Duquesne Law Review

Volume 18 | Number 3 Article 12

1980

Constitutional Law - Civil Rights Action - Federal Court Review of State Statutes - Abstention

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Recent Decisions

CONSTITUTIONAL LAW—CIVIL RIGHTS ACTION—FEDERAL COURT REVIEW OF STATE STATUTES—ABSTENTION—The United States Supreme Court has held that federal courts must abstain from intervention into pending state proceedings under the *Younger* doctrine when the federal plaintiff has an available state court opportunity to raise his federal constitutional claim.

Moore v. Sims, 99 S. Ct. 2371 (1979)

On March 25, 1976, the appellant, Texas Department of Human Resources (Department), received a report from school officials at the Osborne Elementary School in Houston, Texas that a child, Paul Sims, was suffering from physical injuries apparently inflicted upon him by his father, the appellee,[1] during a recent visit to the elementary school. On the same day, the Department took temporary custody[2] of all three Sims children enrolled in the school and had each examined by a physician who determined that the children were battered.[3] On the following day, the Department instituted a suit in the Harris County juvenile court for emergency protection of the children pursuant to provisions of the Texas Family Code.[4] The juvenile court judge entered an

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1. The appellees before the United States Supreme Court were the parents and their three minor children. Moore v. Sims, 99 S. Ct. 2371, 2375 (1979).

2. The Department took custody of the children under the authority of § 17.01 of the Texas Family Code, which provided as follows:

> An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his physical safety and deliver him to any court having jurisdiction of suits under this subtitle . . . . The child shall be delivered immediately to the court.

TEX. FAM. CODE ANN. tit. 2, § 17.01 (Vernon 1975) (current version at TEX. FAM. CODE ANN. tit. 2, § 17.03 (Vernon Supp. 1979)). The Department of Human Resources was formerly the State Department of Public Welfare. 99 S. Ct. at 2375. The appellant, Hilmar G. Moore, was the chairperson of the Department of Human Resources.

3. 99 S. Ct. at 2375. Paul Sims was hospitalized for eleven days as a result of the injuries discovered during the medical examination. *Id.*

4. Section 17.02 of the Texas Family Code provided as follows:

> Unless the child is taken into possession pursuant to a temporary order entered by a court under § 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

TEX. FAM. CODE ANN. tit. 2, § 17.02 (Vernon 1975) (current version at TEX. FAM. CODE ANN. tit. 2, § 17.03-.04 (Vernon Supp. 1979)).

emergency ex parte order[5] giving the Department temporary custody of the Sims children.[6]

On March 31, 1976, the Simses, invoking the proper procedure for terminating the Department's temporary custody,[7] appeared in the Harris County juvenile court with a motion to modify the ex parte order. Since the juvenile court judge was unavailable for the hearing required under Texas state law,[8] the motion to modify was returned to the appellees' attorney. Rather than renew the motion or appeal the emergency order, the appellees filed a petition for a writ of habeas corpus in the same Harris County court.[9] At a hearing held on April 5th, the court determined that venue was proper in Montgomery County since the children resided there[10] and transferred the proceedings accordingly.[11] At the same time, the Harris County juvenile court directed the Department to file a suit affecting the parent-child relationship.[12] This suit was also transferred to Montgomery County. The Harris County court also issued a temporary restraining order[13] con-

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5. The ex parte order was issued pursuant to § 17.04 of the Texas Family Code, which provided:

> On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

TEX. FAM. CODE ANN. tit. 2, § 17.04 (Vernon 1975) (current version at TEX. FAM. CODE ANN. tit. 2, §§ 17.02, 17.04(c) (Vernon Supp. 1979)).

6. 99 S. Ct. at 2375.

7. *Id.* at 2376. Section 17.06 of the Texas Family Code provides in pertinent part:

> On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order . . . if found to be in the best interest of the child.

TEX. FAM. CODE ANN. tit. 2, § 17.06 (Vernon 1975) (repealed 1979).

8. 99 S. Ct. at 2376. See note 7 *supra* for the mandatory hearing provision of the Texas Family code.

