the doctrine of *Younger v. Harris*,¹⁴ which since 1971 has blocked federal injunctions against state *proceedings*, to the much more complex and sensitive area of federal injunctions against state *officials*.¹⁵ As a little reflection will show, a defense applicable in both contexts covers the board: It could block all federal judicial challenges to state action. The new defense has been variously tagged "Our Federalism,"¹⁶ "principles of federalism,"¹⁷ or "equity, comity, and federalism."¹⁸ But whatever its name this new¹⁹ door-closing mechanism threatens the continued vitality of those institutions of modern judicial federalism by which national standards are imposed upon the states in the matter of civil rights: the Civil Rights Act of 1871,²⁰ *Ex parte Young*²¹ and the second *Brown v. Board of Education*.²²

This Essay reviews the foundations of federal judicial power against the states; considers previous attempts to limit the exercise of that power; and examines the new defense — its origins in *Younger*, its application in *Rizzo*, and its potential for application in other civil rights cases. It

13. These rationales were developed in part in the school desegregation cases, *see note 5 supra*, and in the jury selection cases, *e.g.*, *Castaneda v. Partida*, 97 S.Ct. 1272 (1977) (grand jury); *Carter v. Jury Comm'n.*, 396 U.S. 320 (1970) (petit jury). In addition, *see Wright v. Rockefeller*, 376 U.S. 52 (1964) (congressional apportionment).

14. 401 U.S. 37 (1971).

15. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

16. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

17. *Rizzo v. Goode*, 423 U.S. 363, 380 (1976). Notions of federalism of necessity always have characterized discussions of collateral federal review of state action. *See, e.g., Ex parte Young*, 209 U.S. 130, 166-68 (1908). Similar to the *Younger* defense was the doctrine of *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), employing equitable restraint concepts to bar federal injunctions not barred by the Anti-Injunction Act, 28 U.S.C. § 2283 (1970).

18. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

19. The defense is "new" in a technical sense. *See notes 89 & 108 infra*.

20. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343(3) (1970). *See note 96 infra*.

21. 209 U.S. 123 (1908).

22. 349 U.S. 294 (1955).

concludes both that overriding national policy requires continued access to federal remedial power at least for cases that, like the school desegregation cases, raise issues of discrimination, and that Congress should strengthen federal civil rights jurisdiction against the assault tentatively advanced in *Rizzo*.

I. ORIGINS AND SIGNIFICANCE OF INSTITUTIONS OF MODERN JUDICIAL FEDERALISM

A. *Federal Jurisdiction and the Civil War: The Original Understandings*

There is an old American tradition, almost Jeffersonian in its nobility and localism, of hostility to federal equity. Early critics of federal equitable remedial power may have seen in it the apparition of the prerogative courts of the English kings.²³ But their hostility had a more substantial basis.

Given federal equity, the losing party in a lawsuit in state court could eschew direct attack and come into federal court for an injunction against the state proceeding.²⁴ Thus, the very existence of federal equity could lay open even the highest state courts to review and possible reversal, not at the hands of the august national tribunal, but collaterally, almost embarrassingly, by any ordinary federal trial judge. The states would not have agreed to such an arrangement at the outset.²⁵

23. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 23 (1921); von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. Pa. L. Rev. 287, 289 (1927) ("[T]he fundamental explanation is probably to be found in the fact that the colonists regarded equity as an appanage of the Crown's prerogative, and, therefore, inimical to their individual liberties."). On the "prevailing prejudices against equity jurisdiction" at the time of the enactment of the Anti-Injunction Act, see *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 131 (1941); F. MAITLAND, *EQUITY: A COURSE OF LECTURES* 10 (Brunyate ed. 1936).

24. Injunctive restriction of common law jurisdiction was at the heart of the Coke-Ellesmere controversy. See generally T. PLUCKNETT, *A CONCISE HISTORY OF THE ENGLISH COMMON LAW* 627 (2d ed. 1936); F. MAITLAND, *supra* note 23, at 9.

25. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123, 175-76 (1908) (Harlan, J., dissenting) ("I cannot suppose that the great men who framed the Constitution ever thought the time would come when a subordinate Federal court...would... assume to deprive a state of the right to be represented in its own courts by its regular law officer."); C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (1922). But see THE FEDERALIST No. 82 (A. Hamilton) ("[B]ut could an appeal be made to lie from

Even more significantly, the states themselves might conceivably be sued in federal courts.²⁶ Given federal jurisdiction in equity, state government would then fall subject to federal decrees. Here would be something very like King George, ruling from something very like Privy Council, with branch office.²⁷

These twin apprehensions — that federal injunctions could issue against both state judicial proceedings and state executive actions — may explain why the first Judiciary Act²⁸ included no grant of general jurisdiction to federal trial courts for cases arising under federal law.²⁹ Constitutional questions and such other issues of federal law as might arise would be decided in the state tribunals in the ordinary course of litigation. If there was to be federal judicial supervision of the sovereign states it would have to be on writ of error in the Supreme Court alone.³⁰

The twin embodiments of these early understandings were the Federal Anti-Injunction Act,³¹ generally forbidding a federal trial court from interfering by injunction with state judicial proceedings, and the 11th

the state courts, to the subordinate federal judicatories?... The following considerations counsel the affirmative.") Hamilton, however, was considering collateral review rather than injunctive interference with or prevention of the original state proceeding.

26. THE FEDERALIST No. 81 (A. Hamilton) ("[I]n cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal. . . ."). Chief Justice Marshall's attempt in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), despite the understandings Hamilton articulates to approve federal jurisdiction over a state as party defendant, led to ratification of the amendment within 5 years. *See generally* *Monaco v. Mississippi*, 292 U.S. 313, 322-29 (1934).

27. *See* 3 W. BLACKSTONE COMMENTARIES 49. Federal judges were among the few federal officials with territorially defined local authority and shared only with military officers the power to govern by decree. But such power would depend in turn upon jurisdiction in equity over state governmental agents or instrumentalities. *See* text accompanying note 48 *infra*.

28. 1 Stat. 73 (1789).

29. Apart from the abortive "Law of the Midnight Judges," 2 Stat. 89 (1801), *repealed*, Act of 1802, 2 Stat. 156, no general federal question jurisdiction was granted federal trial courts until the Act of 1875, 18 Stat. 470.

30. Judiciary Act of 1789, § 25, 1 Stat. 783. *See generally* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-42 (1816); The federalist No. 82 (A. Hamilton); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 507-15 (1928).

31. 28 U.S.C. § 2283 (1970). *See* note 94 *infra*.

amendment to the Constitution,³² forbidding federal trial courts from taking jurisdiction over a state as party defendant.

These were the main outlines of judicial federalism in the antebellum period. But the limits on the exercise of federal judicial power built into the federal system a dangerous softness. A day might come when state judges and officials would refuse to accede to the Supreme Court's view of the Constitution. In that crisis, how could federal standards be imposed upon the states? Even the seemingly unimpeachable proposition that the state courts must obey a Supreme Court mandate in a particular case had to be reaffirmed in successive generations.³³ What, then, of a more widespread reluctance among the states to enforce or effectuate national policy? Could such a reluctance, as a practical matter, be controlled by mandates issuing on writs of error from the Supreme Court?

Viewed in this light, the Civil War settled the fundamental constitutional question whether the Union could impose national standards upon the states. This blood-won power was to be deployed in the case just put: one of widespread reluctance to enforce or effectuate national policy. Confronted with that crisis, the Reconstruction Congresses rejected the original compromise.³⁴ Federal trial courts were given jurisdiction in habeas corpus to test the legality of detentions of state prisoners,³⁵ jurisdiction in cases removed from state courts by persons claiming they could not obtain enforcement of their civil rights there,³⁶ jurisdiction in cases alleging state deprivations of civil rights — in equity

32. U.S. CONST. amend. XI. *See* note 94 *infra*.

33. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1822); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See generally* Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913).

34. "Sensitiveness to 'states rights', fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant. . . ." F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 64 (1927). For a sensitive early lay account of the constitutional history of the 1860's and 1870's, see W. DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* (1898).

35. Act of 1867, 14 Stat. 385. This jurisdiction is exercised today under 28 U.S.C. § 1331 (1970).

36. Civil Rights Act of 1866, § 3, 14 Stat. 27. This jurisdiction is exercised today under 28 U.S.C. § 1443(1) (1970).

as well as at law³⁷ — and at last, in 1875, jurisdiction in cases arising under federal law generally.³⁸

It is not our task to review here the fate of these achievements of Reconstruction insofar as positions then taken in the Supreme Court rendered them ineffective to secure federal judicial enforcement of civil rights. As far as civil rights were concerned the powers won lay tragically dormant until our own time.³⁹ But the massive restructuring of judicial federalism during Reconstruction had almost immediate impact upon ordinary private litigation. The 14th amendment opened to Supreme Court review the internal procedures of state courts,⁴⁰ and the new federal

37. Civil Rights Act of 1871, § 1, 17 Stat. 13. This jurisdiction is exercised today under 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) (1970).

38. Act of 1875, § 1, 18 Stat. 470. This jurisdiction is exercised today under 28 U.S.C. § 1331 (1970).

39. The legal causes of this disuse are various. The "state action" requirement established in the Civil Rights Cases, 109 U.S. 3 (1883), taken in conjunction with the 11th amendment as it was understood prior to *Ex parte Young*, 209 U.S. 123 (1908), was a chief reason for the paucity of reported cases prior to 1908. Obstacles remaining after 1908 included judicial interpretations of the "color of law" language in § 1983, which excluded cases for which state remedies existed, requirements of exhaustion of state remedies, reluctance to award general damages in the absence of special damages, and confusion about jurisdictional amount. *See generally Gressman, The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952); text at notes 48-55 *infra*.

The contemporary federal class action rules have made a difference, not only because the possibility of class relief and substantial fees encourages the development of a vigorous public interest bar but also because individual grievances often cannot be remedied effectively through individual actions. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 80-81 (1973) (lengthy and expensive individual litigation ineffective to secure immediate housing even though Congress is now understood to have power under § 1982 to reach private discriminations; only class suits and administrative remedies are employed effectively).

40. *E.g.*, *Pennoyer v. Neff*, 95 U.S. 714 (1877) (Supreme Court review under due process clause of state service of process in diversity case in which the federal question arose as replication to a defense). *Cf.* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 242 (1833) (on writ of error from Court of Appeals of Maryland, Supreme Court cannot review state substantive violation of fifth amendment due process clause, the Bill of Rights limiting only the national government). In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Court per Justice Story did pass on the validity of a state's summary escheat of

jurisdictional grants could subject those procedures to collateral review in federal trial courts as well. In the same way, the notion of "due process" as protecting against arbitrary or confiscatory state regulation of business eventually would bring state executive action before both the Supreme Court and the federal trial courts.⁴¹

It was in this business context rather than that of civil rights that the Supreme Court was compelled to work out the effect of the new grants of judicial power upon the surviving embodiments of the antebellum understandings; the Anti-Injunction Act and the 11th amendment. These venerable restrictions on federal equity, barring injunctions against state judicial proceedings and state executive actions, seemed intended to assure the states of total noninterference from the federal trial judiciary. In definitively dealing with both the Act and the amendment as they were affected by the new grant of federal question jurisdiction and the 14th amendment, the great case of *Ex parte Young*⁴² cleared broad avenues for federal trial court interference with state government, and in so doing drew the lines of modern judicial federalism.

B. *From Ex parte Young to Brown v. Board of Education*

Ex parte Young arose when railroad interests sought a federal injunction restraining the Attorney General of Minnesota from enforcing that state's allegedly confiscatory rate regulations. The 14th amendment was held to provide the federal question necessary to support the jurisdiction of the trial court. The Anti-Injunction Act was held not an issue in the case, because Attorney General Young had not filed the state enforcement proceeding until the day *after* the trial judge issued the stay order;⁴³ the Act applied only to pending proceedings, not to merely threatened ones.

But the big issue in the case was whether or not the suit was actually one against the state of Minnesota and thus barred by the 11th amendment.⁴⁴ *Ex parte Young* laid down the principle that a federal court

property but had to do so under principles of general common law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

41. *E.g.*, *Ex parte Young*, 209 U.S. 123 (1908) (injunction against threatened state violation of 14th amendment). The first case interpreting the 14th amendment in this way came relatively late, however, *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241, (1897).

42. 209 U.S. 123 (1908).

43. Because this subsequent filing violated the stay order, Young was held in contempt; the case arose in part on writ of habeas corpus. *Id.*, at 126.

44. "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

has power, despite the amendment, to override state sovereignty upon a showing of state unconstitutionality. Because the action was not against the state as party of record but only against the official, upon a showing that the defendant had violated the plaintiff's constitutional rights, he was "stripped of his official or representative character and ... subjected in his person to the consequences of his individual conduct."⁴⁵

This position cast a very bright light indeed upon the future of the Civil Rights Act of 1871.⁴⁶ That legislation had been intended to provide a forum for adjudication of grievances against the states, and the Supreme Court had held that "state action" was a necessary allegation of a civil rights complaint.⁴⁷ *Ex parte Young* made a complaint under the Civil Rights Act begin to seem a practical possibility, because it cut a swath through the sovereign immunity of the states in federal courts.

But the position horrified the first Justice Harlan. In a prescient dissent he wrote:

This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal Courts to supervise and control the official action of the States as if they were 'dependencies' or provinces.⁴⁸

Of course, this is precisely what has happened; Justice Harlan's formulations could be used as well by current critics of federal judicial activism. But a long road remained to be traveled between *Ex parte Young* and present exercises of federal injunctive power in civil rights cases.

United States by Citizens of another State, or by Citizens or subject of any Foreign State." U.S. CONST. amend. XI. *Hans v. Louisiana*, 134 U.S. 1, (1890), construed the amendment to cover suits by a citizen of the same state.

45. 209 U.S. at 160. *Cf. Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (11th amendment no bar to federal suit where state is not a party of record).

Under *Ex parte Young*, the state remains immune in actions for monetary relief to be paid from the state treasury rather than by the defendant official. *Edelman v. Jordan*, 415 U.S. 651 (1974). *But see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may authorize such relief under its 14th amendment enforcement powers, which override the 11th amendment).

46. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983(1970), 28 U.S.C. § 1343(3) (1970), *quoted in* text accompanying note 96 *infra*.

47. *The Civil Rights Cases*, 109 U.S. 3 (1883).

48. 209 U.S. at 175.

After *Ex parte Young*, release of that power still would require expansive constitutional interpretation,⁴⁹ particularly of the equal protection clause of the 14th amendment,⁵⁰ hospitable interpretation of the Civil Rights Act,⁵¹ a broad view of the scope of federal equity,⁵² and federal judicial willingness to undertake these long-avoided tasks.⁵³

It was not until the Warren Court era that the positions taken on these issues propelled the nation into a second Reconstruction, and federal injunctive power came of age.⁵⁴ The question of the scope of federal injunctive power against state officials, in fact, was put squarely for the first time when, in the second *Brown v. Board of Education (Brown II)*,⁵⁵ the Supreme Court ordered briefs and argument on the issue. Having decided the state constitutionally could not maintain segregated public

49. Most importantly, *Home Tel. & Tel. v. City of Los Angeles*, 227 U.S. 278 (1913) ("state action" requirement of complaint alleging violation of 14th amendment is satisfied although state itself outlaws the violation complained of).

50. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and *Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law school for blacks maintained on campus of celebrated law school could never provide an equal educational opportunity) with *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Vorchheimer v. Philadelphia* may maintain sexually segregated high schools although female students are thus denied opportunity to study at Philadelphia's celebrated Central High School).

51. *Monroe v. Pape*, 365 U.S. 167 (1961) (state official's acts held "under color of law" within meaning of § 1983 although state would prohibit conduct at issue; § 1983 action does not require exhaustion of state remedies; no allegation of specific intent necessary).

52. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (federal trial court has power and duty to administer desegregation of state public schools and may draw upon broad inherent powers, citing antitrust cases).

53. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but ... [n]ational respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges." *Baker v. Carr*, 369 U.S. 186, 262 (1962) (Clark, J., concurring) (reapportionment of state legislature may be ordered despite "political question" doctrine).

54. See Pollak, *The Legacy of Earl Warren*, 88 HARV. L. REV. 8 (1974) (in memoriam).

55. 349 U.S. 294 (1955).

schools,⁵⁶ the Supreme Court faced the necessity of providing remedial guidelines.

