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Dealing with *Younger* Abstention as a Part of Federal Courts Reform—The Role of the Vanishing Proposal

*George D. Brown**

I. Introduction

Should Congress take action to deal with *Younger* abstention, perhaps by altering the doctrine, perhaps by abolishing it? That intriguing set of questions is raised by President Rex Lee and Professor Richard Wilkins in an article published in the Brigham Young University 1990 Federal Courts Symposium.[1] The various pieces in the symposium were prepared for The Federal Courts Study Committee's Subcommittee on the Federal Courts and Their Relation to the States. According to Judge Richard Posner, the Subcommittee's chairman, the symposium pieces had a great influence on the Subcommittee and on the full Committee's final report.[2] In turn, the final Report of the Federal Courts Study Committee is dubbed, by the Committee, as the product of "the most comprehensive examination of the federal court system in the last half century . . . ."[3]

The Report will no doubt play an important role in debates about the federal judiciary. Yet many scholars will be surprised at the virtual absence of discussion of federal courts doctrines in a document about the federal courts. Of such staples as the eleventh amendment, abstention, res judicata, and removal there is hardly a word. The Brigham Young University 1990 Federal Courts Symposium suggests another approach; it contains a great deal of doctrinal analysis followed by proposals.[4] In this comment I will focus on the treatment of *Younger* abstention by President Lee and Professor Wilkins.

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1. Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321.
2. Posner, *Introduction, Federal Courts Symposium*, 1990 B.Y.U. L. Rev. 1.
3. Report of the Federal Courts Study Committee 3 (1990).
4. *E.g.*, Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. Rev. 183.

I have chosen this particular component of the symposium for several reasons. First, *Younger* abstention is the quintessential Burger-Rehnquist federal courts doctrine. Addressing it at any length takes one deeply into the broader debate over the proper role of the federal courts when values of federalism and nationalism seem to clash. Second, Lee and Wilkins' analysis is worth attention not only because it addresses and criticizes *Younger* abstention, but also because it goes further by proposing specific modifications so as to bring more cases into federal courts. Such an analysis is important and worth considering in and of itself. Finally, it is also worth considering why none of this excellent analysis ended up in the final Report.

II. THE LEE-WILKINS CRITIQUE OF *Younger* ABSTENTION

Lee and Wilkins' critique of *Younger* abstention is part of a larger analysis of all five abstention doctrines.[5] *Pullman* abstention is invoked when resolution of an uncertain state law question might obviate the need for deciding a federal constitutional issue.[6] *Thibodaux* abstention, a much rarer doctrine, applies when a difficult, unsettled issue of state law bears on a strong state governmental or regulatory interest.[7] Similarly, *Burford* abstention is triggered when there is a specialized scheme for judicial review of state administrative decisions under a detailed state program.[8] *Colorado River* abstention is a narrow doctrine which permits federal courts to abstain in favor of parallel state proceedings to increase judicial efficiency.[9] It may be invoked to avoid duplicative litigation and inconvenience to the parties. *Younger* abstention is frequently viewed as a fifth form of abstention,[10] although some commentators view it as a separate phenomenon.[11] Under *Younger* abstention, a federal court must

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5. Lee & Wilkins, *supra* note 1, at 335-74. In addition to the extensive treatment of abstention, the authors analyze "supplemental" (i.e. pendent and ancillary) jurisdiction. *Id.* at 322-35.

6. *Id.* at 338-43. The doctrine derives its name from *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

7. Lee & Wilkins, *supra* note 1, at 343-45. The doctrine derives its name from *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

8. Lee & Wilkins, *supra* note 1, at 345-48. The doctrine derives its name from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

9. Lee & Wilkins, *supra* note 1, at 356-61. The doctrine derives its name from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

10. *E.g.*, Lee & Wilkins, *supra* note 1, at 348-56. The doctrine derives its name from *Younger v. Harris*, 401 U.S. 37 (1971).

11. *See, e.g.*, C. WRIGHT, THE LAW OF FEDERAL COURTS 320-30 (4th ed. 1983) (treat-

dismiss a case when (1) the plaintiff is a party to a pending state judicial proceeding, (2) the federal issue is directly presented in a way that indicates that the state courts are likely to decide it adequately, and (3) an important state interest is present.