9. 99 S. Ct. at 2376.

10. TEX. FAM. CODE ANN. tit. 2, § 11.04(a) (Vernon 1975) provides with regard to venue that "[e]xcept as otherwise provided in this subtitle, a suit affecting the parent-child relationship shall be brought in the county where the child resides."

11. 99 S. Ct. at 2376.

12. TEX. FAM. CODE ANN. tit. 2, § 17.05(b) (Vernon Supp. 1978) (current version at TEX. FAM. CODE ANN. tit. 2, § 17.04 (Vernon Supp. 1979)), provided that "[i]f the child is not restored to the possession of its parent, guardian, or conservator the court shall . . . direct the filing of a suit affecting the parent-child relationship . . . ."

13. The temporary restraining order was issued pursuant to TEX. FAM. CODE ANN. tit. 2, § 11.11(a)(4) (Vernon 1975), which provides in pertinent part that "(a) [i]n a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child, including but not limited to an order . . . (4) taking the child into the possession of the court or of a person designated by the court . . . ."

tinuing the Department's custody of the children.[14]

On April 19, 1976, the appellees filed an action in the United States District Court for the Southern District of Texas to enjoin the Department from instituting or continuing with any action under the Texas Family Code.[15] Upon receiving notice of the federal action, the Department suspended the pending state proceedings in the Montgomery County court. The appellees' petition for a temporary restraining order was denied and the district court set May 5, 1976 as the hearing date on the application for a preliminary injunction.[16] After a hearing, the federal court held that the temporary custody order issued by the Harris County court a month earlier had expired, and ordered the children returned to their parents, with leave to the Department to institute a new state action. The district court also noted that it was requesting a three-judge court to consider the appellees' constitutional challenge to the Texas Family Code.[17]

On May 14th, in response to a new suit filed by the Department, the Montgomery County juvenile court issued a show cause order and a writ of attachment ordering Paul Sims delivered into the temporary care of his grandparents.[18] The show cause hearing was scheduled for June 21, 1976.[19] On May 21st, however, the appellees filed a second petition in the federal district court for a temporary restraining order aimed at the pending Montgomery County proceedings.[20] This order was granted, and a three-judge court subsequently issued a preliminary injunction enjoining the Department and other defendants from prosecuting any state suit under the challenged statutes until a final determination by the three-judge court.[21]

On October 22, 1977, the federal court held that the state's child abuse proceedings violated the due process clause of the fourteenth

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14. 99 S. Ct. at 2376. The appellees made no attempt to expedite the hearing or to appeal the temporary restraining order as provided by Texas law. *Id.*

15. *Id.* The appellees contended that Title 2 of the Texas Family Code violated their constitutional right to due process guaranteed by the fourteenth amendment. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1187 (S.D. Tex. 1977).

16. 99 S. Ct. at 2376. One day before the scheduled federal hearing, the appellees moved for leave to file an original petition for a writ of habeas corpus with the Texas state court of appeals. The motion was denied for lack of jurisdiction. *Id.*

17. *Id.* The three-judge court was convened pursuant to 28 U.S.C. § 2281 (1976) (repealed 1976).

18. 99 S. Ct. at 2376-77.

19. The court originally set the show cause hearing for May 21, 1976, but when the parents could not be found for purposes of service, the hearing was reset for June 21st. *Id.* at 2377.

20. *Id.*

21. Sims v. State Dep't of Pub. Welfare, 438 F. Supp. at 1183.

amendment of the Federal Constitution.[22] The district court initially decided that abstention under the doctrine of *Younger v. Harris*[23] was inappropriate for three reasons. First, the district court found that the denial of parental custody rights, regardless of the result of the pending hearing, was in itself sufficient to prevent the application of *Younger* abstention.[24] Second, the district court noted that procedural irregularities and the absence of a fair opportunity to present the constitutional claims at a meaningful time warranted equitable relief even if *Younger* principles did apply.[25] Finally, the federal court stated that unlike a criminal prosecution,[26] or a nuisance,[27] contempt,[28] or attachment proceeding,[29] there was no single state proceeding in which the Simses could seek relief on constitutional or any other grounds.[30] After disposing of the threshold abstention issue, the district court found that certain provisions of the Texas Family Code were unconstitutional.[31] On appeal by the Department, the United States Supreme Court noted probable jurisdiction[32] to decide whether the federal district court should have abstained under the principles of *Younger*. Finding that abstention was warranted, the Supreme Court reversed the decision of the federal district court and remanded with instructions to dismiss the complaint.[33]