In *Brown II*, the Court decided in a straightforward way that federal trial courts would administer school desegregation in this country. The Court quite accurately sketched out the pattern that modern federal equitable intervention would follow for decades to come. It was to be, and has turned out to be, the very sort of governance by federal trial judges that the first Justice Harlan had so despairingly foreseen in *Ex parte Young*.⁵⁷

Long lines of power flow from the Civil Rights Act, *Ex parte Young* and *Brown II*, that today enable federal trial judges to supervise the day-to-day business of local governmental agencies,⁵⁸ school boards, hospitals, police departments, prisons. In some cases this supervision takes the mild form of a court order requiring local officials to devise a plan for their own governance, to be implemented on threat of contempt.⁵⁹ In cases like the Boston school desegregation case,⁶⁰ however, the district judge has had to take charge and govern from day to day by decree, according to plans laboriously formulated by the court itself, often in consultation with court-appointed experts. Under *Brown II*, the trial judge retains jurisdiction of the controversy;⁶¹ the parties may return for instructions, modification or to complain of backsliding.⁶² Meeting interminably with officials, within the jurisdiction invoked by the controversy, the federal judge rules the school system like the governor of some colonial dependency.⁶³ The stand taken by Congress in the Civil Rights Act of 1871, and by the Supreme Court in *Ex parte Young* — that there must be a reserve of power over the states in federal trial courts — is today a dynamic principle of national policy.

56. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

57. See text accompanying note 48 *supra*. Some of the characteristics of federal equitable intervention are outlined in the text accompanying notes 58-61 *infra*.

58. See generally Weinberg, *The New Meaning of Equity*, 28 J. LEGAL EDUC. 532 (1977) (written 1974).

59. See, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976).

60. *Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 529 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

61. 349 U.S. at 299.

62. See generally O. Fiss, *Injunctions* 415-81 (1972).

63. See text accompanying note 48 *supra*.

But federal judicial resources began to be spread thin as other impressive expansions of federal jurisdiction occurred in the Warren Court era,⁶⁴ notably in civil rights actions for damages under *Monroe v. Pape*,⁶⁵ and in postconviction relief for state prisoners under *Fay v. Noia*.⁶⁶ And a real explosion in federal litigation occurred after the federal rules governing class actions were revised in 1966,⁶⁷ with implications that could not then have been fully perceived.⁶⁸ As federal remedies became increasingly potent, interest in litigation heightened; in the sympathetic political climate of the time, a vigorous public interest bar rapidly emerged. Funded in part by percentage fees from class monetary recoveries,⁶⁹ in part by such architects of civil rights strategy as the

64. Statutory jurisdictional grants with significant impact included the civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1970), and the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, 3631 (1970). Expansive reinterpretation of existing jurisdictional grants was also a contributing factor. *E.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 90 (1972), *interpreting* 28 U.S.C. § 1331 (1970); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *interpreting* 42 U.S.C. § 1981 (1970). For judicial creation of new private rights of action under federal law, see *e.g.*, *Biven v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (fourth amendment); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (general maritime law); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1976) (securities regulations).

65. 365 U.S. 167 (1961).

66. 372 U.S. 391 (1963).

67. Fed. R. Civ. P. 23(b)(2), 23(b)(3).

68. The contemporary concern was apparently with the due process difficulty of binding absentees with only a "spurious" connection to the named representatives of the class; the draftsmen had made *res judicata* a fundamental goal of the revision. See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Har. L. Rev. 356, 387-422 (1967); *Development in the Law: Class Actions*, 89 HARV. L. REV. 1318, 1394 (1976). Class actions, however, came to have a litigation-generating quality beyond what could have been predicted from the provision alone of a meaningful forum for binding adjudication in consumer and other suites. H. FRIENDLY, *supra* note 39, at 118-20 ("Something seems to have gone radically wrong with a well-intentioned effort."). See notes 69-71 *infra* and accompanying text.

69. Private corporate defendants became a particularly attractive target in actions for damages; liability could exceed the value of the company and could be expected to induce early and generous settlements, from which large percentage fees would be approved by courts recognizing the public interest in encouraging vigorous prosecution of cases involving aggregated small claims. See MANUAL FOR COMPLEX LITIGATION 11-12 (1973). *But see* Lindy Bros

NAACP Legal Defense Fund and the American Civil Liberties Union, and in part by court-awarded attorneys' fees to prevailing injunction plaintiffs on a new "private attorneys-general" theory,⁷⁰ these advocates were to some extent free under the first amendment to contact potential clients, to inform them of their rights and to frame and employ class litigations to vindicate those rights.⁷¹

C. *Judicial Federalism and Today's Supreme Court*

With rising pressure on judicial resources and the end of the Warren Court, the Supreme Court increasingly has seemed engaged in what amounts to a jurisdictional counterrevolution.⁷² The Burger Court has sought assiduously to narrow access to federal jurisdiction, an endeavor in which "principles of federalism" are only one device.⁷³ We witness today a turning away from tasks still unfinished: the swing of the pendulum and the closing door.

It is difficult to resist the conclusion that much of this federal door closing is not so much a function of enlightened federalism or even an evolving political environment as of crowded dockets.⁷⁴ Ironically, in

Bldrs., Inc. v. American Radiator and Standard Sanitary Corp. 487 F.2d 181 (3d Cir. 1973).

The problem was acute in actions under statutes providing minimum damages for each claim, *e.g.*, *Katz v. Carte Blanche*, 496 F.2d 747 (3d Cir. 1974) (Truth in Lending Act, 15 U.S.C. § 1640(a)(1) (1970), \$100 minimum), and treble damages, *School Dist. of Phila. v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967) (Clayton Act, § 4, 15 U.S.C. § 15 (1970)). *See generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 87 HARV. L. REV. 1597 (1974).

70. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *see* Civil Rights Attorneys' Fees Awards Act of 1976, 90 Stat. 2641, *amending* 42 U.S.C. § 2000-5(k) (equal employment opportunities suites). *See generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

71. *NAACP v. Button*, 371 U.S. 416 (1963).

72. *See* notes 9-11 *supra*.

73. 123 CONG. REC. S95, 202 (daily ed. Jan. 10, 1977) (remarks of Sen. Mathias).

74. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 429 (1971) (Black, J., dissenting. But note Justice Douglas' dissent in *Warth v. Seldin*, 422 U.S. 490, 519 (1975); "The mounting caseload of the federal courts is well known. But cases such as this one reflect festering sores in our society. . . . We are today far from facing an emergency. For in all frankness, no Justice of this Court need work more than four days a week. . . . *Cf. Thermtron Products, Inc.*

view of much current thinking that public interest cases are a peculiarly appropriate province of federal jurisdiction,⁷⁵ public interest litigation has been the poor relation on whom it has proved easiest for the Supreme Court to close the door.⁷⁶ The federal consumer class action has been seriously impaired,⁷⁷ and the environmental injunction action has been hard hit.⁷⁸ State prisoners seeking release have lost remedies under the Civil Rights Act⁷⁹ and have been remitted to habeas corpus, under which

v. *Hermansdorfer*, 423 U.S. 336 (1976) (district court could not decline to exercise removal jurisdiction on the ground of crowded dockets).

The chief Justice has called attention to the problem of crowded dockets on a number of occasions. *See e.g.*, Remarks of Warren E. Burger, American Bar Association, St. Louis, Mo. (Aug. 10, 1970). Congress has not been entirely unresponsive to the problem. *See, e.g.*, Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1970 & Supp. V 1975), *as amended by* Pub. L. No. 97-577 § 1, 90 Stat. 2729 (1976) (permitting federal magistrates to undertake a broad variety of judicial tasks); Act of Aug. 12, 1976, Publ. L. No. 94-381, 90 Stat. 1119 (amending 28 U.S.C. § 2284 (1970) (contracting jurisdiction for 3-judge courts). For the thinking of the current administration, see *Bell Offers Plan to Ease Burden of Courts and Avert Breakdown*, N.Y. Times, Feb. 11, 1977, at A12, cols. 3-6.

75. H. FRIENDLY, *supra* note 39, at 68, 75; Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356-61 (1970); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

76. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977); note 8 *supra*.

77. *See, e.g.* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (notice to class must be sent to all reasonably identifiable members at expense of the named plaintiff); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (each class member must meet jurisdictional amount requirement); *Snyder v. Harris*, 394 U.S. 332 (1969) (aggregation of claims not permitted to meet jurisdictional amount).

78. The decision denying discretionary power to award attorneys' fees in *Alyeska Pipeling Service Co. v. Wilderness Soc'y.*, 421 U.S. 250 (1975), of course, has been a serious depressant to public interest litigation for which Congress has not specifically authorized fee awards.

79. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (challenges to duration of confinement may not be remedied under the Civil Rights Act, even though only administrative action of prison officials is complained of). *But see* *Wolff v. McDonnell*, 418 U.S. 539 (1974) (joinder with a claim for damages under § 1983 is permissible).

their rights have been whittled down.⁸⁰ Civil rights class and individual relief have become substantially unobtainable in a variety of circumstances.⁸¹

Most significantly, the Burger Court has given renewed prominence to seemingly superseded expectations concerning the allocations of judicial power in a federal union. The first Justice Harlan had argued in his dissent in *Ex parte Young* that "a decent respect for the states" required us to assume that the state courts would "enforce every right secured by the Constitution."⁸² In that tradition, Justices Holmes,⁸³ Frankfurter⁸⁴ and

80. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (no access to federal habeas corpus for state prisoner who raised fourth amendment defense in state court); *Francis v. Henderson*, 425 U.S. 536 (1976) (no access to federal habeas corpus for state prisoner who failed to raise constitutional defense in state court). *Stone v. Powell*, strictly speaking, does not deprive the prisoner of fourth amendment remedies that would have been available outside of habeas, but it does carve back on rights in habeas. *Francis v. Henderson*, in sealing from scrutiny prior state adjudications, is much more destructive, and in conjunction with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), seems to have overruled *Fay v. Noia*, 372 U.S. 391 (1961), *sub silentio*.

81. The *Alyeska* decision has not had the impact in the civil rights context it had elsewhere. For statutory authorizations of fee awards in civil rights cases, see note 70 *supra*. A more significant curb on access to federal remedial power in these cases has been made by rulings destroying the effectiveness of Fed. R. Civ. P. 23(b)(2) in remedying threatened harm to an indeterminate class. See *O'Shea v. Littleton*, 414 U.S. 488 (1974) (named plaintiffs must meet case or controversy requirements and thus must prove threat to themselves individually). This burden cannot be carried where the class is indeterminate. E.g., *Rizzo v. Goode*, 423 U.S. 362, 373 (1976). Justiciability rulings have cut back on access in a variety of settings. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Paul v. Davis*, 424 U.S. 693 (1976) (no remedy for state official's libel under either § 1983 or § 1331); *Warth v. Seldin*, 422 U.S. 490 (1975). Heavy new burdens of proof on the issue of intent have placed significant risks on this sort of litigation. See notes 5-6 *supra*.

82. 209 U.S. at 176. See *Robb v. Connolly*, 111 U.S. 624, 6537 (1884); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 359-60 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*]; H. FRIENDLY, *supra* note 39, at 90, *citing* U.S. CONST. art. VI *and* THE FEDERALIST No. 82; Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 327-28.

83. E.g., *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 223 (1917) (Holmes, J., dissenting).

Black⁸⁵ continued to point out that the states can and must administer their affairs in conformity with the Constitution and ought to be allowed to do so. And that position again has begun to seem as much a principle of national policy as does the stand taken in section 1983, *Ex parte Young* and *Brown II*.⁸⁶ Both positions are, of course, correct. This is the central paradox of our judicial federalism. The continued coexistence of these opposing national policies creates the ambivalence that from one generation to the next seems to open and then to close the doors of federal courts to those complaining of state wrongs. The task has always been to find an accommodation.

And so today a major area of controversy in the Burger Court's current retrenchment is the field occupied by federal courts under the Civil Rights Act, *Ex parte Young* and *Brown II*: their power to stay state proceedings, and, more broadly, their power to govern local agencies and officials by injunction. It is in the former area that the new "principles of federalism" were first applied in the post-Warren Court era, and in the latter that *Rizzo v. Goode* now make those "principles of federalism" applicable.

II. ORIGINS AND SIGNIFICANCE OF THE NEW DEFENSE:

Younger v. Harris

_____The case of *Younger v. Harris*⁸⁷ is almost universally understood to have worked a revolution in the availability of federal injunctions against state proceedings. Since that case was decided, the Supreme Court has devoted considerable energy to working out its implications.⁸⁸ But neither

84. *E.g.*, *Snowden v. Hughes*, 321 U.S. 1, 15-17 (1944) (Frankfurter, J., concurring).

85. *E.g.*, *Younger v. Harris*, 401 U.S. 37 (1971); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

86. *E.g.*, *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("The National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

87. 401 U.S. 37 (1971). There were five companion cases: *Samuels v. Mackell*, 401 U.S. 66 (1971) (declaratory judgment barred on *Younger* facts); *Boyle v. Landry*, 401 U.S. 77 (1971) (injunction barred where threat of prosecution too remote); *Perez v. Lesesma*, 401 U.S. 82 (1972) (no injunction to suppress evidence in state prosecution, reaffirming *Stefanelli v. Minard*, 342 U.S. 117 (1951)); *Dyson v. Stein*, 401 U.S. 200 (1971) (per curiam); *Byrne v. Karalex*, 401 U.S. 216 (1971) (per curiam).

88. The most significant rulings are *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (*Younger* showing is not required when no state proceedings are pending, either for declaratory or injunctive relief); *Hicks v. Miranda*, 422 U.S.

the Court nor the commentators seem to have explained why *Younger* and its progeny have affected particular changes in preexisting law.⁸⁹

In *Younger*, the federal plaintiff had been indicted for the crime of unlawful advocacy under a California criminal syndicalism statute.⁹⁰ A similar statute was subsequently held unconstitutional by the Supreme Court in another case.⁹¹ He sought a federal injunction to stop the California prosecution, relying on the first amendment. The Supreme Court held such relief unavailable in federal courts.

No one should have been surprised at the result. It is true that the celebrated case of *Dombrowski v. Pfister*⁹² had authorized an injunction in a first amendment case, but in *Dombrowski* no prosecution was in fact

332 (1975) (state proceeding is "pending" whenever filed, as long as no proceedings of substance on the merits have taken place in federal court); *Huffman v. Pursue, Ltd.*, 240 U.S. 592 (1975) (*Younger* applies to enforcement proceedings civil in form). *See also* *Steffel v. Thompson*, 415 U.S. 452 (1974).

89. Before *Younger*, 28 U.S.C. § 2283 (1970) was an absolute bar to federal interference with pending state judicial proceedings, civil or criminal, except for three codified exceptions. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281 (1970). After *Younger*, "Our Federalism" is the bar to federal interference in pending state proceedings, but there is a common law exception for proceedings brought in bad faith or other extraordinary circumstances.

Before *Younger*, doctrines of equitable restraint had been developed that virtually barred federal interference with nonpending but threatened state proceedings. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943). There was a common law exception, however, for proceedings threatened in bad faith or other extraordinary circumstances. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). After *Younger*, bad faith does not have to be shown in such cases; injunctive relief is available if equitable jurisdiction is shown. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

In addition, after *Younger*, declaratory relief is treated in the same way as injunctive relief, despite Congress' intention to provide a milder alternative in U.S.C. § 2201. *Compare* *Cameron v. Johnson*, 390 U.S. 611 (1968) *with* *Steffel v. Thompson*, 415 U.S. 452 (1974).

90. CAL. PENAL CODE §§ 11400-11401 (West 1970).

91. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), overruled *Whitney v. California*, 274 U.S. 337 (1927), which had upheld California's criminal syndicalism statute. The district court in *Younger* stayed Harris' state prosecution before *Brandenburg* was decided. 281 F. Supp. 507 (C.D.Cal. 1968).

92. 380 U.S. 479 (1965).

pending.⁹³ Harris' prosecution, on the other hand, was certainly pending and seemed obviously barred by the Anti-Injunction Act,⁹⁴ unless his suit fell under one of the statutory exceptions,⁹⁵ or unless *Dombrowski's* first amendment rationale could be extended to authorize relief even when state proceedings were pending.

Harris argued that the case came within the codified exception for injunctions "expressly authorized" by Congress, because it was brought under section 1983,⁹⁶ which grants jurisdiction "in equity." But the Court found it unnecessary to reach that point. Returning to language of earlier cases, including *Ex parte Young*,⁹⁷ the court treated the Anti-Injunction Act as emblematic of an underlying principle that would limit federal injunctions against state proceedings even in the absence of the Act. Justice Black, writing for the majority,⁹⁸ labeled that underlying principle

93. 380 U.S. at 484 n. 2.

94. 28 U.S.C. § 2283 (1970). The statute reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs., 398 U.S. 281, 294-95 (1970) (§ 2283 an absolute bar to federal interference with state proceedings, civil or criminal, no common law exceptions; statutory exceptions construed narrowly).

95. 28 U.S.C. § 2283 (1970). *See note 94 supra.*

96. Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970). The section, as amended, reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress."

The parallel jurisdictional provision reads: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States," 28 U.S.C. § 1343(3) 1970).

97. 209 U.S. at 166-68.