Lee and Wilkins analyze each of these doctrines and express considerable reservations about the Supreme Court's authority to formulate them[12] as well as reservations about how they work in practice. For example, in discussing *Pullman* abstention, Lee and Wilkins raise serious questions about whether the practice really furthers the stated goal of reducing federal-state friction and argue that it imposes an excessive cost on litigants.[13] It seems clear, however, that Lee and Wilkins regard *Younger* abstention as the most important of the abstention doctrines. In this they are surely correct.[14]

Younger abstention has received far more extensive treatment at the hands of the Burger-Rehnquist Court than any other abstention doctrine.[15] It poses the most significant questions of federalism at the doctrinal level, and it probably plays the largest practical role in keeping cases out of federal court. *Pullman* abstention is also widely invoked, but under it, as opposed to *Younger* abstention, the plaintiff can return to federal trial court after state court resolution of the state issues. *Younger* abstention originated because of efforts to use federal courts to stop state criminal prosecutions when the state defendant had a federal defense.[16] Much of the doctrine's importance, however, lies in its extraordinary potential for growth. This potential is shown by the Supreme Court's expansion of the doctrine beyond the context of criminal cases[17] and indeed beyond

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ing "our federalism" as "a specialized application of" abstention doctrines).

12. Lee & Wilkins, *supra* note 1, at 336-38. They also discuss the divergence of scholarly opinion on the subject. *Id.* at 361-62.

13. *Id.* at 339-43.

14. *See* Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336 (1989) (indicating that *Younger* is the broadest of the abstention theories).

15. *E.g.*, New Orleans Pub. Serv., Inc. v. City Council of New Orleans, 491 U.S. 350 (1989); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

16. Younger v. Harris, 401 U.S. 37 (1971). *Younger* cut back on a more hospitable approach to such cases manifested in *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

17. *E.g.*, Pennzoil Co. v. Texaco, Inc. 481 U.S. 1 (1987) (applying *Younger* to private civil dispute when federal plaintiff challenged state mechanism for enforcing judgments); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying *Younger* to quasi-criminal proceedings).

the judicial context into the realm of abstention in favor of state administrative proceedings.[18] While the 1989 decision in *New Orleans Public Service, Inc. v. City Council of New Orleans*[19] shows that the Court is willing to limit the application of *Younger* abstention in favor of state administrative proceedings, and perhaps that the Court wants to put the brakes on the doctrine generally, that case may be more of a slowing down than a fundamental rejection of *Younger* itself.[20]

Lee and Wilkins accept the basic correctness of the *Younger* decision insofar as federal court abstention in favor of state criminal adjudication is concerned.[21] For them, *Younger* "is grounded on traditional principles of equity and prevents federal interference with perhaps the most important exercise of state sovereign prerogative—enforcement of state criminal law."[22] Their serious reservations about the *Younger* doctrine concern its extension beyond the original, narrow criminal context. They offer several specific critiques. First, Lee and Wilkins have serious doubts as to the Supreme Court's authority to formulate any such doctrine in light of the fact that Congress has provided for limited abstention in other situations and has directed the federal courts to exercise their jurisdiction in order to enforce section 1983 of 42 U.S.C.[23] Second, they find that the *Younger* doctrine is extremely confused and uncertain and that continuation in its present form poses the ongoing risk of ad hoc decisions, particularly by the lower courts.[24] Third, Lee and Wilkins argue that the Court has been vague in defining what constitutes an important state interest and whether such interests can be identified simply by listing categories of cases from which federal trial courts should abstain.[25] Fourth, they argue that the Court's current approach of almost automatic abstention in cer-

18. *E.g.*, *Middlesex County Ethics Comm.*, 457 U.S. at 423.

19. 491 U.S. 350 (1989) (holding abstention was not appropriate under *Younger* where city council's proceedings were not judicial in nature).

20. I have discussed the doctrinal importance of this case in Brown, *When Federalism and Separation of Powers Collide—Rethinking* Younger *Abstention*, 59 GEO. WASH. L. REV. 114 (1990). Lee and Wilkins also treat *New Orleans Public Service* as a possible turning point. Lee & Wilkins, *supra* note 1, at 355-56.

21. Lee & Wilkins, *supra* note 1, at 366-67.

22. *Id.* (footnote omitted).

23. 42 U.S.C. § 1983 (1988); Lee & Wilkins, *supra* note 1, at 367.

24. Lee & Wilkins, *supra* note 1, at 367-68. According to Lee and Wilkins, "[t]he Court has been unable to explicate workable rules for determining when federal deference to state proceedings should be granted." *Id.* at 368 n.277.