Justice Rehnquist, speaking for the majority,[34] first explained that

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22. *Id.* at 1195. The district court's conclusion was based on a survey of virtually every aspect of child abuse proceedings in Texas. *Id.* at 1189-95.

23. 401 U.S. 37 (1971) (federal courts forbidden to stay or enjoin pending state criminal proceedings).

24. 438 F. Supp. at 1187.

25. *Id.* at 1188.

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

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

28. *See* Juidice v. Vail, 430 U.S. 327 (1977).

29. *See* Trainor v. Hernandez, 431 U.S. 434 (1977).

30. 438 F. Supp. at 1188.

31. *Id.* at 1191. The district court held that the ex parte order removing the child from his parent's custody violated due process since the order was based merely on the showing that the relief sought was necessary to determine the existence of child abuse. The three-judge panel further concluded that the confidential reports gathered under the authority of the statute, but not made available to the family, violated the due process clause. *Id.* Finally, the district court held that the state juvenile court's order directing the filing of a suit affecting the parent-child relationship, without having first conducted an adversary hearing, violated due process guarantees. *Id.* at 1193.

32. 439 U.S. 925 (1978). Direct appeals to the United States Supreme Court from decisions of three-judge district courts were authorized by 28 U.S.C. § 1253 (1976) (repealed 1978).

33. 99 S. Ct. at 2383.

34. The Court was divided 5-4. Chief Justice Burger and Justices White, Blackmun, and Powell joined the majority opinion. Justices Brennan, Stewart, Marshall, and Stevens dissented.

the *Younger* doctrine reflects a strong policy against federal intervention in an ongoing state judicial proceeding in the absence of great and immediate irreparable injury to the federal plaintiff.[35] Noting that the policy was first enunciated with reference to pending state criminal prosecutions, the majority reemphasized that the concern about displacing state courts with federal forums equally applied to those civil suits which involved important state interests.[36] The *Moore* Court reasoned that because the state was a party in the state proceedings,[37] and because the removal of the child in the child abuse context was closely related to criminal statutes,[38] *Younger* principles applied to bar the intervening federal action.[39] Justice Rehnquist noted that a federal

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35. The strong policy against federal court intervention into pending state court proceedings can be traced to the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), which provides that "[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." The Supreme Court interpreted § 2283 as an absolute ban against federal injunctions of pending state proceedings absent one of the recognized legislative exceptions. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970). The Court, nonetheless, in *Younger*, retreated from this position by carving out a judicial exception to § 2283 where the federal petitioner could demonstrate great and immediate irreparable harm. 401 U.S. at 46. The suit in *Younger* was brought under 42 U.S.C. § 1983 (1976), which provides:

> 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 party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Court, however, failed to decide whether § 1983 was a legislative exception to the Anti-Injunction Act. One year later, in Mitchum v. Foster, 407 U.S. 225 (1972), the Court reformed its position by holding that § 1983 was indeed a legislative exception to the Anti-Injunction Act rather than a judicial exception. The Court reasoned that since § 1983 created a federal remedy enforceable in a federal court of equity, it thus permitted injunctive relief directed at pending state actions. *Id.* at 238. The Court concluded by noting that recognition of § 1983 as a legislative exception to § 2283 did not modify the traditional view that federal courts were restrained in the exercise of their injunctive powers by the principles of comity and federalism. *Id.* at 243.

36. 99 S. Ct. at 2377. The applicability of *Younger* abstention principles to quasi-criminal proceedings was first articulated in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (federalism and comity mandates federal abstention where litigation involves important state interests). *See* text accompanying notes 63-64 *infra*.