98. Only Justice Douglas dissented.

"Our Federalism."⁹⁹ It was "Our Federalism," not the Anti-Injunction Act, that closed the federal doors to Harris.

But what, precisely, *was* "Our Federalism"? Now that the dust has settled on the cases applying it, the doctrine can be restated very briefly: Generally, federal trial courts may not interfere in state enforcement proceedings unless there is a showing of extraordinary circumstances, usually amounting to bad faith on the part of the state authorities or other inadequacy of the state forum. "Bad faith," in the context of a state prosecution, is defined as a lack of reasonable expectation that the prosecution will succeed.¹⁰⁰

Failure to make the *Younger* showing of bad faith or other inadequacy of the state forum means dismissal.¹⁰¹ No exception is made for prosecutions under statutes facially invalid on first amendment grounds; that was decided in *Younger*.¹⁰² No exception is made for section 1983 civil rights cases¹⁰³ or for cases of racial discrimination.¹⁰⁴ No

99. 401 U.S. at 44.

100. *Kugler v. Helfant*, 421 U.S. 117, 126 n. 6 (1975); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). Although the Supreme Court since *Younger* has not sustained an injunction on "bad faith" grounds, it has decided a number of cases in which the state forum was challenged as inadequate on other grounds. *See* *Juidice v. Vail*, 97 S.Ct. 1211 (1977) (contempt proceedings challenged on due process grounds; injunction disapproved); *Kugler v. Helfant*, 421 U.S. 117 (1975) (proceedings against judge in his own county by officials allegedly planning to remove him before judges sharing their view; injunction disapproved because state appellate remedies would be adequate); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (legality of pretrial detention could not be raised in prosecution; injunction approved); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding by state board of optometrists inadequate because all members were professional rivals of the federal plaintiff, injunction approved).

101. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

102. 401 U.S. at 51.

103. Virtually all of these cases are, or can be, brought under § 1983. *See* text accompanying notes 115-21 *infra*.

104. Race was not treated as a distinguishing factor in later cases extending *Younger*. *E.g.*, *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974). *See* A.L.I., *Study of the Division of Jurisdiction Between State and Federal Courts* 297 (1969).

exception apparently is made when the enforcement proceedings are civil in form.¹⁰⁵

But why has the Supreme Court in *Younger* and its progeny labored so strenuously to accomplish only this substitution of "Our Federalism" for the Anti-Injunction Act? The participation of most of the liberal wing of the Court¹⁰⁶ may perhaps be explained, if we allow ourselves to presume that there were clear understandings at the time, by first, the fact that after *Younger* federal injunctions were to be held permissible where state proceedings were threatened but not yet pending¹⁰⁷ — a substantial change in prior law;¹⁰⁸ second, the belief that after *Younger* a federal injunction could issue against a pending state *civil* proceeding¹⁰⁹ — another

105. *Juidice v. Vail*, 97 S.Ct. 1211 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

106. Although Justice Brennan, the author of *Dombrowski*, filed a concurring opinion joined by Justices White and Marshall, he did not explain why he was in agreement with the Court on the first amendment issue. 401 U.S. at 56. Justice Stewart also concurred, joined by Justice Harlan. *Id.* at 54. Justice Douglas alone dissented, arguing that § 1983 was an exception to § 2283 "expressly authorized" by Congress. *Id.* at 68.

107. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (*Younger* showing not required if state proceeding is not pending); *accord*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 3 n. 1 (1974); *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory judgments). On the meaning of "pending," see *Hicks v. Miranda*, 422 U.S. 332 (1975) (state proceeding pending even if filed after federal injunction action, providing no substantial proceedings on the merits have taken place in federal court); *Huffman v. Pursue, Ltd.*, 420 U.S. 492 (1975) (federal plaintiff required to exhaust state appellate remedies; injunction barred although state judgment has become final).

108. Under the doctrine of equitable restraint of *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), a federal injunction generally could not issue to stay threatened state judicial proceedings.

109. For some of Justice Brennan's understandings, see his dissents in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 613 (1975) and *Juidice v. Vail*, 97 S.Ct. 1211, 1220 (1977). See notes 115-21 *infra* and accompanying text for some implications of this position. From a doctrinal point of view, it is not possible to distinguish civil from criminal proceedings persuasively. The concerns of federalism that support federal noninterference in criminal cases are also relevant in civil cases, and Justice Brennan's argument based on § 1983 would support federal interference with criminal cases, his concurrence in *Younger* notwithstanding, as well as in civil cases. Arguably the need for intervention is *stronger* in criminal cases than in civil, as the federal criminal plaintiff who is turned away may be subjected to grave risks, expense and stigma.

potentially substantial change;¹¹⁰ and third, the fact that "Our Federalism" would ameliorate the previously inflexible ban of the statute by importing into "pending" cases a common law exception for bad faith or other inadequacy of the state forum.¹¹¹ But these differences do not explain the participation of the conservative majority in building the new structure.¹¹²

A. *The Precipitating Problem*

But the *Younger* Court was concerned not so much with the general problem of controlling federal interference with state proceedings, as with the particular issue the *Younger* Court had avoided reaching: the irreconcilability of the Anti-Injunction Act with the Civil Rights Act of 1871. This problem had been a source of increasing embarrassment to the Court ever since 1961, when *Monroe v. Pape*¹¹³ ushered in a renaissance of jurisdiction under section 1983. The precise question was whether section 1983, by which the Reconstruction Congress gave federal trial courts jurisdiction "in equity" to remedy state deprivations of civil rights, fell within the statutory exception to the Anti-Injunction Act for federal injunctions "expressly authorized" by Congress.

The statutory text and legislative history¹¹⁴ made it difficult to argue that section 1983 did *not* expressly authorize injunctive relief. On the other hand, the Supreme Court could not afford to take the view that section 1983 *was* a congressionally authorized exception to the Act.

110. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281 (1970) holding that § 2283 absolutely bars injunctions against pending state proceedings, was a civil case. Like *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), it involved only a request for collateral review, rather than an order staying pending proceedings. The distinction is discussed in *Wooley v. Maynard*, 97 S.Ct. 1428, 1433 (1977).

111. *Compare* *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs.*, 398 U.S. 281 (1970) (permitting no common law exceptions to § 2283) *with* *Gerstein v. Pugh*, 420 U.S. 103 (1975) (injunction may issue where federal question could not be raised in state proceedings) *and* *Gibson v. Berryhill*, 411 U.S. 564 (1973) (injunction may issue where state administrative tribunal incompetent to adjudicate).

112. Not does the assimilation of declaratory judgments to injunctions after *Younger* explain that participation. *Steffel v. Thompson*, 415 U.S. 452 (1974); *Samuels v. Mackell*, 401 U.S. 66 (1971).

113. 365 U.S. 167 (1961).

114. *See* note 96 *supra*. For legislative history see *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972); *Monroe v. Pape*, 365 U.S. 167, 173-87 (1961).

Consider the Act's core application to state criminal prosecutions. If section 1983 was an exception, any state defendant with a colorable constitutional defense could seek a federal injunction. If federal injunctions were to issue freely to block pending state criminal prosecutions, nearly two centuries of case law establishing the limits of federal judicial power would be overturned.

Moreover, the exception could annihilate the rule.¹¹⁵ Any state judicial proceeding may be couched as a section 1983 deprivation on the theory that what a state court does is state action.¹¹⁶ Wholly private cases conceivably could be scooped out of the state courts and into the federal judicial system. That certainly could happen if the federal plaintiff alleged a state judicial denial of procedural due process.¹¹⁷ It also could happen if judicial enforcement of state tort¹¹⁸ or contract¹¹⁹ law was thought to infringe substantive first amendment and other civil rights. But it could also happen, potentially, if judicial enforcement of state law was alleged to deny the federal plaintiff substantive due process in the sense in which the railroad argued in *Ex parte Young* that the state ratemaking was so arbitrary and confiscatory as to deny it due process of law.¹²⁰ The result could be total federal control over state adjudications, public and private, destroying any significant independent role for the state tribunals in our federal system.¹²¹

115. Any state action might be couched as a § 1983 deprivation, as, for example, when the state sues in a proprietary or contractual capacity. Thus, a dispute of essentially no federal concern could be shifted from state to federal jurisdiction.

116. *See, e.g.,* *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *AFL v. Swing*, 312 U.S. 321 (1941).

117. *E.g.,* *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972). *Compare* *Gibson v. Berryhill*, 411 U.S. 564 (1973) *with* *Juidice v. Vail*, 97 S.Ct. 1211 (1977).

118. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).

119. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racially restrictive covenant).

120. The *reductio ad absurdum* would be a federal plaintiff's allegation that application of the state's strict liability rules to the case would constitute a "taking." *But see* note 121 *infra*.

121. Suppose, for example, a state-court action by a used car dealer against D. The dealer repossesses the car. The state court now proposes to try title to the property. D goes to federal district court seeking a § 1983 injunction, arguing that the state court is taking his property confiscatorily. In *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), the federal plaintiff argued that the

These difficulties may explain why in 1970 the Court in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*¹²² insisted that the Anti-Injunction Act was an absolute bar to interference in all pending state cases,¹²³ and why it continued to reserve the section 1983 issue in case after case,¹²⁴ including *Younger v. Harris*, despite the mounting pressure of section 1983 litigation, until it deemed itself prepared for the confrontation. The confrontation occurred in *Mitchum v. Foster*.¹²⁵

B. *Mitchum v. Foster: "Resolution" of the Confrontation
Between Section 1983 and the Anti-Injunction Act*

In *Mitchum*, Florida had instituted a civil proceeding to shut down Mitchum's bookstore as a public nuisance. Mitchum sued for a federal injunction under section 1983, arguing that the state proceeding violated his first amendment rights. He thus raised again the dangerous question whether section 1983 expressly authorized the injunction within the meaning of the Anti-Injunction Act.

In an eloquent opinion the Court affirmed that the Reconstruction legislation did indeed modify the earlier law in this way.

state forum was procedurally defective; D, however, is going further and arguing a violation of substantive due process rights. *See Ex parte Young*, 209 U.S. 123 (1908); *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). As in *Lynch*, however, D's defendant is not an attorney general but a used car dealer. Should the injunction issue? In a similar but "procedural due process" case, *Juidice v. Vail*, 97 S.Ct. 1211 (1977), the Supreme Court appears to reject such a possibility. Although important rights are always raised in framing a § 1983 case, these cases seem to be civil rights cases only in a fictional sense. Yet it would be impossible to say in advance that all cases in this category cannot be make "federal" cases; the exigencies of pleading alone may generate the federal questions, but the questions may be of great moment nonetheless.

In creating "Our Federalism," the Supreme Court seems to have viewed such questions as beyond the reach of the removal statute, 28 U.S.C. § 1441(b) (1970).

122. 398 U.S. 281 (1970).

123. That case was not a § 1983 case, although it could have been pleaded as one, relying on a first amendment right instead of a federal common law right to picket.

124. *See, e.g., Lynch v. Household Fin. Corp.*, 405 U.S. 538, 556 (1972); *Younger v. Harris*, 401 U.S. 37, 54, (1971); *Cameron v. Johnson*, 390 U.S. 611, 613 n.3 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965).

125. 407 U.S. 235 (1972).

Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

....

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people. . .¹²⁶

But it would have been inappropriate to view *Mitchum* as a significant breakthrough even in 1972, for the Court had already decided the case that made section 1983 a safe nonissue: *Younger v. Harris*. Under *Younger*, issues under the Anti-Injunction Act and its exceptions are simply not reached.¹²⁷ It is worth noting that injunctive relief was not authorized in *Mitchum*; the case was remanded so that the trial judge could consider the applicability of *Younger*.¹²⁸ *Mitchum* was reversed not

126. *Id.* at 242.

127. Assuming the case can be pleaded as a § 1983 case, and it is difficult to imagine a case that cannot. § 2283 is simply inapplicable, as *Mitchum* holds. But suppose that the *Younger* showing of bad faith is made out. Can the injunction issue without regard to § 2283? That is the uniform result when the state forum is held inadequate. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 102 (1975); *Gibson v. Berryhill*, 481 U.S. 564 (1973).

If When the *Younger* showing of bad faith cannot be made out, the question arises: What happens to the former exceptions to § 2283 codified by Congress? Suppose a § 1983 action for a declaratory judgment. The declaratory judgment is entered. The federal defendant next files a state prosecution and, in good faith, begins relitigating the issues tried in the federal case. As a result, the federal plaintiff returns to federal court and files a § 1983 action based on the full faith and credit clause, seeking an injunction to protect the federal court's prior judgment. Under the rationale of *Younger*, the injunction ought not to issue. There is no bad faith, and the state court is fully adequate to process the plea of res judicata. Yet, Congress expressly codified this relitigation exception in 1948, 28 U.S.C. § 2283 (1970) (injunction allowable "to protect or effectuate [a federal court's] judgments"), to overcome the effect of *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). Perhaps that will be thought sufficient to override *Younger*, but if § 1983, another express Congressional authorization, cannot

because the complaint had been dismissed erroneously but because it had been dismissed on the wrong ground.

And so the real explanation for "Our Federalism" surfaces: It obliterates section 1983 as a threat to established patterns of judicial federalism; the Court decided *Younger* as it did because *Mitchum* was waiting in the wings. After *Younger* the Court could decide *Mitchum* without fear of opening any new jurisdictional doors other than those it was prepared to open.¹²⁹

C. *The New Accommodation*

The Court, in fact, was prepared to open some doors, in this sense *Younger* truly was "an accommodation" of the "competing values: of federal civil rights enforcement on the one hand and the dual court system on the other."¹³⁰ In the unanimous decision in *Doran v. Salem Inn, Inc.*,¹³¹ the Court opened the door wide to federal injunctions against state proceedings that are threatened seriously but not yet pending. Under this heading both *Douglas v. City of Jeannette*¹³² and *Dombrowski v. Pfister*¹³³ are no longer in point; no *Younger* showing need be made in order to avoid dismissal, and federal constitutional rights will be enforced fully by federal injunctions, even by staying state prosecutions.¹³⁴

In addition to this, the *Younger* defense has been kept limited to state enforcement proceedings or proceedings akin to them, and has not been

override "Our Federalism," it is hard to see that the much less compelling "relitigation exception" would be permitted to do so. But see *Steffel v. Thompson*, 415 U.S. 452 (1974) (White, J., concurring). Thus, § 2283 seems to be judicially expunged (at least in cases pleadable under § 1983) whenever *Younger* applies, and *Toucey* resurrected. See *Lamb Enterprises, Inc. v. Kiroff*, - --- F.2d ---- (6th Cir. 1977). There should be no distinction between an ancillary and an original bill, and the Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), which allowed an injunction to prevent relitigation ancillary to class suit, like § 2283, would be disregarded on the point.

128. 407 U.S. at 244.

129. *See* text accompanying notes 107-11 *supra*.

130. *See* *Hicks v. Miranda*, 422 U.S. 332, 357 (1975) (Stewart, J., dissenting).

131. 422 U.S. 922 (1975).

132. 319 U.S. 157 (1943). *See* note 108 *supra*.

133. 308 U.S. 479 (1965). *See* note 89 *supra*.

134. *E.g.*, *Wooley v. Maynard*, 97 S.Ct. 1428 (1977); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

applied freely in wholly private civil cases.¹³⁵ Some members of the Court have expressed the view that *Younger* clearly should be inapplicable to pending civil proceedings; they rightly argue that if the door to such relief is not open then, *Mitchum v. Foster* was a "Pyrrhic victory."¹³⁶ Although the result they contemplate would give greater scope to the concerns underlying section 1983, I doubt that it will emerge. The concerns underlying "Our Federalism" seem almost as strongly implicated when a state court has taken jurisdiction over a civil as over a criminal case. Moreover, the concerns underlying section 1983 seem *stronger* when it is a criminal prosecution the federal plaintiff is seeking to halt.¹³⁷ Finally, a wholly private state civil litigation, in the nature of things, often will not be worth "making a federal case" of.¹³⁸ If accommodation along some bright line is what is wanted, federal injunctions should be barred in pending civil as well as criminal state proceedings, just as they are freely available where civil or criminal state proceedings are merely threatened. On the other hand, one might argue that injunctions against only *threatened criminal* proceedings and *pending civil* ones should be permitted. But whatever the ultimate accommodation, it can be agreed that real compromise is necessary; the Court was right in perceiving that section 1983 and the dual court system were on a collision course.