25. *Id.* at 368 n.277.

tain categories of cases fails to consider the "important, countervailing . . . interests" on the federal side of the issue.[26] Finally, they see the doctrine as much too broad in its extended form, contending that the post-*Younger* decisions "seemingly require federal courts to give way any time there is a pending state proceeding in which a federal question can ostensibly be raised."[27]

III. A Critique of the Critique

Some of these arguments have considerable force, while others stand on rather shaky ground. The *Younger* doctrine is indeed confusing—in part because the key operating concept of an important state interest is very hard to grasp. Two cases illustrate this point. In *Pennzoil Co. v. Texaco, Inc.*,[28] the Court said that there was an important state interest in enforcing state court decisions in litigation between two private parties, but the relative force of that interest is not clear from the decision. In *New Orleans Public Service, Inc. v. City Council of New Orleans*,[29] the Court stated that regulation of public utilities was an important state interest, but that important state interest did not play a significant role in the Court's determination of whether *Younger* abstention was appropriate. If one phrases the inquiry in terms of core functions performed by state governments, it can certainly be argued that regulating utilities is as much an important part of that core as is providing mechanisms for private parties to enforce judgments rendered in their favor.[30] Perhaps the Court would do better by focusing on whether the plaintiff is essentially commencing a federal suit that is parallel to an ongoing state suit seeking a similar resolution to the underlying controversy, or whether the plaintiff is attempting to use the federal judiciary to stop the state court system from proceeding at all. Drawing the line in these terms ought to be explored, at least, particularly since it ties abstention to respect for state judicial proceedings—a value that the Court has said is at the heart of *Younger* abstention. Although the Court may not have reached this point yet, it appears that at least some form of balancing between the importance of the

26. *Id.* at 368.
27. *Id.* at 369.
28. 481 U.S. 1 (1987).
29. 491 U.S. 350 (1989).
30. *See* Lee & Wilkins, *supra* note 1, at 356.

state's interest and the federal interest involved is inherent in *Younger* abstention.

Given this inherent balancing, Lee and Wilkins are surely correct when they suggest that the Court needs to focus more on the federal interests present in cases where *Younger* abstention is invoked.[31] The Court's obvious lack of attention to the federal interest in federal adjudication of the claim that a federal plaintiff asserts illustrates an important criticism of current doctrine.[32] Many recent cases present situations in which competing values of federalism and nationalism point to conflicting results. Strongly embracing one approach over the other can lead to one-sided rhetoric that obscures the complex interplay of competing interests.[33] Thus, a modified approach to *Younger* might preserve the doctrine while insisting on a more thorough consideration of the federal interests.[34] An additional advantage to this approach, according to Lee and Wilkins, lies in its recognition that although complication is inherent in the subject matter, a clear identification of the interests at stake could reduce some of the confusion.

Two of Lee and Wilkins' critiques, however, seem substantially overstated. First, their concern that the *Younger* doctrine presents serious questions of judicial legitimacy and is an incursion by the courts upon the domain of Congress is exaggerated. According to Lee and Wilkins, "*Younger* as applied today calls for legislative modification simply to preserve Congress' constitutional authority to delineate the jurisdiction of the lower federal courts."[35] At the same time, as noted above, they accept the legitimacy and correctness of the *Younger* decision. The statutory framework is the same in both the criminal and the extension contexts. If the Court has authority to abstain in favor of pending state criminal proceedings, that can only be because the statutes are fairly read as leaving intact equitable discretionary power not to exercise jurisdiction in some circumstances. The question then becomes whether the Court used its equitable

31. *See generally*, Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988).

32. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

33. *See id.* at 1150-51.

34. *See id.* at 1240.

35. Lee & Wilkins, *supra* note 1, at 367.

power unwisely in extending *Younger*, not whether it lacked any such power in the first place.

This aspect of the Lee-Wilkins critique of *Younger*, and indeed of abstention generally, relies heavily on the work of Professor Martin Redish.[36] Redish has argued that all abstention is an usurpation of legislative authority by the Court and that it runs directly counter to the basic jurisdictional and remedial schemes established by section 1983, the general grant of federal jurisdiction, and the grant of jurisdiction in civil rights cases.[37] However, Professor Redish takes his thesis to the conclusion that *Younger* itself is illegitimate and incorrect.[38] Lee and Wilkins use the Redish thesis but want to preserve *Younger* despite the obvious inconsistency.

It should also be noted that the Redish thesis has been heavily criticized.[39] Under a contrary view of federal jurisdictional development, several commentators have emphasized the notion of a dialogue between Congress and the Supreme Court.[40] Congress sets the basic parameters of federal judicial authority and the judiciary then develops jurisdictional policy within those parameters. Many of the issues that arise present important questions of federal-state relations and, as Professor Fallon puts it, critics of Redish share "the assumption that the federal courts, and especially the Supreme Court, have and ought to have a large responsibility for the substance and health of judicial federalism."[41] This is an important debate among federal courts scholars. Lee and Wilkins may be criticized for supporting both sides of the debate, but clearly their preference is that Congress be the dominant partner in the dialogue. Given their position, Lee and Wilkins would need to propose a statute legiti-

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36. The basic statement of his views is found in Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

37. *See, e.g., id.* at 77 (Congress, under section 5 of the fourteenth amendment "has established a network of federally protected substantive rights and simultaneously vested the federal courts with jurisdiction to enforce those laws, and the Supreme Court lacks the authority to ignore or invalidate those statutes merely because of disagreement with their substance.").