37. The state's presence as a party to the pending state action gives it an interest in the suit. *See* Huffman v. Pursue, Ltd., 420 U.S. at 604.

38. A quasi-criminal statute is closely related to and actually aids a criminal statute, which is a traditional concern of the state. *See id.*

39. 99 S. Ct. at 2377. The *Moore* court stated that the presence of vital state concerns or the vindication of important state policies militated in favor of *Younger* abstention. *Id. See* Trainor v. Hernandez, 431 U.S. 434 (1977) (safeguarding fiscal integrity of state public assistance program sufficient to trigger application of *Younger* principles);

court must abstain unless it is shown that the state proceedings were motivated by a desire to harass or were conducted in bad faith, or if the challenged statute flagrantly and patently violates express constitutional prohibitions.[40] The *Moore* Court found, however, that the district court in the instant controversy did not rely upon these established exceptions in finding that abstention was inappropriate.[41]

The majority then analyzed the reasons put forth by the district court for not applying *Younger* abstention. Focusing upon the meaning of the term "multifaceted litigation," as used by the district court, the Supreme Court concluded that neither of the two possible intepretations provided an adequate ground for federal intervention. The Court first rejected the possibility that the appellees were unable to raise their constitutional challenges in the pending state proceeding by noting that Texas law presented no procedural barriers to resolution of those issues.[42] The Court emphasized that federal abstention was warranted solely on the basis that the appellees had an *opportunity* to advance their constitutional claims in the state court.[43] Because state law did not bar the interposition of the constitutional claims, the Court concluded that abstention was appropriate.[44] The Court likewise rejected the possibility that abstention was unwarranted because of the breadth of the appellees' challenge to the Texas child abuse statutory scheme. The *Moore* majority noted that federal sensitivity to the states' primacy in interpreting its own laws has traditionally militated in favor of abstention when a state statute is broadly challenged.[45] The Court reiterated the concern first expressed in *Railroad Commission v. Pullman Co.*,[46] about federal courts being asked to interpret state law without the benefit of the state court's consideration. Justice Rehnquist emphasized that almost every constitutional claim, and particularly one as far-reaching as the claim in the instant controversy, afforded the state court the opportunity to obviate the need to reach the constitutional issue by narrowing the construc-

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Juidice v. Vail, 430 U.S. 327 (1977) (enforcement of state court contempt proceedings vital enough for application of *Younger* principles).

40. 99 S. Ct. at 2377. *See also* Huffman v. Pursue, Ltd., 420 U.S. at 611.

41. 99 S. Ct. at 2377. *See* text accompanying notes 24-25 & 30 *supra*.

42. 99 S. Ct. at 2378. TEX. FAM. CODE ANN. tit. 2, § 11.02(b) (Vernon 1975) states: "One or more matters covered by this subtitle may be determined in the suit. The court, on its own motion, may require the parties to replead in order that any issue affecting the parent-child relationship may be determined in the suit."

43. 99 S. Ct. at 2378. *See* Juidice v. Vail, 430 U.S. at 337.

44. 99 S. Ct. at 2378.

45. *Id.* at 2379.

46. 312 U.S. 496 (1941) (abstention mandated where state law unsettled, state process provides adequate means of litigation, and decision on state law may be dispositive of case).

tion of the challenged statute. Thus, when federal courts interject themselves into the dispute, they prevent the evolution of state policy by state tribunals. The *Moore* Court stated that intervention could be justified only if state courts were incompetent to adjudicate federal constitutional claims, a postulate which the Supreme Court has repeatedly and emphatically rejected.[47] The majority summarized its analysis of the question by ruling that the sole pertinent inquiry for *Younger* abstention is whether the state proceedings afford an adequate opportunity to raise the constitutional claims.[48]