Finally, *Younger* requires scrutiny of adequacy of the state forum, a ground of exception apparently unavailable under the Anti-Injunction Act.¹³⁹ Thus, if the prosecution is brought in bad faith or the state forum is

135. *Juidice v. Vail*, 97 S.Ct. 1211, 1218 n. 13 (1977), is the closest the Court has come to barring an injunction against a private civil litigant on federalism grounds. There, the federal plaintiff was a defaulting debtor who had disregarded a deposition subpoena. It was held error to enjoin the contempt proceedings but the underlying dispute was between private debtor and creditor. In other cases of pending civil proceedings, the state has been an enforcing party plaintiff. *E.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

A number of courts of appeals have extended *Younger* to civil proceedings. *See Lamb Enterprises, Inc. v. Kiroff*, ---- F.2d ---- (6th Cir. 1977); *Duke v. Texas*, 477 F.2d 244 (5th Cir. 1973); *Lynch v. Snapp*, 472 F.2d 769 (4th Cir. 1973); *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir. 1972). 136. *Juidice v. Vail*, 97 S.Ct. 1211, 1221 (1977) (Brennan, J., joined by Marshall, J., dissenting), *quoting The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 217-18 (1972); Marshall, JJ., dissenting), *quoting The Supreme Court, 1971 Term, supra* at 217-18.

137. *See* note 109 *supra*.

138. *See* notes 120-21 *supra*.

139. *See* note 94 *supra*.

for some other reason inadequate for trial of the federal issue, an injunction is permitted.¹⁴⁰

D. *Troubling Implications of the New Defense*

____ But the new defense of "Our Federalism" is troubling. First, it is not administered within the discretion of the trial court. It is a door-closing rule, shutting the door mechanically in every case in which it is thought to apply, unless the *Younger* showing of bad faith prosecution or other inadequacy of the state forum is made out. The several elements of "bad faith,"¹⁴¹ "pending"¹⁴² and "proceeding"¹⁴³ have been given some definitional content in later cases, but there is little room for judicial analysis and the informed discretion of the chancellor in applying these rules.

Second, the underpinning of the doctrine — the presumed adequacy of the state forum — seems fundamentally at odds with section 1983. Although the Court has taken the trouble to give actual scrutiny when the adequacy of the state forum is challenged,¹⁴⁴ only in *Mitchum* did it

140. *See* note 111 *supra*.

141. *Kugler v. Helfiant*, 421 U.S. 117 (1975) (allegations of pervasive bias against judge on the part of state authorities trying his case; injunction denied on assumption that state appellate remedies would be adequate); *Perez v. Ledesma*, 401 U.S. 82 (1971) (bad faith defined as prosecutor's expectation that prosecution will not succeed); *Allee v. Medrano*, 416 U.S. 802 (1974) (bad faith is quasijudicial showing in "proceedings" cases; in cases seeking relief from state executive action bad faith is part of prima facie case; in police misconduct cases bad faith must be shown by pervasive pattern or practice to distinguish governmental action from collection of isolated trespasses).

142. *Hicks v. Miranda*, 422 U.S. 332 (1975) (state proceeding is pending even if filed after the federal injunction action, as long as no proceedings of substance on the merits have taken place in federal court); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (state proceeding is pending after judgment becomes final; federal plaintiff must exhaust state appellate remedies). In *Wooley v. Maynard*, 97 S.Ct. 1428 (1977), the Court distinguished cases seeking prospective interference from those, like *Huffman*, seeking collateral review. A federal plaintiff need not appeal from a state judgment when seeking relief solely with respect to threatened future proceedings.

143. *Juidice v. Vail*, 97 S.Ct. 1211 (1977) (contempt; creditors' remedy); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (enforcement proceeding civil in form); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding).

144. *Juidice v. Vail*, 97 S.Ct. 1211 (1977) (due process challenge, relief denied); *Kugler v. Helfant*, 421 U.S. 117 (1975) (bias, relief denied); *Gerstein v.*

recognize that section 1983 creates the reverse presumption, at least with respect to those whom the statute was especially intended to protect. Thus, despite *Mitchum*, *Younger* continues, as did the Anti-Injunction Act, to bar a stay of a state prosecution against a member of a racial minority with a constitutional defense.

Third, in slaying the dragon lurking in section 1983, the Court has used more force than necessary. Of course, fictitious civil rights claims ought not to invoke the federal injunctive power,¹⁴⁵ and the difficulty of sorting out fictitious from genuine claims¹⁴⁶ in section 1983 cases may seem to warrant some broad prophylactic rule. But what of the clear case of racial discrimination in contemplation of which section 1983 was enacted? After *Younger*, "Our Federalism" as crudely as section 2283 blocks an injunction to stay a state prosecution under racially repressive legislation, despite the perception in *Mitchum v. Foster* that Congress intended such an injunction to be available. After *Younger*, the state tribunals are presumed adequate to process the equal protection issue, and the notion that prosecution under a facially unconstitutional law would amount to "bad faith" or at least "extraordinary circumstances" justifying injunctive relief was sledgehammered into oblivion in *Younger* itself.¹⁴⁷

Thus, in substituting "Our Federalism" for the Anti-Injunction Act, the Supreme Court has discarded an opportunity to bring reasoned analysis into a federal trial judge's decision whether or not to intervene in an allegedly unconstitutional state proceeding and, in the narrow views taken of forum adequacy and bad faith, has waived an opportunity to provide full protection for those whom the Civil rights Act was especially intended to protect. In making these choices, the Supreme Court has infused "Our Federalism" with the disturbing message that the mighty post bellum shift in power to federal trial courts relied on in *Mitchum* is in reality, in the context of federal injunctions against pending state proceedings, quietly to be finessed. The message is that, since they take jurisdiction, we must trust the state courts, and pace the Civil War.

III. EXTENSION TO OTHER CIVIL RIGHTS CASES: *Rizzo v. Goode*

_____The even greater significance of *Younger v. Harris* is that "Our Federalism" has begun to furnish a broad principle applicable not only in actions for federal injunctions against state judicial proceedings but across

Pugh, 420 U.S. 103 (1975) (issue not raisable, relief granted); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (bias, relief granted).

145. See text accompanying notes 115-21 *supra*; note 121 *supra*.

146. See note 121 *supra*.

147. 401 U.S. at 51-54.

the board in federal civil rights litigation.¹⁴⁸ At least, that appears to be the view taken by the Supreme Court in *Rizzo v. Goode*.¹⁴⁹

A. *Rizzo v. Goode: "Our Federalism" in a New Context*

Rizzo was a class action on behalf of the citizens of Philadelphia against the mayor and the commissioner of police. The plaintiffs alleged that in prearrest procedures the Philadelphia police persistently violated the civil rights of minority citizens and that despite repeated complaints the defendant supervising officials had failed to take adequate remedial steps. The plaintiffs sought broad injunctive relief, including the appointment of a receiver to run the Philadelphia police department.¹⁵⁰

The trial judge found numerous occurrences of the sort of violation alleged.¹⁵¹ Although he did not find that the named defendants intended to violate the plaintiffs' constitutional rights, he found that the defendants had failed to take adequate remedial steps.¹⁵² Nonetheless, he declined to give the sweeping relief prayed for. Instead, retaining supervisory jurisdiction, he ordered the defendants to submit a plan for improving the handling of citizen complaints and revising police training programs and manuals under guidelines composed by him.

148. This has been the result in habeas corpus. *But see* *Francis v. Henderson*, 426 U.S. 536, 551 (1976) (Brennan, J., dissenting) ("The increasingly talismanic use of the phrase 'comity and federalism'--itself devoid of content other than in the *Younger* sense...has the look of an excuse being fashioned by the Court for stripping federal courts of the jurisdiction property conferred by Congress.").

The Court previously has considered extending some analog of *Younger* to injunction cases. *See* *Carter v. Jury Comm'n.*, 396 U.S. 320 (1970) (Black, J., concurring); *Mayor v. Educational Equality League*, 415 U.S. 605, 615-16 (1974). Both cases were decided on the issue of intent.

In the 1976 Term, the Supreme Court has reserved for the first time the question whether the new defense is applicable in civil rights actions for damages. *Juidice v. Vail*, 97 S.Ct. 1211, 1219 n. 16 (1977). On this issue see Justice Brennan's dissent. *Id.* at 1219, 1222 n. 16.

149. 423 U.S. 362 (1976).

150. *Council of Orgs. on Phila. Police Accountability and Responsibility v. Rizzo*, 357 F.Supp. 1289 (E.D. Pa. 1973). Of the two cases consolidated for decision, only *Goode* sought establishment of effective grievance procedures.

151. *Id.* at 1292-317.

152. *Id.* at 1319.

A unanimous panel affirmed in the third Circuit Court of Appeals,¹⁵³ and on certiorari in the Supreme Court briefs *amici* urging affirmance were filed by the Commonwealth of Pennsylvania and by the Philadelphia Bar Association, among others.¹⁵⁴ Surprisingly, in view of this unanimity of support for the trial judge's decree, the Supreme Court reversed. Justice Rehnquist, writing for the majority of five,¹⁵⁵ reasoned that the plaintiffs had failed in three respects to lay a basis for injunctive intervention.

First, the case fell short of an actual case or controversy. The named plaintiffs had alleged only that they were subject to a speculative threat of future injury at the hands of a small number of police officers not joined as defendants. The case should have been dismissed on motion under *O'Shea v. Littleton*;¹⁵⁶ *O'Shea* had held that when the named representatives of a class lacked standing, they could not maintain the action either in their own right or on behalf of those they purported to represent.¹⁵⁷ But Justice Rehnquist felt that he could not rest the decision on this ground because the case, unlike *O'Shea*, was not before the Court on the pleadings; in his view, the case-or-controversy issue was no longer open because an uncontested class certification had been made, and the trial judge thus had "bridged the gap between the facts shown at trial and the class-wide relief sought with an unprecedented theory of 1983 liability."¹⁵⁸

153. *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. 1974).

154. 423 U.S. at 384 (Blackmun, J., dissenting).

155. Justice Blackmun filed a dissent in which Justices Brennan and Marshall joined; Justice Stevens took no part in consideration or decision of the case.

156. 414 U.S. 488 (1974).

157. *O'Shea* thus substantially undercuts Fed. R.Civ.P. 23(b)(2), the purpose of which was to provide a remedy for threatened harms to a class. Whenever the threat is serious enough to affect whole populations, as in police misconduct cases. *O'Shea's* individual standing requirement makes the threatened violation virtually irremediable in equity. Curiously, the case has been the subject of little commentary.

158. 423 U.S. at 373. But these facts do not actually explain why the case could not be rested on the *O'Shea* case-or-controversy ground. It is true that in *Sosna v. Iowa*, 419 U.S. 393 (1976), a class action that had become moot as to the original plaintiff was held not moot with respect to the class. But nothing in *Sosna* overrules *O'Shea*. Nor, for that matter, could the proof at trial affect the case-or-controversy issue, which is adjudicated on the assumption that the allegations of the complaint are true. And the trial judge's theory of liability, that the defendants had failed to run the police properly, could add nothing to

Second, the burden of proof of discriminatory intent had not been carried. The plaintiff failed to show a pervasive pattern of discriminatory conduct on the part of the subordinate officers that would support an inference of intentional discrimination on the part of the defendants.¹⁵⁹ Justice Rehnquist felt it inappropriate to subject these city officials to affirmative duties under court order upon a showing of a small number of isolated trespasses on the part of their subordinates.¹⁶⁰ He distinguished the case in this respect from school discriminatory cases relied on by the plaintiffs, because in those cases discriminatory intent had to be shown. The Court seemed to hold that merely negligent failure of city officials to supervise their departments could not lay a basis for injunctive relief under section 1983. The case thus importantly joins other late civil rights cases imposing heavy new burdens of proof of discriminatory intent.¹⁶¹

Justice Rehnquist gave no reason why this failure to show the requisite quantum of intent did not ground the decision. But perhaps the Court decided not to rest the case on either of these first two rationales for the simple reason that certiorari had been granted to deal with a third

whatever inferences of future harm might be found in the allegations of the complaint.

159. 423 U.S. at 375. This wing of the opinion seems unpersuasive because it amounts to a disagreement between the five members of the majority and the trial judge on the conclusions to be drawn from the lengthy factual record. There seems to have been an adequate basis in fact for the conclusion the trial judge did draw, as the dissenting Justices pointed out. *Id.* at 383.

160. Here, the partial dissent of Chief Justice Burger in *Allee v. Medrano*, 416 U.S. 802, 844 (1974) (Burger, C.J., concurring in part and dissenting in part), seems to have become law, along with the views expressed by Justice Frankfurter in his dissent in *Monroe v. Pape*, 365 U.S. 167, 215 (1961), and his opinion in *Snowden v. Hughes*, 321 U.S. 1, 15-17 (1944).

161. *See* note 6 *supra*. *See* notes 243-49 *infra* and accompanying text for further discussion of the impact of the intent requirements on § 1983. The intent requirement imposed in *Rizzo* does not seem as consistent with prior jurisprudence as Justice Rehnquist implied. The Civil Rights Act of 1871 was intended to remedy omissions and neglect in high places in injunctive as well as damage suite. *See Mitchum v. Foster*, 407 U.S. 225, 240-41 (1972). Moreover, the statute is read "against the background of tort law which makes a man responsible for the consequences of his acts." *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Finally, although *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973), articulated an intent requirement for school desegregation cases, it allowed a showing of disproportionate impact upon racial minorities to shift the burden of explanation to the defendants. *Id.* at 208-09. Yet, the recent injunction cases on intent, including *Rizzo*, seem to hold that disproportionate impact, without more, cannot establish a prima facie case. *See* note 6 *supra*.

issue:¹⁶² the general desirability of federal intervention in state governmental affairs. And on that issue, the Court held that principles of federalism blocked federal injunctions not only against state proceedings but against state officials as well:

[T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress . . . likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments....¹⁶³

It is this last point, of particular interest to students of federal jurisdiction and public law, that is the stated ground of decision.¹⁶⁴ It is a most novel proposition that, *Ex parte Young*, section 1983 and *Brown II* notwithstanding, a federal trial court cannot fashion a prospective remedy to discourage deprivations of constitutional rights because federalism requires that state officials failing to protect against such deprivations be left free from federal interference. Moreover, in striking down a rather ordinary injunction in a rather commonplace civil rights case as an injection by injunctive decree into the "internal disciplinary affairs" of a state agency¹⁶⁵ and an unwarranted intrusion by the federal judiciary into the discretion of that agency,¹⁶⁶ the Court in *Rizzo* took a startlingly restrictive view of the sweep of federal injunctive power.¹⁶⁷

B. *Attempting to Understand Rizzo*

Rizzo's discussion of federalism would be troubling even if it were obiter dictum and represented only the inattention of the rest of the

162. 423 U.S. at 366 ("We granted certiorari to consider petitioners' claims that the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions.").

163. *Id.*

164. *Id.*

165. *Id.* at 379.

166. *Id.* at 380.

167. See text accompanying notes 267-78 *infra*.

Court.¹⁶⁸ The suggestion that there are "principles of federalism" that bar federal injunctions against state officials seems a broadside attack upon the equity clause of section 1983 and on *Ex parte Young* and *Brown II*.¹⁶⁹

That apprehension is made more painful by the crudeness with which *Rizzo* proposes that the door be slammed. A denial of access to federal equity under *Rizzo* would be at least as automatic in "officials" cases as it has become in "proceedings" cases. In part, that danger arises from *Rizzo's* failure to discuss the applicability of the new defense and to indicate where its limits may be found. And it also arises from *Rizzo's* lack of realistic inquiry into the existence of factual bases for the application of such a defense. But, most importantly, it arises from *Rizzo's* failure to see the differences between "proceedings" and "officials" cases and to accommodate the national interest, as, in fact, that interest is ultimately accommodated under *Younger*.

Clues to the applicability of the new defense cannot be found in the language of the opinion. *Younger's* concern for the integrity of pending state criminal prosecutions does not define the reach of the case, because in *Rizzo*, there were no pending prosecutions.¹⁷⁰ Nor can the case be limited to the criminal justice context: The Court's broad language gives

168. The dissent by Justice Blackmun in which Justice Brennan joined was silent on the federalism issue. Dissenting in the habeas corpus case of *Francis v. Henderson*, 426 U.S. 536 (1976), however, Justice Brennan took occasion to criticize *Rizzo*. See note 148 *supra*.

169. Indeed, the Court might be suggesting not only that the litigant with a constitutional *defense* is to be denied access to the federal courts under *Younger*, but also that the litigant with a constitutional *claim* is to be denied access, as long as the violation is by a state, rather than by the national government; in the end, even damage claims may be included. See note 148 *supra*.