38. *See id.* at 92-95 (arguing that judicial system could function smoothly without *Younger*).

39. *E.g.*, Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 544 (1985); Wells, *Why Professor Redish is Wrong about Abstention*, 19 GA. L. REV. 1692 (1985).

40. *E.g.*, Fallon, *supra* note 32, at 1248-49. For a recent elaboration of the dialogue concept, see generally Freidman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U.L. REV. 1 (1990).

41. Fallon, *supra* note 32, at 1248.

mizing *Younger* abstention, whether they approve of the decision itself or not.

In addition to their concern about judicial legitimacy, Lee and Wilkins also overstate their concern that *Younger* abstention goes too far. They disapprove of the extension of *Younger* because it removes far too many cases from the federal courts and constitutes a serious inroad on the basic jurisdiction of the national tribunals. As they put it, "[a]n abstention doctrine that requires the federal courts to turn any and all issues of national law over to a state forum any time state proceedings are commenced is certainly too broad."[42] The argument that *Younger* goes much too far is frequently made[43] and, as here, is frequently overstated.[44] While *Younger* is partially triggered by parallel state proceedings on the same issue, that alone is not enough. As the Court's decisions on *Colorado River* abstention show, there is a basic systemic presumption in favor of parallel proceedings.[45] *Younger* does not alter this presumption. Rather, although it does have potential for great growth, *Younger* abstention operates primarily to stop the federal proceeding when it is viewed as unduly interfering with the state proceeding. The recent decision in *New Orleans Public Service, Inc. v. City Council of New Orleans*[46] shows that the Court is aware of the need to keep *Younger* within its bounds. Still, there are strong arguments that Congress, as part of a broad review of the status of the federal judiciary, at least ought to consider the issues surrounding *Younger* abstention.

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42. Lee & Wilkins, *supra* note 1, at 369.

43. *E.g.*, Levit, *supra* note 14, at 339 (all section 1983 suits may be subject to *Younger* when any kind of state proceeding is involved).

44. For example, Justice Brennan has decried the doctrine as an "evisceration" of section 1983. Juidice v. Vail, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting). However, the great bulk of section 1983 litigation is largely untouched by *Younger* abstention; indeed, the remarkable growth of that statute fueled by cases such as *Monroe v. Pape*, 365 U.S. 167 (1961) (official's action may still be "under color of" state law even if it violates the law), and *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (city may be sued under section 1983 if official's acts represented official policy of city) appears to be a continuing phenomenon in American public law.

45. Thus in *Colorado River* itself the Court quoted earlier precedent to the effect that generally, "the pendency of an action in state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction. . . ." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

46. 491 U.S. 350 (1989).

IV. The Lee-Wilkins Statutory Solution to the *Younger* "Problem"

Lee and Wilkins propose the following statute:

> A court of the United States may not grant an injunction to stay criminal proceedings in any state court except in exceptional circumstances when necessary to prevent irreparable harm.
>
> Absent exceptional circumstances, a court of the United States shall not abstain from deciding any case presenting a dispositive question of federal law solely because state administrative or judicial proceedings are pending. Notwithstanding the foregoing, however, a court of the United States may not grant an injunction to stay proceedings in a state court or administrative agency except as expressly authorized by Act of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[47]

The proposed statute appears to have four goals related to *Younger* abstention: (1) codify the present doctrine in criminal cases; (2) legitimize its extension in some circumstances; (3) limit those circumstances; and, (4) end confusion in the abstention area. It probably would achieve the first goal. Even in the criminal context, *Younger* does not currently present an absolute bar to injunctions against pending state proceedings. The Court has recognized various exceptions to *Younger* which generally permit federal injunctions when bad faith and harassment are present, or when the plaintiff challenges a state statute as patently unconstitutional in its entirety.[48] The proposed exception for "exceptional circumstances when necessary to prevent irreparable harm"[49] is consistent with existing law, and legislative history could establish clearly that the proposed statute's goal is to incorporate current standards.

Whether the proposed statute would achieve its other goals is less certain. Lee and Wilkins resolve the problem of the legitimacy of a federal court's authority to abstain, as presented by the extension cases, by requiring congressional action to validate the *Younger* doctrine. The first paragraph of the proposal is clearly limited to the criminal context. However, beyond that,

47. Lee & Wilkins, *supra* note 1, at 371.

48. *See, e.g.*, Hicks v. Miranda, 422 U.S. 332, 350-51 (1975) (finding the bad faith and harassment standard not met).