Finally, the Court examined the facts of the *Moore* controversy to determine if any of the recognized exceptions to the *Younger* abstention doctrine were present.[49] Justice Rehnquist found that the state agency was not motivated by bad faith or a desire to harass[50] the Simses in instituting the state proceeding. The majority reasoned that the procedural difficulty encountered by appellees was the predictable by-product of a new state statute which could not be equated with bad faith.[51] Nor could intervention be justified on the basis of the second exception to *Younger;* as the district court correctly found,[52] the Texas statute was not flagrantly and patently violative of express constitutional prohibitions.[53] The potential applicability of the third and final exception to *Younger* abstention, that of extraordinary circumstances,[54] was determined by examining the status quo at the time federal intervention was sought. Justice Rehnquist noted that the appellees had custody of Paul Sims and that a date had been set for the show cause hearing. The majority concluded that the issuance of the writ of attachment for the child did not constitute great and immediate irreparable harm requiring federal court intervention.[55] Because the appel-

47. 99 S. Ct. at 2380. *See also* Trainor v. Hernandez, 431 U.S. at 443; Juidice v. Vail, 430 U.S. at 336; Huffman v. Pursue, Ltd., 420 U.S. at 610-11; Steffel v. Thompson, 415 U.S. 452, 460-61 (1974).

48. 99 S. Ct. at 2381. The Court noted that the opportunity requirement was satisfied if the constitutional claim could be raised in any manner, stating:

> There is no magic in the term "defense" when used in connection with the *Younger* doctrine if the word "defense" is intended to be used as a term of art. We do not here deal with the long past niceties which distinguished among "defense," "counterclaims," "set offs," "recoupments," and the like.

Id. at 2381 n.12.

49. *Id.* at 2382. Federal courts should not enjoin pending state proceedings in the absence of a flagrantly unconstitutional statute, bad faith, or extraordinary circumstances. *Younger,* 401 U.S. at 46.

50. 99 S. Ct. at 2382. *See* note 49 *supra.*

51. 99 S. Ct. at 2382. *See* text accompanying notes 85-88 *infra.*

52. *See* Watson v. Buck, 313 U.S. 387, 402 (1941).

53. 99 S. Ct. at 2382. *See* text accompanying notes 80-84 *infra.*

54. *See* Huffman v. Pursue, Ltd., 420 U.S. at 611. *See also* note 77 *infra.*

55. 99 S. Ct. at 2383.

lees had an adequate opportunity to raise their constitutional claims in the state proceeding and none of the exceptions to the *Younger* abstention doctrine were present, the Court reversed the decision of the district court.

Justice Stevens, speaking for the dissenters, contended that *Younger* abstention was inappropriate in the *Moore* case since there was no adequate pending state action in which the appellees could have fairly pursued their constitutional claims. The dissenters noted that the appellees challenged the validity of a statute which allowed the seizure and detention of the children for forty-two days without a hearing. Justice Stevens maintained that the pending state suit, which involved questions of the appellees' fitness as parents and permanent custody of Paul Sims, was an inadequate forum for resolution of the unrelated constitutional issues.[56] Because of the prehearing seizure and the unrelated nature of the constitutional issue to the state proceedings, Justice Stevens asserted that the statutory procedures were violative of the due process clause of the fourteenth amendment.[57]

The Supreme Court's decision in *Moore* is the latest development in the doctrine of federal court abstention in the face of an ongoing state court proceeding.[58] In its landmark decision in *Younger*,[59] the Court held that principles of comity and federalism dictated the dismissal of an intervening federal suit when the plaintiff could present his constitutional claims in a pending state action.[60] The *Younger* Court stated that notions of comity and federalism involved deference to and proper respect for state court functions. The Court reasoned that the national government would fare best if the individual states were permitted to perform their own functions free from federal interference.[61] The *Younger* ruling recognized the legitimate interest the federal government had in protecting federal rights and constitutional guarantees, but required this function to be carried out in a manner that did not intrude upon the proper interests of the states. Thus, in the majority of situations, *Younger* required federal courts to abstain when asked to enjoin a pending state prosecution.[62]

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56. *Id.* at 2383-85 (Stevens, J., dissenting).
57. *Id.* at 2387-88 (Stevens, J., dissenting).
58. *See* note 35 *supra.*
59. 401 U.S. 37 (1971).
60. *Id.* at 43-46. The Court also relied on a basic doctrine of equity jurisprudence that courts of equity should not act when the petitioner has an adequate legal remedy and will not suffer irreparable harm if denied injunctive relief. Justice Black stated that the doctrine prevented the erosion of the jury's role and a duplication of legal proceedings and sanctions where a single suit would be sufficient to protect the rights asserted. *Id.* at 43-44.
61. *Id.* at 43-44,
62. *Id.* at 45.