170. This is one of the reasons why Justice Rehnquist's reliance on *O'Shea v. Littleton*, 414 U.S. 488 (1974), seems unpersuasive. 423 U.S. at 378, 379. In *O'Shea*, a class of minority plaintiffs alleged that state judicial officers systematically set higher bail and imposed higher sentences upon minority defendants, 414 U.S. at 491-92. The refusal on federalism grounds to authorize injunctive relief was a reasonable extension of *Younger*, because enforcement of an injunction regulating sentencing and bond setting could entail intervention in every ongoing criminal case before those judicial officers. Similarly, in *Stefanelli v. Minard*, 342 U.S. 117 (1961), also mentioned by Justice Rehnquist, 423 U.S. at 378, an injunction against the use of illegally seized evidence could interrupt an ongoing prosecution for piecemeal trial of collateral issues. But in *Rizzo* there was no interference with state judicial process.

no comfort to that view¹⁷¹ and Justice Rehnquist relies not only on one case civil in form¹⁷² but on another in which the criminal context arguably is wholly absent.¹⁷³ The injunctions struck down in *Rizzo* did not impinge on the state criminal process; rather, the decree sought to restructure administrative grievance machinery and personnel programs outside the criminal justice process. At any rate, now that a federal injunction *can* issue to stop a criminal prosecution provided only that it is seriously threatened but not yet pending,¹⁷⁴ it would be anomalous if some tangential criminal context were the key to *Rizzo*. Finally, the Court recently has rejected the view that "Our Federalism" is entirely a product of concern for the integrity of state criminal justice; it now perceives that the new defense protects the national interest in dual federalism and the dual court system.¹⁷⁵

The simplest way to read the case, and one that persuasively may distinguish it from other civil rights cases, is to read it as a policy misconduct case. It now seems to be the view of the majority that neither isolated¹⁷⁶ nor systematic¹⁷⁷ police misconduct can be an appropriate

171. The absence of qualifying modifiers is notable throughout the federalism wing of the opinion. *E.g.*, 423 U.S. at 378 ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"); *id.* at 380 ("[W]e think these principles . . . have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here."); *id.* ("When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.").

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

173. *Mayor v. Educational Equality League*, 415 U.S. 605 (1974).

174. *See* cases cited in notes 107 & 134 *supra*.

175. "[W]e think the salient fact is that federal court interference with the States' contempt process is 'an offense to the State's interest. . .likely to be every bit as great as it would be were this a criminal proceeding'.... Moreover, such interference with the contempt process not only 'unduly interferes with the legitimate activities of the State' . . . but also 'can readily be interpreted "as reflecting negatively upon the State court's ability to enforce constitutional principles.'" *Judice v. Vail*, 97 S.Ct. 1211, 1217-18 (1977).

The perception that state criminal processes are indistinguishable from state civil processes, if the concern is the integrity of the dual court system, is correct, but it means that *Mitchum* is "an empty shell." *Id.* at 1222 (Brennan, J., dissenting). *See* the discussion of this point in note 109 *supra*.

subject for federal judicial supervision.¹⁷⁸ If this is all that the case represents, however, it is odd that it is painted with so broad a brush.¹⁷⁹ Moreover, the decree struck down in *Rizzo* did not purport to regulate police misconduct. Thus, little in the opinion would stand in the way of a broad application to bar federal injunctions against any state official or instrumentality,¹⁸⁰ and in fact the Court is applying the doctrine more broadly, although not yet in actions under section 1983.¹⁸¹

Nor is it clear, as it is even under *Younger*, what sort of showing would avoid dismissal. *Rizzo* alludes casually to the fact that "extraordinary circumstances" might justify an exception to the rule.¹⁸² But we are not told what these circumstances might be. The *Younger* showing of bad faith harassment could not be what is meant, because

176. "In sum, the genesis of this lawsuit--a heated dispute between individual citizens and certain policemen--have evolved into an attempt by the federal judiciary to resolve a 'controversy' between the entire citizenry of Philadelphia and the petitioning elected and appointed officials . . . " *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

In *Allee v. Medrano*, 416 U.S. 802 (1974), Chief Justice Burger expressed the view that ultimately prevailed in *Rizzo*: "Willful, random acts of brutality by police, although abhorrent in themselves, will not form a basis for a finding of bad faith." *Id.* at 838. "Nor can the isolated instances of police misconduct . . . found by the District Court turn a series of prosecutions. Apparently instituted in good faith . . . into a campaign of terror. . . . *Id.* at 844.

177. *Rizzo*, of course, is such a case. *See Juidice v. Vail*, 97 S.Ct. 1211, 1220, 1223 (1977) (Brennan, J., dissenting); note 157 *supra*.

178. "The problems created by this injunction against police misconduct are manifold. In the enforcement of the injunction, the district court will likely place itself on a collision course with our holdings in *Younger* and *O'Shea*. . . . Federal district courts were not meant to be super-police chiefs, disciplining individual law enforcement officers for infractions. . . ." *Allee v. Medrano*, 416 U.S. 802, 857-58 (1974) (Burger, C.J., concurring in part and dissenting in part), "reaching down through the State's criminal justice system to deal directly with the abuses at the primary enforcement level," *id.* at 838.

179. *See* note 171 *supra*.

180. Those arguing to lower courts that the case is limited to police misconduct facts can quote only the following as suggesting that limitation: "The lower courts have, we think, overlooked several significant decisions of this Court in validating *this type of litigation* and the relief ultimately granted." 423 U.S. at 371 (emphasis added).

181. *See* note 148 *supra*.

182. 423 U.S. at 379 (citing *O'Shea*).

Rizzo holds that there must be proof of discriminatory intent in any event.¹⁸³ Thus, in failing to establish elements of and limits upon its "principles of federalism," the *Rizzo* Court fails to give the new defense even the minimal analytic content "Our Federalism" has under *Younger v. Harris*.

Furthermore, the *Rizzo* Court makes no attempt to say what it was in the trial judge's decree that offended equity, comity or federalism.¹⁸⁴ If, as the Court notes, there is a "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law,"¹⁸⁵ the question whether that delicacy of adjustment was, in fact, preserved or upset by the decree ought to have been explored; curiously, there is no attempt at that sort of analysis.¹⁸⁶ Justice Rehnquist noted that the decree restricted the latitude of a state agency in the dispatch of its own internal affairs.¹⁸⁷ But the agency activity the decree restructured related

183. *Id.* Chief Justice Burger treats the two showings as identical in *Allee v. Medrano*, 416 U.S. 802, 854 (1973) (Burger, C.J., concurring in part and dissenting in part): "A finding of police harassment necessary for the issuance of an injunction against police misconduct is not quasi-jurisdictional as with *Younger*, but is a determination on the merits."

184. The Court used general, repetitive phrases. For example, the Court stated that the trial judge's decree was a departure from "principles" and "considerations" having to do with "delicate issues of federal-state relationships. . . ." 423 U.S. at 380, quoting *Mayor v. Educational Equality League*, 415 U.S. 605, 615 (1974). In addition, the *Rizzo* Court complained that the decree disregarded "principles of federalism which play such an important part in governing the relationship between federal courts and state governments. . . ." 423 U.S. at 380. The Court's language is slightly more specific in describing the decree as "undoubtedly" restricting the latitude of a state agency in the dispatch of its own affairs, *id.* at 379, an attack on the "exercise of authority" by state officials, *id.* at 378, and an injection "by injunctive decree into the internal disciplinary affairs of this state agency," *id.* at 380.

185. 423 U.S. at 378.

186. See text accompanying notes 191-209 *infra*.

187. 423 U.S. at 379. The references to internal affairs here, and to internal disciplinary affairs, *id.* at 380, seem unconvincing. A decree regulating the establishment of grievance machinery to be furnished to the public regulates not the internal affairs of the defendant but those of its affairs that are related to the needs of the public. Moreover, the implication of this language that the creation of an administrative remedy for one aggrieved by police misconduct is beyond federal equitable power is unfortunate. See text accompanying note 308 *infra*. Finally, the Chief Justice in his dissent in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422 (1972), suggested that an administrative remedy

importantly to the plaintiff class, and the minimal intrusion contemplated would seem to be the inescapable corollary of *Ex parte Young*, section 1983, and *Brown II*.

Thus, the "federalism" wing of the *Rizzo* opinion reads as though it were intended to gut the equity clause of section 1983. Justice Rehnquist did deal very briefly with the irreducible fact that in the Civil Rights Act Congress expressly authorized injunctive relief in actions against state officials. Like Justice Stewart in *Mitchum v. Foster*,¹⁸⁸ Justice Rehnquist was able to solve that problem by a reference to *Younger v. Harris*.¹⁸⁹ While candidly conceding that under *Mitchum* section 1983 was an exception to the Anti-Injunction Act, he was able to point out that today "principles of equity, comity and federalism" nevertheless block injunctions that the Act would have blocked but for section 1983.¹⁹⁰

C. *The Concerns of Federalism and the Policies Underlying the Civil Rights Act: Distinguishing Younger*

Rizzo's "principles of federalism" turn the grand institutions of our judicial federalism upside down. They set up a presumption against federal relief that is utterly at odds with the Civil Rights Act and *Ex parte Young*. The Court casually asserts that, except in "extraordinary circumstances," a federal court will not grant an injunction against a state official!¹⁹¹ What has been lost sight of is the national interest in federal enforcement.¹⁹²

I. *The propriety of dismissals in cases raising issues of federalism.*

The *Younger* provenance of the *Rizzo* defense should not be allowed to create an illusion that docket-clearing dismissals would be appropriate in certain civil rights cases. In a case in the *Younger* mold, when a court is

would be a superior solution; in view of that opinion in *Bivens*, the Chief Justice ought to have explained his concurrence on this point in *Rizzo*. The fact that the state agency itself would administer the remedy set up by the decree rather than some federal quasi-administrative tribunal established by Congress, as the Chief Justice suggested in *Bivens*, could hardly have made the difference in an opinion relying on principles of federalism.

188. 407 U.S. 225, 243 (1972).

189. *Younger* was not mentioned by name, but the reference is unmistakable, 423 U.S. at 180.

190. *Id.* at 479, quoting *Mitchum v. Foster*, 402 U.S. 225, 243 (1972).

191. 423 U.S. at 379 (citing *O'Shea*).

192. See text accompanying notes 213-17 *infra*.

asked for a stay order it either grants or denies the application. But in an action complaining of other official conduct, a court can shape the relief as artfully or crudely as the occasion requires, and dismissals are always inappropriate when the grounds for them could be accommodated by limiting the scope of the decree. In invoking the venerable desiderata of equity, comity and federalism, the Supreme Court fails to persuade us that these are the ingredients of some monolithic defense along the lines of "Our Federalism." The case would remain unconvincing even had the Court purported to leave these "factors" of equity, comity, and federalism to the trial judges to "weigh" in deciding in their discretion whether or not to issue civil rights injunctions. It would be difficult to understand under either view why problems of federalism could not, with hard work and imagination, be accommodated as they arise in the shaping of relief. It would be difficult to understand why the trial judge's attempt to do just that was struck down in *Rizzo*.

Of course, there must be limiting cases in which the problems of federalism seem so acute that even on a showing of intentional violation no effective injunction can issue. *O'Shea v. Littleton* was probably such a case,¹⁹³ and it appeared when decided that *Milliken v. Bradley*¹⁹⁴ was another. But to impose the Procrustean final solution of mandatory *Younger* dismissals, not only in extreme cases but in cases in which the decree *could* accommodate concerns of federalism, is to miss the point of *Younger v. Harris* and to lose sight of the national interest manifested in the Civil Rights Act.

Younger and its progeny represent an accommodation of fundamentally opposing national interests along a bright line.¹⁹⁵ When a state court has not yet taken jurisdiction, the national interest in federal enforcement of the Civil Rights Act is allowed full play, and federal injunctions issue even in criminal cases.¹⁹⁶ But under *Younger* once the state has taken jurisdiction of a case the national interest in dual federalism predominates, and federal injunctions interfering with state courts are barred — certainly in criminal prosecutions, probably in civil suits.¹⁹⁷ That all-or-nothing accommodation reached in *Younger* is a virtual necessity because in the paradigm case a injunction is simply a stay

193. See note 170 *supra*.

194. 418 U.S. 717 (1974).

195. See text accompanying notes 130-40 *supra*; note 142 *supra*.

196. *Wooley v. Maynard*, 97 S.Ct. 1428 (1977); *Doran v. Salem Inn*, 422 U.S. 922 (1975).

197. See note 105 *supra*.

order; the decree *has no_scope*, so that there is no room for accommodation within it. But as *Younger* itself suggests, some accommodation is necessary.

The *Rizzo* Court immolates the national interest in federal enforcement in order to exalt the opposing national interest in dual federalism. It does this while shutting its eyes to the trial judge's decree that did accommodate both interests. It is the Court's blind refusal to leave room for any accommodation, to separate the question of availability from the question of scope, that gives *Rizzo* its aura of unreality.

2. *The propriety of allocating jurisdiction to state rather than federal courts.*

The Court should have seen two crucial differences between "proceedings" and "officials" cases. Under *Younger*, by hypothesis some forum is available in the state courts, and the lynchpin of "Our Federalism" is the presumed adequacy of the state court to try the federal plaintiff's constitutional defenses. But in "officials" cases, by hypothesis there is no particular forum, only some vague possibility of state remedies — which in *Rizzo* the Court does not bother to canvass. Even if the Court correctly viewed *Rizzo* as a collection of miscellaneous common law trespasses,¹⁹⁸ the question remains whether the local courts could have taken jurisdiction of this claim against high city officials without other options. In any event, state trespass remedies were recently canvassed by Justice Harlan and found inadequate,¹⁹⁹ and were considered in *Monroe v. Pape* and held irrelevant.²⁰⁰ The Supreme Court in *Rizzo* did not consider whether it may be remitting the plaintiffs to state remedies that do not exist. It did not inquire whether there is some local analog to Rule 23(b)(2) by which the courts of Pennsylvania could give relief for threatened harms to a class. It did not state whether the judges in Pennsylvania ride circuit, or are assigned to cases or only to sessions; yet, if judges do not sit in one county and retain supervisory jurisdiction of a case throughout its history, rational administration of complex civil rights cases is not a realistic possibility. It was proved at trial on the merits that in *Rizzo* there was an utter absence of any effective administrative remedy. That fact underscores the unreality of a result that upset the trial judge's attempt to set up just such an administrative remedy.²⁰¹ Finally, there is the importance, especially in race cases, of providing the option of a federal forum even for those whose doubts about their chances of fair trial in the state courts are speculative and would not furnish the basis of an additional constitutional defense. Even if the Supreme Court could guard the civil rights of all litigants on certiorari,²⁰² this right of option would be defeated by *Rizzo*.

Rizzo was the sort of case that is probably *most* appropriate for the taking of federal jurisdiction. The public action on behalf of a class resting on allegations of racial injustice, like the antitrust case, the consolidated multiple patent infringement action, the railroad bankruptcy suit — and unlike the automotive collision case in diversity, or the prosecution of a petty mail thief — is the paradigm federal case; it calls for the presumptively even-handed and effective federal injunctive power. In the absence of federal relief, the trial judge in *Rizzo* could conclude from the record that the abuses proved would continue, with attendant frustration of national policy in race and police misconduct matters.

198. 423 U.S. at 371, *quoted in* note 176 *supra*; *id.* at 375 (showing of isolated instances insufficient to prove pervasive pattern from which intentional state action can be inferred).

199. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).

200. 365 U.S. 167 (1961). It should be noted, on the other hand, that the states generally must take jurisdiction of a § 1983 cause of action. *See, e.g., Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969). *See also Testa v. Katt*, 330 U.S. 386 (1974); *General Oil Co. v. Crain*, 209 U.S. 211 (1908).

201. On the potential inconsistency of Chief Justice Burger's concurrence in *Rizzo* and his suggestion in dissent in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422 (1971), that Congress should establish an administrative remedy for police misconduct, *see* note 187 *supra*.

202. *England v. Louisiana State Bd. of Med. examiners*, 375 U.S. 411, 416 (1964) (possibility of certiorari insufficient to protect federal rights).

3. *Accommodating problems of federalism.*

The Court also should have seen that the problems of federalism in "officials" cases are different from those in "proceedings" cases. It cannot be said that the rule of federal trial judges by decree since *Brown II* has been a politically palatable one or even a wholly successful one.²⁰³ But their real struggle lies not in the taking of jurisdiction or even in the job of trial and decision but in the task of formulation and administration of remedies. In this sense, "officials" cases present problems and opportunities wholly absent from "proceedings" cases.

It is easy to fall into the error of thinking that in framing a civil rights decree a federal judge weighs national against local interests and winds up subordinating states' rights. Although a chancellor will weigh the equities, under the supremacy clause, any local policy, however strongly established, would have to fall before a conflicting national interest. Instead, in formulating and administering a decree, a federal trial judge must take into account interests shared by the whole nation.

It is national as well as state policy that the task of delivering vital local government services like peacekeeping and education be delegated to local officials, and that the federal trial judiciary, when possible, be allowed to get on with its other jobs. It is national as well as state policy that the smooth delivery of these vital services not be impeded by awkward restrictions on the discretion of local officials. It is national as well as state policy that local budgets not be embarrassed by impossible demands vastly exceeding conceivable resources. It is national as well as state policy that democratically elected officials be allowed to govern without usurpation of their tasks by judges with life tenure who are thus accountable to no one. It is national as well as state policy to encourage local solutions even to widespread problems. And it is national as well as state policy that the dignity and autonomy of the states be preserved. These are the national interests in federalism that federal trial judges must struggle to accommodate in decrees manifesting the equally urgent national interest in federal enforcement of civil rights.