49. Lee & Wilkins, *supra* note 1, at 371.

the proposed statute is unclear as to whether it is a limited extension, a broad extension, or a negation of any extension of *Younger* abstention. The statement of the general rule in the negative—"shall not abstain"—plus the phrasing of the qualifying language in terms of "exceptional circumstances" suggests, at most, a narrow role for *Younger* abstention beyond the criminal context.

Lee and Wilkins' explanatory text is somewhat ambiguous. On one hand, it states flatly that "outside the criminal context, *Younger* should not apply where litigants present an important, dispositive question of federal law."[50] A footnote tells us that "the exceptional circumstances exception to the general rule of non-abstention is necessary to preserve the viability of *Colorado River* abstention."[51] These two statements taken together lead to the conclusion that there should be no *Younger* abstention outside criminal cases. On the other hand, the authors cite current doctrine with partial approval, while stating that it "should be subjected to defined legislative limits."[52] Somewhat surprisingly, they suggest the Court's own cases as a possible source of limits.[53]

A plausible reading of the Lee-Wilkins proposed statute is that it is meant to impose on the federal courts a more case-specific inquiry than is presently found in non-criminal *Younger* abstention cases. In order to find exceptional circumstances, the trial court would have to focus on the particular facts of the case before it rather than on general categories of cases such as "quasi-criminal" or general notions of important state interests. Thus read, the statute could serve to make *Younger* more of a doctrine of equitable discretion than a set of hard, fast, and automatically applied principles of federalism.[54] As such, the statute would respond to the criticisms of *Younger*'s automatic approach which have been voiced elsewhere.[55] Whether it would

50. Lee & Wilkins, *supra* note 1, at 370.

51. *Id.* at 370 n.291.

52. *Id.* at 370.

53. *Id.* Perhaps I am missing something, given the fact that all of these statements are found on the same page. It may be that the authors seek an automatic rule of no abstention if the federal interest is of a certain level. This would keep *Younger* a one-way street, something they decry, *id.*, but make it go in the opposite direction. They seem, on balance, to be searching for more flexibility.

54. *See id.* at 368-69 (criticizing automatic approach of current doctrine).

55. *E.g.*, Fallon, *supra* note 32, at 1240-41.

substitute "legislative clarification" for "judicial bewilderment," as Lee and Wilkins suggest,[56] is questionable.

Legislative history could, of course, be crafted to clear up much of the uncertainty that the present language and the "legislative history" in the article create. Given the general difficulty of codifying equitable approaches to the exercise of discretion, the proposed statute presents a useful working draft to present to Congress, as long as the issue of limits in the non-criminal context is dealt with effectively.

V. The Uncertain Status of the *Younger* Proposal in the Final Report of the Federal Courts Study Committee

Whatever one thinks of Lee and Wilkins' analysis of *Younger* or of their proposed statute, it is clear that they have done an excellent job of putting the problem on the table. In the final Report, however, the Committee mentions the entire matter only in passing, and it takes no position on any aspect of abstention. This somewhat puzzling decision seems to reflect a general approach to federal court reform rather than simply the possibility of failure to develop agreement in this particular area. It is worth tracing the progress of the Lee-Wilkins proposal to get a clearer sense of what might have been produced compared to what actually was produced.

A. *The Subcommittee's Analysis of* Younger

A major change in course occurred when the Subcommittee on the Role of the Federal Courts and Their Relation to the States considered *Younger* and other abstention issues. The Subcommittee disagreed with Professor Redish's separation of powers critique of *Younger* abstention. Instead, the Subcommittee relied on one of the principal rebuttals of this critique and took the position that "the abstention doctrines fit comfortably within [the] tradition of declining jurisdiction when doing so serves policies of federalism, separation of powers, or sound judicial management. As such, abstention represents a legitimate form of statutory interpretation."[57] Thus an important component of the analysis leading to the Lee-Wilkins statute was directly rejected. Within the general area of abstention, the Sub-

56. Lee & Wilkins, *supra* note 1, at 376.

57. Federal Courts Study Committee, Report of the Subcommittee on the Federal Courts and Their Relation to the States 603-04 (1990).