In *Huffman v. Pursue, Ltd.*,[63] the Supreme Court extended the principles of the *Younger* abstention doctrine to encompass civil proceedings which the Court characterized as quasi-criminal in nature. Although the challenged statute in *Huffman* was in aid of and closely related to criminal statutes, it was not this fact which dictated abstention. Instead, it was the overriding concepts of comity and federalism which led the Court to extend the doctrine.[64] The *Huffman* Court further held that *Younger* principles applied where state appellate remedies had not been fully exhausted.[65] In the same year as *Huffman*, the Court clarified the breadth of the abstention principle by defining the threshold concept of pending state proceeding. In *Hicks v. Miranda*,[66] the Court held that *Younger* principles applied to a federal suit filed prior to the state action provided that no proceedings on the merits had taken place in the federal forum.[67] The *Hicks* ruling foreclosed a race to the courthouse by a federal plaintiff seeking to circumvent the application of *Younger*. The Supreme Court's adherence to the seminal policies of comity and federalism were next expressed in *Juidice v. Vail*,[68] where the justices stated that the federal plaintiff need only be afforded an opportunity to raise his federal claims in the state court proceedings in order for *Younger* principles to apply.[69] Finally, in *Trainor v. Hernandez*,[70] a divided Court held that prehearing deprivations of property without notice to garnishees accomplished under color of state statute did not warrant federal intervention if the

63. 420 U.S. 592 (1975) (federal court must abstain from interfering with ongoing civil nuisance proceeding).

64. *Id.* at 604.

65. *Id.* at 609.

66. 422 U.S. 332 (1975).

67. *Id.* at 349. In *Hicks*, police seized copies of an allegedly obscene film from the federal plaintiffs' theatre and filed criminal charges against two theatre employees. The state court, after viewing the film, declared it obscene and ordered all copies seized from the theatre. The federal plaintiffs did not appeal this order but instead sought injunctive relief in federal district court against future prosecution under the obscenity statute. One day after the federal suit was filed, the municipal court criminal complaint was amended to include the federal plaintiffs as additional defendants. *Id.* at 335-39. The federal district court held the state statute unconstitutional and enjoined its enforcement. The Supreme Court reversed, holding that abstention under *Younger* was proper even though no criminal prosecution had been initiated against the federal plaintiffs in the state court when the federal suit was filed. *Younger* was applied because no proceedings on the merits had taken place in the federal court when the state action was commenced. *Id.* at 349.

68. 430 U.S. 327 (1977) (federal court must abstain from interfering with ongoing state civil contempt proceeding).

69. *Id.* at 337.

70. 431 U.S. 434 (1977) (federal court must abstain from interfering with ongoing state civil contempt enforcement proceeding).

constitutional challenge to the procedure could be adjudicated in a pending state proceeding.[71]

These later precedents established that the hallmark of *Younger* abstention was simply the pendency of a state proceeding in which the federal plaintiff could raise his federal claims. Since the pendency of a state action triggers the application of the doctrine,[72] the rationale of the abstention requirement is that ordinarily a pending state proceeding provides the litigant with a fair and sufficient opportunity for vindication of federal constitutional rights.[73] *Moore v. Sims* further elucidates the scope of the opportunity concept given only a cursory discussion in *Juidice*. *Moore* stands for the proposition that the opportunity to raise the constitutional claim is present if the federal plaintiff can advance his challenge in the pending state action by way of a permissive counterclaim or similar procedural device rather than strictly in the rigid sense of a defense.[74] Thus, a federal court asked to enjoin a pending state court proceeding must now scrutinize the particular state's rules of civil procedure. If any procedural possibility for advancing the constitutional issue exists in the pending state action, and in the absence of a recognized exception to the rule of abstention, the federal court must abstain.