In *Rizzo*, once the trial judge's narrow decree was available for scrutiny, it could not be said that any of these interests were offended. The interest in delegation of vital governmental tasks to local officials, for example, was not an issue. No vital governmental service, such as police peacekeeping, was regulated by the decree. Thus, the Chief Justice's powerful argument in *Allee v. Medrano*,²⁰⁴ that federal judges cannot sit as super-police chiefs "reaching down through the State's criminal justice system to deal directly with the abuses at the primary law enforcement level," has little relevance in *Rizzo*. Even if the decree had purported to regulate the exercises of police discretion, the defendants there were the supervising officials themselves, not the officers on the street. The decree only ordered them to perform their preexisting statutory and contractual duties of supervision.

For similar reasons, the national interest in smooth delivery of vital peacekeeping services was not involved in the case because the decree did not restrict the exercise of police discretion in performance of peacekeeping duties. Justice Rehnquist apparently took the view that it was enough that the decree restricted the latitude of a state agency in the conduct of its internal affairs. Yet the police department had already agreed in a prior case to the substance of the decree.²⁰⁵ In any event the language about "internal affairs" seems inapposite. It cannot be said

203. See text accompanying notes 280-92 *infra*.

204. 416 U.S. 802, 838, 858 (1974) (Burger, D.M., dissenting in part).

205. See *Goode v. Rizzo*, 506 F.2d 542, 547 (3d Cir. 1974) (discussing the consent decree in *Alexander v. Rizzo*, No. 70-992 (E.D. Pa. 1972)).

that grievance procedures furnished to the *public* are affairs of *internal* agency management. It is also hard to say that grievance procedures furnished to the public are necessarily among those activities committed to agency discretion and hence unreviewable; no special policy concern would seem to support this view, while section 1983 was enacted to remedy the very situation in which local officials would *fail* to take remedial steps.²⁰⁶ The changes in police training that the decree might achieve could not seriously impair the discretion of law enforcement officers on the street, unless ignorance of the Bill of Rights is a precondition for effective police work.

Nor were the national interests in judicial noninterference with local representative government and taxing functions serious issues. The grievance machinery and new police manual proposed would be of minimal incremental expense to Philadelphia, and the trial judge was ordering only the performance of tasks the named defendants were elected to perform.

Finally, it is baffling that the Court could have believed the *Rizzo* decree a threat to the dignity, autonomy or sovereignty of the state, when the commonwealth of Pennsylvania itself was before the Court as *amicus curiae* urging affirmance.²⁰⁷ Had the relief originally sought been granted, and a receiver appointed to run the Philadelphia police department, the decree might have offended this and other concerns of federalism. But after the trial judge's actual decree was available for scrutiny, the reversal seems without rational basis.

In sum, it appears that in *Rizzo* the Court attempted to thrust the *Younger* result on an "officials" case without taking into account the accommodation on which *Younger* is based. In an "officials" case that accommodation usually can be made, as it was in *Rizzo*, in framing the decree. Of course there will be cases, like *O'Shea*, in which the impossibility of framing a workable decree produces a dismissal at the outset. But there also will be cases, like *Baker v. Carr*²⁰⁸ and *Brown v. Board of Education*,²⁰⁹ in which even the gravest problems of federalism cannot be allowed to take from the federal trial judges the struggle to find solutions.

Rizzo, then, bears all the indicia of a *Younger v. Harris* in the field of federal injunctions against state officials, without the saving grace of the accommodation ultimately reached under *Younger*. It falls short of *Younger*'s grandeur only because it seems as yet too tentative; it lacks the definitive, legislative note the Court struck in *Younger*. Because *Rizzo* fails to accommodate the national interest manifested in *Ex parte Young* and the Civil Rights Act, if that note is ever struck it will sound a dangerous and unjustified retreat. Ironically, the trumpet may blow in a field already vacated by decamping armies. As the next Part will show, *Ex parte Young* already has suffered grave reverses.

IV. ASSESSING THE IMPACT OF THE NEW DEFENSE: OTHER DEFENSES TO CIVIL RIGHTS INJUNCTION ACTIONS

Rizzo's new "principles of federalism," of course, can make a difference only to the extent that other defenses have not already eroded *Ex parte Young*. It becomes useful, then, to examine the current range of effective defenses in civil rights injunction cases.

206. See *Monroe v. Pape*, 365 U.S. 167, 175-76 (1965).

207. 423 U.S. at 384 (Backmun, J., dissenting).

208. 369 U.S. 186 (1962); see note 53 *supra*.

209. 347 U.S. 483 (1954).

Before the era of the Warren Court, general controls upon federal jurisdiction over state unconstitutionality were imposed by narrow interpretation of the 14th amendment and the Civil Rights Act.²¹⁰ Congress had enacted legislation intended to soften²¹¹ or block²¹² certain federal trial-court challenges to the dignity and autonomy of the states. But as the federal courthouse door swung open to civil rights claimants in the Warren Court era, a consensus seemed to emerge: *Ex parte Young* was perceived to be essential to the rule of law in our country.²¹³ It was understood that suitors threatened by unlawful state action ought not to be remitted for protection to state courts unfit, if not to pass dispassionately upon complaints of state governmental lawlessness, then to give the appearance of doing so. And while damages²¹⁴ and declaratory judgments²¹⁵ have their uses in civil rights litigation, the need for a coercive remedy was apparent.²¹⁶ In the Civil Rights Act and *Ex parte Young*, it was perceived that both Congress and the Court had recognized this need.²¹⁷ Today federal equity seems central to the institutions of federalism; it administers a supremacy more dear to us than our dualism because it is more necessary to the preservation and regulation of the Union.

Given that consensus, one would expect to find even in the present Court few overt assaults on this vital heading of federal jurisdiction. In the Burger Court, a significant degree of control over federal injunctions against state officials has been obtained through imposition of

210. See note 39 *supra*.

211. The Three-Judge Court Acts, 28 U.S.C. §§ 2281-2284 (1970), have been repealed except in apportionment cases and cases requiring a three-judge court under other acts of Congress. Three-Judge Court Amendments, 90 Stat. 1119 (1976).

212. The Anti-Injunction Act, 28 U.S.C. § 2283 (1970); see note 94 *supra*. Statutes protecting state official acts other than the prosecution of enforcement proceedings include the Johnson Act of 1934, 28 U.S.C. § 1342 (1970), forbidding federal injunctions against state administrative ratemaking agencies under certain conditions, and the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1970), forbidding federal injunctions against the assessment or collection of state taxes under certain conditions.

213. See *e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 208-11 (3d ed. 1976).

214. *E.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961). But damages awards leave the state free to violate the Constitution first and pay later.

215. *E.g.*, *Steffel v. Thompson*, 415 U.S. 452 (1974). A declaratory remedy, however, presupposes willing assent. It has not always been possible to make this assumption in § 1983 litigation.

216. See note 33 *supra*. Consider also the problems of enforcement inhering in Supreme Court original jurisdiction of cases in which a state is a party. See HART & WECHSLER, *supra* note 82, at 268-69. The effectiveness of federal coercive relief for threatened harms to a class was significantly enhanced in 1966 with the promulgation of FED. R. CIV. P. 23(b)(2). But see *O'Shea v. Littleton*, 414 U.S. 488 (1974); notes 156-57 *supra* and accompanying text.

217. *E.g.*, *Zwickler v. Koota*, 389 U.S. 241 (1967). A more subtle blow but one with potentially broad impact fell upon the equity jurisdiction of federal trial courts in all public interest cases with the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (federal courts lack discretion to award attorneys' fees against losing defendants absent a showing of bad faith). In civil rights cases, however, *Alyeska's* impact is muted. Organizations like the American Civil Liberties Union and the NAACP fund much of this litigation, there are several statutory fee authorizations predating *Alyeska*, and Congress since *Alyeska* has provided others. See note 70 *supra*.

new burdens of proof of intent.²¹⁸ This development apart, only traditional doctrines of justiciability²¹⁹ and abstention²²⁰ have been available to curb the exercise of federal power. The new "principles of federalism" have no antecedents in this context.

A. *The Extension of Comprehensive Immunities Defenses to*

Injunction Actions

But recently a fairly coherent system for limiting the power of federal courts over state officials has emerged in actions for *damages* under *Monroe v. Pape*.²²¹ I refer to the several doctrines of immunity. For the present inquiry, the important question is the extent to which these doctrines have been imported into injunction suits.

First, there is the defense of *sovereign immunity* under the 11th amendment. *Ex parte Young* holds only that a state official may be personally liable; the state itself remains immune from federal suit without its consent. Thus, when damages are to come not from the pocket of the defendant official but from the state treasury, the action cannot be maintained.²²² In 1974, the Supreme Court applied the defense in a section 1983 *injunction* case, in which a federal decree would have required a retroactive distribution from state coffers.²²³ An extension of the case to cover orders of future disbursements or orders that would entail future expenditures clearly

218. See notes 5 & 6, *supra*.

219. Doctrines of justiciability, if applied in a principled way, can debar from federal adjudicating only cases that are inappropriate for such adjudication; they cannot be stretched to restrict access in cases like *Younger* in which there is clear standing, ripeness and controversy. It is true that the Supreme Court may take a very restrictive view on what standing, ripeness and controversy embody. *O'Shea* is a prime example; the justiciability requirement of that case makes most police misconduct cases nonjusticiable in equity. Yet, such cases arguably represent a misreading of Article III and an overstatement of prudential problems inhering in such adjudication. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), for example, is a clear recognition by the Burger Court of the impropriety of a restrictive view of justiciability in public interest cases. See also *Singleton v. Wulff*, 428 U.S. 106 (1976); *Griswold v. Connecticut*, 381 U.S. 479 (1965). As modern commentators have perceived, public actions involve the interests of whole classes of citizens and their governments, not merely the interests of the named plaintiff and a subordinate state officer, and in this context a restrictive view of justiciability is therefore inappropriate. See M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 69, 84 (1971); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

220. The abstention doctrine is a clumsy tool for clearing federal dockets because it requires formal retention of federal jurisdiction. See cases cited in note 10 *supra*.

There also has been much recent discussion proposing a return to strict requirements of exhaustion of state remedies. See *Runyon v. McCrary*, 427 U.S. 160, 160 n.2 (1976) (Powell, J., concurring). This trend has already been accomplished in cases under *Younger* in which postjudgment collateral review of state court adjudications is sought. E.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). But broader application would seem singularly inappropriate in civil rights cases in view of the balance struck by Congress in § 1983. H. FRIENDLY, *supra* note 39, at 100-03 (1973) (exhaustion requirement desirable for administrative but not judicial remedies). See *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

221. 365 U.S. 167 (1961).

222. E.g., *Ford Motor Co. v. Department of Treas.*, 332 U.S. 549 (1945).

223. *Edelman v. Jordan*, 415 U.S. 651 (1974). But see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

would undermine existing understandings of the scope of federal equity as it is currently exercised under *Brown II*.²²⁴

Second, there is the defense of *municipal immunity*. That originated in *Monroe v. Pape* itself, holding that a municipal corporation was not a "person" within the meaning of section 1983.²²⁵ And in 1973 this statutory interpretation was quite logically carried over to actions in equity.²²⁶

Third, there are the absolute *official immunities*. Legislators²²⁷ and judges²²⁸ had been given such immunities before the advent of the Burger Court, and prosecutors were added to the roster in 1976).²²⁹ These officials cannot be held liable in section 1983 damages for conduct within the scope of their offices, however corrupt or malicious their motives, or great the damage or the affront to the Constitution.²³⁰ The Supreme Court has not approved such a defense in an injunction suit.²³¹ To do so, of course, would be to overrule *Ex Parte Young pro tanto*. But of course *Younger v. Harris* will produce dismissals in actions against prosecutors or judges for

224. See *Graham v. Richardson*, 403 U.S. 365 (1971) (welfare officials prohibited from denying benefits); *Griffin v. School Bd.*, 337 U.S. 218 (1964) (state officials ordered to levy taxes and raise funds), *distinguished in* *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (county is not state for 11th amendment purposes). This problem is raised in the Detroit school desegregation case presently before the Supreme Court. *Milliken v. Bradley*, 97 S.Ct. 380 (1976).

225. 365 U.S. 167, 187 (1961).

226. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. Alameda County*, 411 U.S. 693 (1973) (county immune despite lack of immunity under state law); *see* *Mr. Healthy City School Dist. v. Doyle*, 97 S.Ct. 568 (1977) (civil rights action under Constitution and 28 U.S.C. § 1331 (1970); immunity issue not raised: Court assumed, without deciding, that defendant may be sued whether or not it could be sued under § 1983). *Cf.* *Aldinger v. Howard*, 427 U.S. 1 (1976) (municipal immunity cannot be circumvented by pleading pendent state claim joining otherwise immune defendant). Lower courts have extended the immunity to school boards in § 1983 cases. See 123 CONG. REC. S95, 206 (Jan. 10, 1977) (remarks of Sen. Mathias) ("If the Kenosha ruling--which now has been held to . . . apply . . . school boards--had been in force 20 years ago, 'I don't know if we ever would have gotten school desegregation.' says chief Judge John R. Brown of the U.S. Court of Appeals in New Orleans.").

227. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

228. *Pierson v. Ray*, 386 U.S. 547 (1967).

229. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

230. In a compelling case, however, lower courts probably will define narrowly the "scope of office." *E.g.*, *Sparkman v. McFarlin*, 45 U.S.L.W. 2462 (7th Cir., Mar. 23, 1977) (no immunity for judge who on the application of the mother ordered sterilization of a minor without affording notice or appointing guardian ad litem).

231. The Court was fairly invited to do so in *O'Shea v. Littleton*, 414 U.S. 488 (1974). There, the plaintiff class sought a federal injunction to insure nondiscriminatory sentencing in state criminal cases. The court of appeals rejected the district court's *cri de coeur* that the defendants were judicially immune. The Supreme Court solved the problem by reserving the immunity question, *id.* at 488, and by forging a justiciability rule for class actions. See note 157 *supra*. In *Sosna v. Iowa*, 419 U.S. 393, 398 n.5 (1975), Justice Rehnquist indicated his belief that judicial immunity might be available in equity. In most cases likely to raise the issue, it would seem that *Younger* would lead to dismissal in any event.

stay orders or for injunctions that otherwise would interfere with pending state litigation,²³² and in this context *Ex parte Young* is overruled *pro tanto*.

Finally, there are the *qualified immunities of good faith* that the Supreme Court has bestowed upon a rapidly widening circle of state officials. Governors and other executive official may escape liability for a section 1983 violation by showing good faith,²³³ as may public hospital officials²³⁴ and school authorities.²³⁵ And the police have enjoyed a qualified defense of good faith and probable cause since Warren Court days.²³⁶ These defenses, of course, protect reasonable exercises of discretion.²³⁷ Their application produces a beneficial scrutiny of the circumstances of the particular case.²³⁸ But, like the absolute immunities, they have not been recognized in injunction suits. There would seem to be no need for them in such suits; officials in exercising their discretion may not be influenced by the possibility of an adverse ruling in an injunction suit; the imposition of monetary liability might seem to them a greater danger. It is true that after an injunction has issued a defendant official must exercise discretion so as to avoid contempt; but it generally has been left to the trial judge to frame a decree allowing latitude for the reasonable exercise of official discretion.²³⁹

This scheme of immunities in civil rights damage actions has made it difficult for the civil rights tort plaintiff to find a defendant able to pay damages — and the contingency fee of plaintiff's counsel. The state need not pay unless it consents; the municipality cannot rewrite section 1983 even by consent,²⁴⁰ and the ordinary schoolteacher or police officer, even if unable to show good faith, cannot pay much worth suing for. The officials higher up the ladder might be worth litigation costs but are often wholly immune from suit or at least privileged for their good faith torts. Thus, the section 1983 action for damages today has surprisingly low vitality. If the *Monroe v. Pape* floodgate is open, these days the flood is under control,²⁴¹ whatever Congress intended by including the words "shall be liable"²⁴² in the Civil Rights Act.

Although it approved the defenses of sovereign and municipal immunity for use in equity, the Supreme Court left untouched the central principle of *Ex parte Young*: the personal

232. *E.g.*, *O'Shea v. Littleton*, 414 U.S. 488 (1974). Not can the prosecutor be liable for damages, even for a bad faith decision to prosecute. *Imbler v. Pachtman*, 424 U.S. 232 (1976).

233. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

234. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

235. *Wood v. Strickland*, 420 U.S. 308 (1975).