committee devoted substantial attention to *Younger* and appears to have endorsed it. The Subcommittee noted some criticisms of the doctrine which echo the Lee-Wilkins analysis: The doctrine may have "no clear stopping point,"[58] it may be uncertain in its application,[59] and it may give insufficient recognition to the importance of federal adjudication of federal rights.[60] Nonetheless, the Subcommittee came out in favor of *Younger* and of the broader doctrine of abstention in basically its present form. The Subcommittee noted, in particular, the need to recognize and avoid, where possible, friction between the two sets of courts in "a system that of necessity relies to a substantial degree on state courts to enforce federal rights."[61]

The Subcommittee then considered whether there should be any modifications of *Younger* abstention. It basically recommended that the matter be left alone and that the courts be allowed to continue to develop the law in this area.[62] Specifically, the Subcommittee proposed a statute on abstention that initially would not allow *Younger* abstention in any form, but then it altered the thrust of that statute by proposing a modification of the Anti-Injunction Act that would recognize a general policy against enjoining state proceedings with limited exceptions.[63] According to the Subcommittee Report, adoption of the proposal "would transform *Younger* from an abstention doctrine to a limitation on remedies without restricting the power of the federal courts to experiment in this area."[64] At the same time, since the proposal is couched only in equitable terms it would appear to preclude the use of *Younger* to bar a federal action for damages.[65]

Thus, at this point in the process of "the most comprehensive examination of the federal court system in the last half century,"[66] the Subcommittee had moved the material for public discussion away from a position of criticizing and limiting

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58. *Id.* at 630.
59. *Id.* at 634.
60. *Id.* at 638.
61. *Id.* at 639.
62. *Id.* at 643.
63. *Id.* at 627-28, 643-44.
64. *Id.* at 644.
65. *Id.* The general issue of the Anti-Injunction Act is discussed in a paper by Professor Diane Wood for the Subcommittee, Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. REV. 289.
66. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 3, at 3.

Younger abstention toward one of general endorsement and acceptance. Although the Subcommittee does propose a statutory approach, it is not necessitated by any desire to limit *Younger* or to legitimize it. A doctrinal turn-around has occurred which will satisfy those who tend to favor Burger-Rehnquist jurisdictional doctrines, but will appall those who disagree with them. Still, the debate continues, and interested members of the public—especially Congress—can see it, understand it, and take a position on it.

B. *The Committee's Consideration of* Younger

The Federal Courts Study Committee Report contains considerably less consideration of *Younger* abstention than does the Subcommittee Report. Its recommendation is as follows: "We recommend for further study, but take no position on, proposals concerning the Anti-Injunction Act [and] abstention. . . ."[67] A four sentence discussion of the abstention proposal calls attention to the possibility of statutory amendment, notes the uncertainty of when cases involving both federal and state law belong in federal court, and directs the reader to "thoughtful proposals" on the issue contained in part III of the Report.[68] However, the status of part III is something of a mystery. It was issued two to three months after the Report, and can hardly be considered a part of it. Rather, it is entitled "Working Papers And Subcommittee Reports."[69] Thus, the reader of the Report comes away with little, if any, sense of the importance of *Younger* abstention as an issue, the strong arguments that can be made on both sides, the possibility of different statutory approaches, or even the underlying question of whether any statutory action is necessary at all.

The extraordinary progression in the abstention area makes the Report far weaker than the documents that preceded it. There are, no doubt, many reasons bound up in the internal politics and proceedings of the Federal Courts Study Committee for it to avoid a controversial subject. I have discussed several possibilities elsewhere[70] and do not propose to repeat them here

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67. *Id.* at 48.

68. *Id.*

69. Both volumes of Part III of the Report contain explicit disclaimers to the effect that the material therein is not to be considered as reflecting the views of the Committee.

70. Brown, *Nonideological Judicial Reform and its Limits—The Report of the Fed-*

at any length. Nonetheless, two general aspects of the Report merit discussion given the fact that the initially vigorous discussion of *Younger* in the Lee-Wilkins study and the Subcommittee Report were watered down to the point of suggesting that this is a non-issue. Treating the matter this way is quite consistent with one major aspect of the entire enterprise: the emphasis on keeping cases *out* of federal courts. The Committee was particularly concerned with the need to cope with the perceived caseload crisis in the federal courts.[71] Many of its proposals are shaped by the need to respond to this crisis.[72] Therefore, even though the Committee was well aware that developing any general approach to the role of the federal courts would identify cases that ought to be in federal courts,[73] its Report is generally silent on what to do about cases that fit this description but that are currently restricted to the state courts because of federal jurisdictional doctrines.