While *Moore* expands the breadth of the opportunity concept, the Court did little to preserve the already imperiled exceptions to the *Younger* doctrine. These often enunciated but seldom applied exceptions are state proceedings motivated by bad faith or harassment,[75] a statute which is flagrantly and patently violative of express constitutional prohibitions,[76] or extraordinary circumstances.[77] The viability of

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71. *Id.* at 439-40.

72. *See* Steffel v. Thompson, 415 U.S. 452 (1974) (*Younger* considerations of equity, comity, and federalism have no effect in absence of ongoing state action).

73. Kugler v. Helfant, 421 U.S. 117, 124 (1975). *See also* Steffel v. Thompson, 415 U.S. at 460 (pending state proceeding provides federal plaintiff with necessary vehicle for vindication of constitutional rights).

74. 99 S. Ct. at 2381 n.12. *See* note 48 *supra*.

75. *See Younger*, 401 U.S. at 54.

76. *See* Watson v. Buck, 313 U.S. at 402.

77. *See Younger*, 401 U.S. at 54. The Supreme Court discussed the extraordinary circumstances exception in detail in Kugler v. Helfant, 421 U.S. at 124-25, but has not to date applied it to a case on review. Commentators have suggested that the application of the *Younger* exceptions does not conflict with the notions of comity and federalism since the state has no legitimate interest in trying a case if any of the exceptional situations are involved. *See* Comment, *Federal Courts—Younger Doctrine—State Criminal Defendant Must Exhaust State Appellate Remedies Before Seeking Federal Relief on Matters Collateral to the Merits of the State Prosecution*, 52 N.Y.U. L. REV. 1212, 1230 (1977). *See also* Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEX. L. REV. 1324, 1340, 1343 (1972).

the flagrant statute exception was questionable prior to *Moore* because, to date, the Supreme Court has not sanctioned federal intervention into a pending state court proceeding under this exception.[78] The reason may have been the all-encompassing standard which requires the statute to be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.[79]

Moreover, the Court's discussion of the principles of the *Pullman* abstention doctrine[80] in the context of a *Younger* case can only be taken as an indication that the flagrant statutes exception is of limited utility. The reference to *Pullman* expresses the Court's view that the policy considerations behind *Pullman* are also engaged when a federal court is asked to enjoin a pending state action based on the flagrant statute exception.[81] This hesitancy reflects the *Pullman* concern that state courts have greater latitude in construing state statutes than do federal courts.[82] The conjunctive effect is to foreclose federal intervention if the challenged statute has not been interpreted by the state courts. Where the opportunity to raise the constitutional challenge exists in an ongoing state action, the state court is presumed competent[83] to decide whether a narrow construction of the contested

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78. *See* Trainor v. Hernandez, 431 U.S. at 463 (Stevens, J., dissenting). *See also* Spears, *The Supreme Court February Sextet; Younger v. Harris Revisited*, 26 BAYLOR L. REV. 1, 46-48 (1974). *But cf.* Roe v. Wade, 410 U.S. 113 (1973), where a Texas physician being prosecuted in state court for violations of Texas' abortion laws sought to intervene in a federal action brought by a woman challenging the constitutionality of the same statute. The Court held that *Younger* barred the physician from intervening in the federal suit, but reached the merits of the female's constitutional challenge. *Id.* at 125-27. After declaring the Texas statute unconstitutional, the Court expressed its conviction that the Texas authorities would not continue to prosecute persons under the statute. *Id.* at 166. Thus, even though the physician was denied intervention under *Younger*, the relief afforded Roe effectively precluded state prosecution against him under the statute.

79. *See Huffman*, 420 U.S. at 611; *Younger*, 401 U.S. at 53-54.

80. *See* note 46 and accompanying text *supra*. *Pullman* abstention applies where no state action is pending and mandates only stay of federal jurisdiction rather than outright dismissal. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1043 (2d ed. 1973).

81. *See* Trainor v. Hernandez, 431 U.S. at 445; Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 538 (1970).