236. *Pierson v. Ray*, 386 U.S. 547 (1967).

237. *Id.* at 557.

238. *E.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).

239. *See Allee v. Medrano*, 416 U.S. 802, 811-14 (1974).

240. *Moor v. County of Alameda*, 411 U.S. 693 (1973).

241. The exception seems to be *Monroe v. Pape* actions against trespassing police officers. In some communities governmental indemnification programs make the police attractive defendants, with consequent impact on federal dockets. The 11th amendment implications of indemnification are unclear.

242. 42 U.S.C. § 1983 (1970). *See* note 96 *supra*. For discussion of the extent to which the immunities defenses encroach upon *Ex parte Young*, *see Scheuer v. Rhodes*, 416 U.S. 232, 237-49 (1974); *Sterling v. Constantin*, 287 U.S. 378, 397-98 (1932).

responsibility of state officials for their unconstitutional acts. But that principle has in fact been undermined by a shifting of the qualified immunities into injunction suits.

In imposing strict burdens of proof of discriminatory intent in such civil rights injunction actions as *Rizzo*, *Washington v. Davis*,²⁴³ *Arlington Heights*,²⁴⁴ and the Austin school desegregation case,²⁴⁵ the Supreme Court obviously has set up the functional equivalent of a qualified defense of good faith for these cases. There is, of course, a difference in allocation of burden of proof on the issue of bad faith. But it is anomalous that the burden should be on the plaintiff in the injunction rather than the damages case, given the assumptions with which this discussion began about the importance of federal equity in civil rights litigation.

When state enforcement proceedings are pending, the Court similarly has transplanted the defense of good faith to equity cases. As we have seen, under *Younger v. Harris* a showing of "bad faith" is now required to avoid dismissal in such suits, unless some other inadequacy of the state forum can be shown.²⁴⁶ And here, too, the burden is placed on the plaintiff rather than the defendant to show the defendant's state of mind.

Thus, the qualified immunities of good faith *have* as a practical matter been shifted over to injunction suits. *Ex parte Young*, at law and in equity, now can protect only against demonstrably intentional violations: against the violations of legislators, only in equity;²⁴⁷ against those of prosecutors and judges, rarely even in equity.²⁴⁸ To cap all, threats of future harm to a class, as in police misconduct cases, to a great extent are removed from the protection of *Ex parte Young* by the justiciability doctrine of *O'Shea v. Littleton*.²⁴⁹

B. *The Impact of Rizzo*

Rizzo can make one difference — not material to the result but possibly significant to a Supreme Court anxious to clear federal dockets — in cases that would fail anyway for lack of sufficient showing of intent: It can produce dismissals at the pleading stage.²⁵⁰ Beyond this not-so-small point, *Rizzo*'s new "principles of federalism" can add a meaningful weapon to the armamentarium only in the narrow class of cases in which intent problems do not arise or can be surmounted. *Rizzo*, in brief, is not of great moment unless it applies to block injunctions against demonstrably intentional violations; those injunctions appear to be all that is left of *Ex parte Young*.

243. 426 U.S. 229 (1976).

244. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S.Ct. 555 (1977).

245. *Austin Independent School Dist. v. United States*, 97 S.Ct. 517 (1976).

246. *See* cases cited in note 100 *supra*.

247. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

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

249. *See* notes 156-57 *supra* and accompanying text.

250. *See* texts accompanying notes 101 and 147 *supra*; text accompanying note 310 *infra*. There also may be a possibility of extending *Rizzo* to damage actions in which the defendant lacks full immunity. Lower courts seem to be taking this path. *E.g.*, *Martin v. Merola*, 532 F.2d 191, 194-95 (2d Cir. 1976) (principles of comity and federalism said to bar action against state prosecutor). Of course, after *Imbler v. Pachtman*, 424 U.S. 409 (1976), the defendant prosecutor in *Martin* would have been immune in any event.

Rizzo is an imperfect fool for toppling what little remains of the precious, but fragile, edifice of federal court enforcement of civil rights. Because the intentional torts in *Rizzo* were committed not by the defendants but by subordinate officers who were never joined in the action, it is hard to argue that *Rizzo* itself immunizes the intentional constitutional torts of state officials from federal injunctive interference. But recent developments, taken together with certain aspects of *Rizzo*, strongly suggest that that result is precisely what the Supreme Court contemplates.

Rizzo relies, for example, on *O'Shea v. Littleton*.²⁵¹ In that case, the Court in dictum expressed the view that principles of federalism barred relief. A class of minority citizens were complaining of systematic discriminations by state judicial officers in criminal sentencing and in bailsetting. But if principles of federalism could bar relief in *O'Shea*, they can override proof of intentional discrimination: *O'Shea* arose on the pleadings, and thus the allegations of discriminatory intent had to be taken as true.²⁵²

Rizzo also refers prominently to *Mayor v. Educational Equality League*.²⁵³ There, the Court considered whether principles of federalism forbade federal injunctive interference with a mayor's discretionary appointment powers.²⁵⁴ If they did so apply, they could override a showing of discriminatory intent; for when certiorari was granted, the Court of Appeals had held that a violation had been proved.²⁵⁵ It was only because the Supreme Court reversed on the issue of intent that it did not reach the federalism issue.²⁵⁶ In *Rizzo* itself, as we have seen, the Court went ahead after a similar collapse of the case on the issue of intent, and decided the federalism issue anyway, treating it as a separate and overriding issue.²⁵⁷

251. 414 U.S. 488 (1974).

252. *Id.* at 492.

253. 415 U.S. 605 (1974). *See also* *Carter v. Jury Comm'n.*, 396 U.S. 341 (1970) (Black, J., concurring).

254. 415 U.S. at 615.

255. 472 F.2d 612 (3d Cir. 1973).

256. 415 U.S. at 616.

257. Recall the "Our Federalism" in cases under *Younger* prevails over the holding in *Mitchum* that Congress intended access, despite § 2283, to federal injunctions in civil rights cases. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). It might be thought, however, that the "bad faith" exception simply means that the injunction will issue upon a showing of discriminatory intent--exactly the pattern the Court has been insisting on in civil rights cases generally. Yet it appears that "bad faith" in the *Younger* sense means something more than an ordinary prima facie showing of intent. For example, a trier of fact might rationally infer that prosecutor *Younger* intended to prosecute *Harris* under a facially unconstitutional, politically repressive law, because he disagreed with his politics. Yet a "bad faith" exception was held in that case to require a greater showing. The *Dombrowski* facts involving a pattern of harassment, perhaps involving unwarranted seizures and repeated prosecutions, may be the requirement. *See Allee v. Medrano*, 416 U.S. 802, 838 (1974) (Burger, C.J., concurring in part and dissenting in part). Thus, "Our Federalism" seems to override even a prima facie showing of intentional violation of unconstitutional rights.

By way of analogy, consider the Court's current thinking on "bad faith" for the purposes of justifying a discretionary award of attorney's fees. The *Alyeska* case left untouched the bad faith

Indeed, it is an established proposition that plaintiffs prepared to prove intentional violations of constitutional rights can be denied federal relief. That is the result when damages are sought against legislators, prosecutors and judges²⁵⁸ The same result is reached in those injunction cases in which the scope of any effective remedy is held beyond federal equitable power.²⁵⁹

Thus, it is reasonable to expect that the new federalism defense *Rizzo* proposes will apply even where discriminatory intent is established. And yet, as we have seen, to allow such a defense would virtually blot *Ex parte Young* and much of the Civil Rights Act of 1871 from the landscape of American jurisprudence. The new defense, then, is a bald assertion that we are to trust state officials, as *Younger v. Harris* is an assertion that we are to trust state courts.

But just as the allocations of jurisdiction in the Union inevitably hinge on critical considerations of federalism, so also, deep at the heart of our problems of federalism lies the racial question, as it always has. After all, the old, ugly issue persists; it was involved in *Rizzo*. It cannot be said in 1976, any more than it could be in 1954, or in 1871, that on the racial question we *do* trust the states. Thus, this instance of federal door-closing, at best explainable as a matter of institutional convenience, may be perceived as a way to accomplish procedurally a counterrevolution in race relations impossible to launch substantively.

V. THE NEW JUDICIAL FEDERALISM AND THE SCHOOL DESEGREGATION CASES

This inquiry thus inevitably leads to the question whether *Rizzo* has potential for application beyond police misconduct cases to civil rights cases generally. In singling out the school desegregation cases as illustrative I have chosen the application that might be thought least plausible. On the other hand, it can be agreed that these cases represent the most controversial current exercises of federal injunctive power.

Should the Supreme Court decide to quicken the pace of its current retrenchment in school desegregation, it will not do so by reinterpreting the equal protection clause. It will do so by discovering the sort of procedural impediment with which it has limited access to federal jurisdiction for other public interest litigation.²⁶⁰ In this light, "principles of federalism" may have a real potential for application in school desegregation cases.

A. *Changing Attitudes Toward Court-Ordered Desegregation*

exception to the general rule that plaintiff must pay its own attorney's fees. In *Runyon v. McCrary*, 427 U.S. 160 (1976), the successful plaintiffs in a race discrimination case against private schools under § 1981 sought attorney's fees on the ground that the showing of intentional racial discrimination of necessity amounted to "bad faith." But the Court distinguished "bad faith" in this context from the discriminatory intent that must be proved to show a violation. "Simply because the facts were found against the [defendants] does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified." *Id.* at 183. If discriminatory intent on the part of a civil rights defendant is not sufficient "bad faith" to justify an award of attorney's fees, arguably a proved intentional violation would not constitute the "extraordinary circumstances" that might justify an exception to the seemingly more compelling "principles of federalism."

258. See notes 227-29 *supra* and accompanying text.

259. See notes 193-94 *supra* and accompanying text.

260. See notes 9 & 10 *supra*.

Since *Brown v. Board of Education*, the Court has changed, the political environment has changed and the degree to which federal plaintiffs are sure of what they want has changed. Until quite recently, nothing could have seemed less probable than a Supreme Court retreat of federal judicial supervision of school desegregation in this country. As the federal courthouse doors began to close to other public interest cases, the Supreme Court, with the unanimity of the Warren Court days, still could hold in *Swann v. Charlotte-Mecklenberg Board of Education*²⁶¹ that busing and assignment on the basis of race were permissible remedies.²⁶² School boards were under an affirmative duty²⁶³ to eliminate dual school systems "root and branch",²⁶⁴ the test of a permissible desegregation plan was its effectiveness.²⁶⁵

Then the focus began to shift from the rural to the urban school district, and from southern segregation patterns set by discriminatory laws to northern segregation patterns set by seemingly private residential choices.

In the post-1966 explosion of public interest litigation,²⁶⁶ state government by federal decree became an increasingly characteristic feature of our polity. But the uniquely "governing" quality of federal equity²⁶⁷ since *Brown II* was nowhere so dynamically invoked as in the school desegregation cases that unleashed it.²⁶⁸ There, scarcely tempered by political, administrative and financial realities, scarcely deflected by small but painful vortices of popular resistance, fear and flight, the power wielded by federal trial judges in the task of desegregating our nation's schools astonished the country.

In this great task, federal trial judges have barred elected officials from performing their duties, have put schools in receivership,²⁶⁹ have ordered, with whatever provision for financing was in their power, that local authorities build or open schools,²⁷⁰ close others,²⁷¹ hire teachers,

261. 402 U.S. 1 (1971).

262. *Id.* at 28, 29.

263. *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955); *Green v. County School Bd.*, 391 U.S. 430, 437, 439 (1968).

264. *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968).

265. *Id.* at 439.

266. *See* text accompanying notes 64-71 *supra*.

267. *See generally* Weinberg, *The New Meaning of Equity*, 28 J. LEGAL ED. 532 (1977). Interestingly, Judge Garrity is considering delegating the administration of Boston public schools to a "department of implementation" to be appointed by the School Committee. N.Y. Times, May 7, 1977, at 8, col. 5.

268. *Brown v. Board of Educ.*, 349 U.S. 294 (1955). *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (busing, assignment on basis of race, pairing, or even closing of schools); *Davis v. Board of School Comm'rs*, 402 U.S. 33 (1971) (faculty and staff desegregation); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972) (altering district lines). *But see* *Austin Independent School Dist. v. United States*, 97 S.Ct. 517 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).

269. *E.g.*, *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 45 U.S.L.W. 3640 (Jan. 11, 1976).

270. *Griffin v. County School Bd.*, 377 U.S. 218, 233 (1964).

271. *See* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20 (1971).

reassign teachers and principals,²⁷² provide transportation, transport whole populations of schoolchildren daily,²⁷³ reassign teachers and pupils on the basis of race,²⁷⁴ redistrict gerrymandered districts²⁷⁵ and rearrange gerrymandered attendance zones, create gerrymandered attendance zones,²⁷⁶ change uses for existing schools, create special educational programs,²⁷⁷ levy taxes, and raise funds.²⁷⁸ The very closeness and constancy of federal judicial supervision and the very breadth of the decrees have provoked controversy among those who claim to take no negative stand on the substantive issues.²⁷⁹ Doubts about federal judicial supervision have begun to be expressed openly, not only by the avowed racists or regional spokesmen of 10 years ago, but by the highest national officials,²⁸⁰ social scientists²⁸¹ and leaders of black as well as white opinion.²⁸²

The climate of hostility to federal school desegregation decrees in the North has not approached the intensity of reaction to *Brown v. Board of Education* in the South; residents of northern cities have not seen a state governor blocking the schoolhouse door²⁸³ or the United States Army called out to contain the disturbance.²⁸⁴ But many children travel to school under police escort and receive their education in buildings in which police presence is highly visible.

In this atmosphere, the problem of third person "harms" to schoolchildren in the form of "forced busing" has become an important national issue.²⁸⁵ In 1972, President Nixon's antibusing

272. See *Davis v. Board of School Comm'rs*, 402 U.S. 33, (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 232, 235 (1969); *Green v. County School Bd.*, 391 U.S. 430, 435 (1968).

273. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

274. *Id.* at 22.

275. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

276. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971).

277. *E.g.*, *Bradley v. Milliken*, 540 F.2d 229 (5th Cir. 1976), *cert. granted*, 97 S.Ct. 380 (1976).

278. *Griffin v. County School Bd.*, 377 U.S. 218, 233 (1964).

279. *E.g.*, L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISION ON RACE AND THE SCHOOLS* (1976).

280. See text accompanying note 1 *supra*.

281. *E.g.*, Glazer, *Is Busing Necessary?*, 53 COMMENTARY 39 (1972). See generally *The Courts, Social Sciences and School Desegregation, part II*, 39 LAW & CONTEMP. PROB. 217 (1975). The retraction by its author of the "Coleman Report" has had substantial impact. J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

282. *E.g.*, Bell, *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROB. 341 (1975); see *Norwalk CORE v. Norwalk Bd. of Educ.*, 423 F.2d 122 (2d Cir. 1970).

283. In 1957 Governor Faubus of Arkansas attempted to block the desegregation of Central High School in Little Rock. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

284. *Id.* at 12-13, See generally Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C. L. REV. 117 (1958).

285. *The Busing Dilemma*, TIME, Sept. 22, 1975, at 7; see Glazer, *supra* note 281; Coleman, *Integration, Yes: Busing No.* N.Y. Times, August 24, 1975, § 6 (Magazine), at 10; note 2 *supra* and

legislation was eviscerated in Congress and judicially nullified,²⁸⁶ as had been similar legislation in the Civil Rights Act of 1964.²⁸⁷ But in 1974 President Ford signed into law new legislation purporting to forbid court-ordered busing,²⁸⁸ and by 1976 the Republican party could list as a goal of its platform a constitutional amendment to make busing impermissible.

The problem of benign reverse discrimination, meanwhile, has become entangled with the problem of assignment of schoolchildren on the basis of race,²⁸⁹ the recent grant of certiorari in *Bakke v. Regents of the University of California*²⁹⁰ casts a pall on discussions about the continued vitality of *Swann*. Moreover, an overwhelming picture of failure in school desegregation has emerged. Despite an optimistic report of the United States Civil Rights Commission,²⁹¹ the schools in our nation's inner cities somehow have become hopelessly segregated.²⁹² What little has been accomplished is often attributed to the occasional withholding of federal funds under the Civil Rights Act of 1964 rather than to the ongoing struggle in the federal courts.