It may be true that in dealing with the status of the federal courts, a necessary first step is to propose coping with the caseload crisis by eliminating low priority cases; however, a comprehensive study should not ignore the high priority cases now kept out of federal court because of possibly incorrect abstention doctrines. These high priority cases must be considered simply to get a sense of the real demands on federal court resources. Certainly any Committee effort to identify and prioritize candidates for federal adjudication is incomplete if it only looks at those cases already in the system without looking also at those cases that *should* be in the system.[74] Congress, in its mandate to the Committee, did not forbid any such consideration; indeed, it seems exceedingly likely that Congress would want to know about these cases. Thus, if *Younger* abstention is sound doctrine, it is hard to see why the Committee did not at least raise the issue, discuss it in its broad outlines, and demonstrate that no problem exists. The decision to resolve the matter by not ad-

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eral Courts Study Committee, 47 WASH. & LEE L. REV. 973 (1990).

71. *E.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 3, at 4-9 (discussing the crisis).

72. *See id.* at 26-28 (discussing how specific recommendations would reduce number of cases).

73. *See, e.g., id.* at 15 ("central task" of federal courts is "protecting federal rights and interests").

74. The Report suggests that such a road can be taken in the future, after the burden of diversity jurisdiction has been removed. *Id.* For a critique of this position, see Brown, *supra* note 70.

dressing it is probably a conscious choice, but the Report does not tell us why.

The Committee's desire to ease the caseload of the federal system may be only part of the reason that it ignored the abstention issue. Beyond that desire, the Report gives the distinct impression that its authors wished to emphasize technical and operational issues rather than to plunge into the ideological and doctrinal debates which have dominated recent Supreme Court decisions as well as academic commentary in the area of federal courts. The Report may be viewed as an intentional, giant step away from an ideological approach to federal courts issues. In this respect, it may follow the recommendations of Professor Fallon who has urged a less polarized approach to the broad cluster of federal courts issues.[75] According to Fallon, the problem with present analyses is that they are dominated by an irreconcilable competition between Federalist and Nationalist premises.[76] He argues that each side overstates its position and is unwilling to recognize the merits of a contrary approach.[77] Thus, many decisions are both one-sided in their rhetoric and inconsistent with other decisions in which proponents of a contrary point of view have prevailed.[78] Lee and Wilkins' initial analysis of *Younger* is similar to the approach that Professor Fallon calls for when he advocates a "law between the poles."[79] Fallon foresees an approach which recognizes the utility in both sets of premises, but which tries to do a better job of balancing these contrary imperatives by recognizing and harmonizing the values of each. Much of Lee and Wilkins' critique of *Younger* focuses on the inconsistent and unbalanced nature of the doctrine in its present form. At the same time, like Fallon, they do not advocate a wholesale rejection of it in the name of Nationalist premises, even though their approach to the problem clearly represents more of a Nationalist than a Federalist approach.

This balancing approach raises the questions of whether an attempt at depolarizing debates over federal courts issues is likely to lead to an attempt to take ideology out of the matter altogether, and, if so, whether that is desirable. Fallon himself

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75. Fallon, *supra* note 32, at 1224-48.

76. *See id.* at 1151-64 (developing the two sets of premises).

77. *Id.* at 1151.

78. *Id.* at 1164

79. *Id.* at 1224.

says that he is nearly driven to reject both competing models.[80] Perhaps the progression that took place in the deliberations of the Federal Courts Study Committee is an example of nonideological federal courts analysis being pushed too far.

The "law between the poles" approach suggests two initial observations. First, dealing with federal courts issues in this way will have the likely effect of leaving most current doctrines in place with little searching examination. This is so partly because the suggested approach is anything but a radical departure. Therefore, normal forces of stare decisis and judicial inertia will leave present decisions in more or less their present form.

Second, any analysis that focuses on middle ground approaches, such as better balancing, is likely to result in a discovery that a large amount of doctrine in current law is worth preserving even after a serious second look. This is particularly true if one views the present decisions as not being very unbalanced. It is possible to view the Burger-Rehnquist decisions not as a tide of Federalist victories, but as a series of narrow Federalist modifications of the dominant Nationalist themes in federal jurisdiction. These themes dominate current theory because of the statutory framework[81] and because of the strong Nationalist thrust of such foundation decisions as *Monroe v. Pape*[82] and *Ex parte Young*.[83] Thus, the supposedly conservative Court can be seen as tempering nationalism rather than as eviscerating it. Decisions such as *Edelman v. Jordan*,[84] *Fitzpatrick v. Bitzer*[85] and *New Orleans Public Service, Inc. v. City Council of New Orleans*[86] can be interpreted as being law between the poles. If this

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80. *Id.* at 1226.

81. Read literally, the jurisdictional statutes and section 1983 contemplate an extensive role for the federal courts in federal law cases. The Anti-Injunction Act can be viewed as tempering this role when the state courts are also involved, but the Supreme Court has declared section 1983 an exception to the Act's prohibition on federal injunction of state proceedings. Mitchum v. Foster, 407 U.S. 225 (1972).