82. *See* Trainor v. Hernandez, 431 U.S. at 445. Moreover, the *Younger* doctrine commands that mere facial invalidity of the state statute is insufficient for federal intervention. 401 U.S. at 54.

83. 99 S. Ct. at 2380; Trainor v. Hernandez, 431 U.S. at 443; Juidice v. Vail, 430 U.S. at 336; Huffman v. Pursue, Ltd., 420 U.S. at 610-11; Steffel v. Thompson, 415 U.S. at 460-61.

statute is possible and if not, whether the statute is flagrantly and patently violative of express constitutional prohibitions.[84]

The *Moore* Court's unambiguously broad definition of the opportunity concept[85] also raises questions about the need for a separate exception of bad faith[86] once it is shown that the federal claim can be litigated in the pending state proceedings. A state court willing to hear federal claims could not reasonably be accused of bad faith.[87] Conversely, if a state court refuses to hear a federal claim, there is little reason for a federal court to question if the refusal was motivated by bad faith. In such a situation, a federal court could intervene without reliance on any of the *Younger* exceptions, since the opportunity to be heard in state court is an absolute prerequisite to *Younger* abstention.[88]

If the bad faith exception cannot be applied to the conduct of a state court, then the only other possible application of the exception is when the prosecution is undertaken in bad faith. Yet once the state court has shown its willingness to hear a federal defense to a state prosecution, it is unclear why the state court should be denied the power to do so because of the improper motives of the prosecutor. In the procedural context of all *Younger* cases, the state court has done all that it can be expected to do once it has agreed to hear the federal defense.[89] Thus, a federal injunction operates to preclude a state court from carrying out its constitutional responsibilities.[90] It has been suggested that federal intervention to halt a bad faith prosecution is justified because the state has no vital interest in overseeing prosecutions instituted in bad faith.[91] However, when faced with a federal claim, the constitutional responsibility of a state court judge is identical to the constitutional responsibility of a federal judge.[92] Since the constitutional responsibilities are identical, the preference for a federal

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84. *See* 99 S. Ct. at 2380-81.

85. *See* text accompanying note 74 *supra.*

86. The exception for state proceedings motivated by bad faith has enjoyed a more frequent discussion and application. *See* Allee v. Medrano, 416 U.S. 802 (1974) (Supreme court remanded to determine whether there were pending prosecutions and if so, whether such prosecutions were brought in bad faith); Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1972) (black youth prosecuted excessively for simple battery).

87. *See* Dombrowski v. Pfister, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting).

88. Kugler v. Helfant, 421 U.S. at 124.

89. *See* Dombrowski v. Pfister, 380 U.S. at 499 (Harlan, J., dissenting).

90. U.S. CONST. art. VI, § 2 provides in part: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."

91. *See* note 77 *supra.*

92. *See* note 90 *supra.*

forum can be justified only if federal judges are more competent to carry out these responsibilities than are state judges. This, however, is a proposition that the Supreme Court has consistently refused to accept.[93] Federal intervention when the state court has shown every indication of fidelity to its constitutional responsibility, simpy because the prosecutor is acting badly, reflects negatively upon the ability of state judges and is counter to the stated goals of *Younger* abstention.[94]

Moore v. Sims continues the trend of closing the federal forum to a litigant who is involved in a pending state action. The broad definition given the opportunity requirement of *Younger* precludes federal intervention into an ongoing state proceeding where the federal plaintiff has any procedural mechanism which allows him to raise constitutional challenges in the state system.[95] The focus of future *Younger* decisions should, therefore, be the availability of state opportunities for determining constitutional questions. *Moore* unequivocally mandates that if such an opportunity is present, the federal courts must ordinarily exercise total equitable restraint.[96] By limiting the availability of the federal forum, the *Moore* decision further delineates the proper forum allocation for constitutional litigation[97] while simultaneously promoting the principles of comity and federalism at the foundation of *Younger* abstention.

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93. *See* cases cited at note 47 *supra*.

94. *See* Steffel v. Thompson, 415 U.S. at 460-61.

95. *See* notes 73-74 and accompanying text *supra*.

96. *See* text accompanying note 74 *supra*.

97. *See* Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1282 (1977).