Given this background, it is not surprising that retreat did come in the matter of school desegregation. The unanimity of the Supreme Court broke in 1972,²⁹³ although the ruling was nevertheless for the plaintiffs. In the 1973 *Keyes* case, while again ruling for the plaintiffs, the Court made clear that de facto segregation without proof of intent could not be remedied by the federal judiciary.²⁹⁴ And, in the same Term, the Court for the first time turned away without remedy a class of school desegregation plaintiffs who had demonstrated the defendant school board's discriminatory intent.²⁹⁵ Today the retreat is in full force. In *City of Pasadena v. Spangler*,²⁹⁶ the Court, purporting to reserve the issue, washed its hands of the white flight problem, refusing to permit a federal trial judge to reintegrate a school after white emigration had dismantled the desegregation that litigation had achieved. In *San Antonio School District v. Rodriguez*,²⁹⁷ the Court left the states virtually free of constitutional compulsion to eliminate disparities in school funding based on disparities in community wealth. Taken together with the

accompanying text. See generally *Chronology of Search for Busing Alternative*, The Boston Globe, May 20, 1976, at 20, col. 1.

286. Education Amendments of 1972, § 803, 20 U.S.C. § 1653 (Supp. V. 1975); *Drummond v. Acree*, 409 U.S. 1228 (1972) (Powell, Circuit Justice).

287. Civil Rights Act of 1964. Title IV, 42 U.S.C. § 2000c-6 (1970); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16-18 (1971).

288. Education Amendments of 1974, 20 U.S.C. § 1701-1758 (Supp. V. 1975).

289. See generally N. GLAZER, *AFFIRMATIVE DISCRIMINATION* (1975).

290. 18 Cal.3d 34, 553 P.2d 1152, 132 Cal.Rptr. 680 (1976), cert. granted, 45 U.S.L.W. 3570 (Feb. 22, 1977).

291. U.S. COMM'N ON CIVIL RIGHTS, *FULFILLING THE LETTER AND SPIRIT OF THE LAW* (1976).

292. See Delaney, *Chicago Segregation Figures*, N.Y. Times, April 13, 1977, at 14, col. 4.

293. *Wright v. Emporia City Council*, 407 U.S. 451 (1972) (segregated system may not maintain itself by carving our new school district).

294. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

295. *Milliken v. Bradley*, 418 U.S. 717 (1974). For the sequel, see note 325 *infra*.

296. 427 U.S. 424 (1976).

297. 411 U.S. 1 (1973).

Court's recent refusals to permit relief in exclusionary zoning cases,²⁹⁸ and its disapproval of interdistrict remedies not only in school desegregation²⁹⁹ but also in fair housing cases,³⁰⁰ these new rulings carry a disturbing message. In effect, they have locked black children into segregated schools without prospect of escape and have gone so far as to stifle even their attempts to improve the quality of those schools, returning them to a condition that prevailed prior to *Plessy v. Ferguson*:³⁰¹ "'separate' but 'inferior.'"³⁰² Meanwhile, the Court has tightened the burden of proof for these cases, vacating comprehensive desegregation decrees because of supposed defects in the proof of intent.³⁰³ And the Court has granted certiorari to review the Detroit³⁰⁴ and Dayton³⁰⁵ cases, stirring fresh speculation and concern.

Against this background, the notion that the Supreme Court might consider an application of some analog of *Rizzo* to shift this litigation from federal to state dockets³⁰⁶ cannot be dismissed out of hand. An overruling of *Brown v. Board of Education*, of course, is out of the question. The Supreme Court is not about to authorize Jim Crow legislation. Nor could the Court substantially limit *Brown* without putting itself in the gross posture of abandoning the black children it has taken under its wing so determinedly and for so long. For these reasons a substantive attack is not likely, but it is also for these reasons that a procedural one is much more likely. Indeed, the Court's retrenchment thus far has taken the form of a procedural nibbling away at *Brown II*: reducing the scope of federal equity and increasing the burdens of proof. When the first "giant step backwards" was taken in *Milliken*,³⁰⁷ and an interdistrict remedy was held impermissible, the separate opinions of the badly divided Court were heavily larded with references to problems of federalism. A procedural final solution along the lines of "principles of federalism" seems a real possibility.

B. *The Implications of Rizzo for School Desegregation*

298. *E.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Arlington Heights v. Metropolitan Hous. Auth.*, 97 S.Ct. 555 (1977).

299. *Milliken v. Bradley*, 418 U.S. 717 (1974). For an acute example, see *Metropolitan School Dist. of Perry Township v. Buckley*, 97 S.Ct. 800 (1977); other cases cited in note 5 *supra*.

300. *Village of Arlington Heights v. Metropolitan Hous. Auth.*, 97 S.Ct. 555 (1977).

301. 163 U.S. 537 (1896).

302. *Milliken v. Bradley*, 418 U.S. 717, 761 (1984) (Douglas, J., dissenting).

303. *Metropolitan School Dist. of Perry Township v. Buckley*, 97 S.Ct. 800 (1977); *Austin Indep. School Dist. v. United States*, 97 S.Ct. 517 (1976); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974).

304. *Milliken v. Bradley*, 97 S.Ct. 380 (1976).

305. *Dayton Bd. of Educ. v. Brinkman*, 97 S.Ct. 782 (1977).

306. That the Court does not see its limiting rulings as constitutionally required, and indeed is anxious for Congress to shift to administrative agencies some of the tasks now performed by federal trial judges, is apparent from *Hills v. Gautreaux*, 425 U.S. 284 (1976), in which the Court recognized that Congress validly had conferred on HUD power that the Court held beyond the scope of federal equity in *Village of Arlington Heights v. Metropolitan Hous. Auth.*, 97 S.Ct. 555 (1977). See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress has power to override 11th amendment); *Warth v. Seldin*, 422 U.S. 490 (1975) (standing rules in part are prudential only, thus Congress has some power to confer standing).

307. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

It is difficult to put *Rizzo* side by side with some of the school desegregation cases just reviewed.³⁰⁸ In particular, the language in *Rizzo* on the scope of federal equitable control over local government agencies will not square with the powers federal trial judges have exercised in school desegregation cases. Unless the Court means that a federal trial judge can take all the heroic measures of the past, but for some reason may not order the school board to establish an ombudsman's office to handle minority parents' complaints about the way desegregation is going, *Rizzo* sets the stage for a more restrictive approach altogether.

The simplest thing for the Court to do would be what was done in *Rizzo* to deny access to federal courts, perhaps using language about scope to cut off availability.

An illustrative analogy may be seen in the case of *Huffman v. Pursue, Ltd.*³⁰⁹ There, in an action for a stay of state proceedings to close the plaintiff's theatre as a public nuisance, the federal district court was able to shape its stay order so that it remedied only the constitutional violation proved; the court enjoined enforcement of the statute only with respect to those films that had not yet been adjudged obscene. Nevertheless, the Supreme Court reversed and remanded for reconsideration, citing *Younger v. Harris*.³¹⁰ The *Younger* defense prevailed although a constitutional violation was proved and the remedy limited in scope to the proved violation. This is the sort of control that the new "principles of federalism" defense could give to the school desegregation dockets of federal courts. And precisely because the new defense is applied blindly and without analysis in *Rizzo* it seems to contain no conceptual barriers to application that seriously could inconvenience a Supreme Court bent on applying it in the new context.³¹¹

One can envision an opinion in which the Supreme Court reverses a court of appeals judgment affirming a modest school desegregation decree. The Court would begin with strong reassurances about the continued vitality of *Brown v. Board of Education*. But it would point with pride to the great accomplishments of the federal trial judiciary under *Brown II*, and state that it was time for that work to come to an end. In view of changed circumstances and the intrusiveness of federal decrees, principles of equity, comity and federalism required that henceforth, absent extraordinary circumstances, a federal trial court stay its hand. The state courts, primary guarantors of constitutional rights, would be invited to take up this task, under the benign supervision of the Supreme Court on certiorary.

But here, just as in *Rizzo*, the Court would be effectuating the national interest in dual federalism without making any separate accommodation for the continuing national interest in federal enforcement in these cases. The national interest in school desegregation remains acute.

308. See text accompanying notes 267-78 *supra*.

309. 420 U.S. 592 (1975).

310. *Id.* at 612.

311. Plaintiffs might argue that in alleging discriminatory intent they were alleging "bad faith" or "extraordinary circumstances," *i.e.*, making a *Younger* showing. But *Younger's* "bad faith" test seems only to work in the context of testing the adequacy of a state forum. See note 100 *supra*. Moreover, it would be difficult for the plaintiffs to argue that federalism blocked an injunction only when a *prima facie* case was not made out; the new defense obviously would be superfluous where a *prima facie* case had not been made out. *Runyon v. McCrary*, 427 U.S. 160 (1976), which discussed the difference between a *prima facie* showing of intent to discriminate and a showing of "bad faith" that would justify an award of attorney's fees, see note 257 *supra*, shows how easily such a distinction can be made.

The fact that these problems are today more complex than when *Brown v. Board of Education* was decided only underscores the need for a continued national interest in dual federalism without making any separate accommodation for the continuing national interest in federal enforcement in these cases. The national interest in school desegregation remains acute. The fact that these problems are today more complex than when *Brown v. Board of Education* was decided only underscores the need for a continued national effort to overcome them in all courts, state and federal. Our multiracial society must find a *modus vivendi* or face some unthinkable crisis. AS the first Justice Harlan wrote so long ago in his *Plessy* dissent, "The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under sanction of law."³¹²

Of course, the state tribunals must play a part.³¹³ But the presumption that state courts will vindicate every constitutional right breaks down, and has always broken down, when the question is the race question. That is why Congress struck the balance in favor of providing the option of a federal forum in section 1983. And the Supreme Court chose to place the administration of school desegregation in the federal trial courts in *Brown II*.

The national interest in continued federal enforcement in these cases is given added emphasis by a recognition that, quite apart from the national interests in vindication of constitutional rights and in racial peace, at stake also is our perception of the Court and perhaps of ourselves as a nation. I have said that a substantive retreat would be unthinkable for the Supreme Court and that a procedural retreat based on "principles of federalism" might be thought to furnish a simple technique for a Court seeking to clear desegregation cases from federal dockets. But I have no doubt that the procedural retreat would be tantamount to a substantive one and would be so perceived, just as other recent denials of access to federal remedies have been perceived: as assaults on the rights of those to whom access was denied.³¹⁴

C. *Postscript: Another Counterargument*

There is a line of judicial reasoning that takes into account the nature of public perception of a governmental retreat on the racial question and that supports a continued firm position in the Supreme Court even in a case where "principles of federalism" might otherwise seem to the Court to justify a denial of access to federal injunctive power. The strongest recent expression of this concern is Justice Stevens' concurrence in the case of *Runyon v. McCrary*,³¹⁵ a private school admissions case decided last Term. There, Justice Stevens reluctantly decided to go along with the majority in extending the rationale of *Jones v. Mayer*³¹⁶ to hold that Congress, under the 13th amendment, could provide in the Civil Rights Act of 1866³¹⁷ a cause of action for the intentionally discriminatory conduct of private schools. He wrote:

The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of

312. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan J., dissenting).

313. See note 200 *supra*.

314. See note 8 *supra*.

315. 427 U.S. 160, 189 (1976).

316. 392 U.S. 409 (1968).

317. 42 U.S.C. § 1982 (1970).

society. This Court has given a sympathetic and liberal construction to such legislation. For the Court now to overrule *Jones* would be a significant step backwards, with effects that would not have arisen from a correct decision in the first instance. Such a step would be so clearly contrary to my understanding of the *mores* of today that I think the Court is entirely correct in adhering to *Jones*.³¹⁸

So also might a significant step backwards in federal judicial administration of school desegregation be contrary to the *mores* of today.

This notion of the unseemliness of governmental retreat from a prior antidiscriminatory stance is not a stranger to our jurisprudence. An important instance is the case of *Reitman v. Mulkey*.³¹⁹ There, California sought by constitutional amendment, authorized by referendum, to repeal preexisting fair housing laws. In striking down the state's repeal of its own laws, *Reitman* reflects a concern with the unseemliness of governmental retreat on the discrimination issue. Although the Supreme Court can never be supposed to harbor the sort of discriminatory intent imputed in *Reitman* to the voters and legislature of California, *Reitman* has strong resonance for the question whether federal trial courts should abstain from adjudication of school desegregation cases. The repeal in *Reitman* was struck down because it was a governmental retreat from a prior antidiscriminatory stance and as such was an enmeshment of the government in the discriminatory choices of its citizens.³²⁰ To have permitted this would have taken a heavy toll of American ideals.

These considerations suggest that school desegregation cases are within that narrow class of cases as to which no problems of federalism could justify a refusal to adjudicate. This is not to say that problems of federalism in these cases are not severe but rather that such problems should be considered in framing relief, not on motion to dismiss.

For example, the acute current problem of "innocent" third persons in these cases, parents and children alike, very possibly can be accommodated only by liberal permissions to intervenors and invitations to community representatives to participate in the formulation of desegregation plans. But the existence of this sensitive issue is no warrant to abdicate jurisdiction. Nor should the problems of federalism raised by orders like Judge Garrity's receivership order in the Boston case justify abdication of jurisdiction; indeed, in the circumstances of that case the order was held to be a proper exercise of federal injunctive power.³²¹ The issues of state political and fiscal autonomy at present before the Supreme Court

318. 427 U.S. at 191 (Stevens J., concurring).

319. 387 U.S. 369 (1967).

320. *Id.* See also *Hunter v. Erickson*, 393 U.S. 385 (1969) (repeal by referendum of Akron's fair housing ordinance); *Bradley v. Milliken*, 433 F.2d 897, 092-03 (6th Cir. 1970) (unseemliness of legislative delay in implementing school board's uncoerced integration plan for Detroit); *Holmes v. Leadbetter*, 294 F.Supp. 991 (E.D. Mich. 1968) (enjoining open housing referendum). *But see* *Dayton Bd. of Educ. v. Brinkman*, 45 U.S.L.W. 4910, 4912 (June 27, 1977) (distinguishing *Reitman* and upholding repudiation of previous board's resolution).

Similarly in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court suggested that Congress in using its 14th amendment enforcement powers could make discriminations in extending the franchise that would be invidious were Congress attempting to restrict the franchise.

321. *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 45 U.S.L.W. 3460 (Jan. 11, 1977).

in the Detroit case³²² ought in the same way to be accommodated only in limits on the scope of the decree.

If, on the other hand, the Supreme Court decides that, in the absence of extraordinary circumstances, a federal trial court may no longer inject itself by injunctive decree into the affairs of local school boards, it will be time for Congress to act. Congress has full authority to buttress the section 1983 jurisdiction of the federal courts.³²³ Congress ought to act to make clear that a federal trial court cannot decline to exercise its section 1983 jurisdiction on grounds of comity or federalism alone.

For the present, it is time for the Supreme Court to reconsider its current course. *Rizzo's* incautious assault upon the foundations of modern judicial federalism would return the Union to an allocation of powers that the Civil War was fought to change and which only demonstrably happier social conditions in our country could justify. It is hoped that the Court will take stock of the damage already done³²⁴ and stop short of the point at which *Rizzo* advances its tentative but potentially annihilating proposal.³²⁵

322. *Milliken v. Bradley*, 97 S.Ct. 380 (1976).

323. U.S. CONST. art. I, § 8; *id.* art. III, §§ 1 & 2; *id.* amend. XIV, § 5.

324. *See* notes 5, 6, 9, & 10 *supra*.

325. The Court handed down its opinions in the Detroit desegregation case, *Milliken v. Bradley*, 45 U.S.L.W. 4873, and in the Dayton desegregation case, *Dayton Bd. of Educ. v. Brinkman*, 45 U.S.L.W. 4910, on June 27, 1977. In both cases the Court unanimously declined to fashion new limits on federal remedial power in school desegregation cases. The Court was able to vacate the comprehensive Dayton decree using its prior jurisprudence on "intent" and "scope of the violation," *see* notes 5 and 6 *supra*, although observers had feared, since the Dayton decree seemed well-founded to them, that it was the Court's purpose to propose fresh limits on federal remedial power.

In the Detroit case, however, the trial judge's decree was sustained. The Court came to grips with the federalism issues raised, and gave some content to "principles of federalism." There, the trial judge had "virtually assumed the role of school superintendent and school board," 45 U.S.L.W. at 4882 (Powell, J., concurring), and had, in effect, "appropriated funds from the state treasury" for expensive remedial educational programs; *id.* n.4. The Court squarely held that federal decrees with impact on the state treasury (here, an estimated \$5,800,000) were permissible under *Ex Parte Young* and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and limited its ruling in *Edelman v. Jordan*, 415 U.S. 651 (1974). *See* text accompanying note 224 *supra*. It held that "principles of federalism" were not offended by the district court's assumption of power and the appropriation from the state treasury: The trial judge had not attempted "to restructure state governmental entities"--*Rizzo* was not alluded to--or to dictate a particular method of financing (citing the Texas school financing case, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

Although the Court has stepped back from the brink of a final application of "principles of federalism" to overturn *Brown II* and unburden itself of the school desegregation problem, unfortunately the Court's discussion preserves the issue for future *ad hoc* application. Based on *Milliken II*, it will not be clear for some time just when a federal decree must be struck down under *Rodriguez* and *Rizzo*, or sustained under *Milliken II*.