82. 365 U.S. 167 (1961).

83. 209 U.S. 123 (1908).

84. 415 U.S. 651 (1974) (because of the eleventh amendment, welfare recipients suing state officials in federal court for violation of federal statute are limited to prospective relief). *Edelman* drew a distinction for purposes of the eleventh amendment between prospective injunctive relief and retrospective monetary relief when the state is the real party in interest. A nationalist critique of *Edelman* would focus on its federalist tilt in barring the latter, while neglecting the accommodationalist thrust of allowing the former.

85. 427 U.S. 445 (1976) (acting under its grant of power to enforce the fourteenth amendment, Congress may authorize suits against states in federal court).

86. 491 U.S. 350 (1989) (*Younger* abstention in favor of state administrative pro-

is feasible as a general description, one might conclude that the Committee had engaged in this kind of analysis and decided that the present decisions should remain intact out of recognition of their strongly accommodationist flavor. One would have expected the Committee to inform the public that it had embarked upon this important new step in analysis of federal courts issues, and that it was recommending it as part of its overall look at the federal judiciary. Apart from this omission, however, the Report may be a good, if somewhat tepid, example of law between the poles in action—one that shows where this approach leads.

Perhaps, however, the Committee went beyond Fallon's approach in viewing federal courts as an area which should not be examined with any ideological premises. Fallon himself comes close to this, and Judge Richard Posner, an influential member of the Committee, went even further than Fallon in his 1985 study of the federal courts.[87] Posner argued that doctrinal analysis had little to offer when it came to analyzing the problems facing those courts.[88] The Committee Report could be the ultimate Posnerian document: a comprehensive review of federal jurisdiction purged of federal courts doctrine. For example, the Report of the Subcommittee On The Role Of The Federal Courts and Their Relation to the States makes a brief reference to the debate over whether parity exists between the two-court systems and then states, "[T]he parity debate may be relevant in resolving technical issues such as the precise scope of abstention or habeas corpus."[89] Thus the reason that abstention receives such summary treatment in the final Report could be that it has been relegated to the level of a minor technicality.

The Report's endorsement of the criticism of restrictive approaches to pendent party jurisdiction[90] may also exemplify its general hesitancy to examine the federal courts with any ideological premises. Lee and Wilkins criticize the Supreme Court for this restrictive approach,[91] as does Professor Mengler in an accompanying paper also found in the Brigham Young Univer-

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ceedings limited to those which are judicial in nature).

87. R. Posner, The Federal Courts (1985).

88. *E.g.*, *id.* at 325 (problems "largely economic, political, and managerial").

89. Federal Courts Study Committee, Report of the Subcommittee on the Federal Courts and Their Relation to the States, *supra* note 57, at 113.

90. Report of the Federal Courts Study Committee, *supra* note 3, at 47-48.

91. Lee & Wilkins, *supra* note 1, at 331-35.

sity Law Review's 1990 Federal Courts Symposium and presented to Judge Posner's Subcommittee.[92] It is puzzling that the Committee would urge an overruling of relevant Supreme Court precedent in the area of pendent jurisdiction while failing to even recognize other issues including *Younger* abstention as discussed above. Perhaps pendent parties can be viewed as an issue concerning essentially matters of efficient operation of the federal courts which can be answered without recourse to ideological considerations. Of course, if abstention is only a technicality, why not deal with it also?

Perhaps my reaction is typical of a federal courts professor, but I have doubts that the subject can be usefully approached in any prolonged way without getting deeply into the ideological issues. Trying too hard to avoid the ideologies may lead to avoidance of the most basic issues. Like Fallon, I would prefer a rhetoric which recognizes the utility of competing sets of premises; perhaps more than he, I feel that such an approach is implicit in much of what the Supreme Court is already doing. The great mystery is why none of this is to be found in the report of such an important committee charged with studying the entire subject.

VI. Conclusion

The history and fate of the Lee-Wilkins proposal provides a good insight into what might have been, but did not happen. To me, the Committee's effort would have been enriched by dealing with *Younger* whether it came out in harmony with the original authors, adopted the view of the Subcommittee, or could find no position that would command a majority vote. The issue is there; it will not go away. Perhaps Congress will address it at some future point, for example, as part of a review of civil rights litigation generally. The nagging question remains: why not deal with the problem now in the context of a comprehensive examination of the federal courts? By looking at the Lee-Wilkins analysis and grappling with their proposed statute we may at least get to the heart of the *Younger* debate. Looking at the Report only reinforces the notion that it was an opportunity, but now it is an opportunity lost.

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92. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. Rev. 247.