To Abstain, or Not To Abstain, That Is the Question: The Seventh and Ninth Circuits' Divergent Approaches to *Younger* Abstention*

Federal abstention is a judicially created doctrine by which a federal court declines to exercise its jurisdiction over a case and controversy properly before it. Abstention is aimed at preserving the balance of sovereignty allocated to the states and federal government as envisioned by the Framers. Of the various iterations of abstention, Younger *abstention perhaps does the most to protect this balance. Despite its importance in maintaining principles of federalism, lower courts have struggled to come up with a consistent approach to* Younger. *This Recent Development highlights two U.S. Circuit Courts—the Seventh and Ninth—and their divergent approaches to* Younger *abstention and proposes that the Seventh Circuit's approach is correct as it effectively advances the principles of federalism and comity that* Younger *abstention was designed to protect in the first place.*

What happens when a court declines to exercise the jurisdiction it has been mandated[1] to exercise? Congress gave the federal judiciary the power to adjudicate state-law claims when the amount in controversy exceeds $75,000 and the dispute is between parties who are domiciled—at "home"[2]—in different states.[3] Likewise, 28 U.S.C. § 1331 requires that any claims "arising under the Constitution, laws, or treaties of the United States" are properly filed in federal district court.[4] These statutes clearly establish when a federal court is granted jurisdiction to adjudicate a controversy. However, courts are permitted to, and in some cases must, decline jurisdiction pursuant to the judicially created doctrine of abstention.[5]

Abstention may not be as well known as other judicially created doctrines like judicial review[6] or *Erie*,[7] but it is certainly no less important and thus requires consistent application among lower courts in the federal judiciary. The

1. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We [the courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

2. *Domicile*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. 28 U.S.C. § 1332(a)(1) (2012).

4. *See id.* § 1331.

5. The doctrine of abstention, which has undergone many iterations, allows a federal court to decline to hear a case within its jurisdiction. James Bedell, Note, *Clearing the Judicial Fog: Codifying Abstention*, 68 CASE W. RES. L. REV. 943, 945 (2018).

6. The doctrine of judicial review is typically covered in a basic constitutional law class through study of *Marbury v. Madison*, 5 U.S. 137 (1803).

7. First-year law students study the *Erie* doctrine, derived from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in a basic civil procedure class.

doctrine's importance is rooted in its aim "to preserve the balance between state and federal sovereignty,"[8] which is one of the guiding principles of our federal republic.[9] Without the ability to abstain, federal courts would be required to act as a "quasi-foreign power," interfering in state-law issues and likely causing unnecessary tension between the state and federal governments.[10]

The Supreme Court first established abstention in *Railroad Commission of Texas v. Pullman Co.*[11] to further solidify the Court's routine policy to decide cases on narrow grounds and avoid making "unnecessary constitutional decisions."[12] Once an abstention doctrine is invoked by a federal court, litigation proceedings in the federal court are often paused or dismissed altogether.[13] Plaintiffs are thus tasked with navigating the procedures, rules, and costs of not one but two court systems. Because abstention orders are immediately appealable, plaintiffs must bear the costs of the appeals process in federal court and then again in state court if their appeal is unsuccessful.[14] While abstention may have furthered the balance between federal and state sovereignty,[15] specific forms of abstention provide unclear guidance as to when courts should decline to exercise jurisdiction. As a result, lower courts are increasingly split in their applications of the doctrines.[16]

One such split in the circuit courts concerns *Younger* abstention. In particular, the Seventh and Ninth Circuits diverge.[17] *Younger* abstention is a form of abstention by which a federal court declines to exercise its jurisdiction

8. Mathew D. Staver, *The Abstention Doctrines: Balancing Comity with Federal Court Intervention*, 28 SETON HALL L. REV. 1102, 1102 (1998).

9. Federalism serves as the primary justification for abstention. THE FEDERALIST NO. 45, at 236 (James Madison) (Ian Shapiro ed., 2009).

10. *See* Drew Alan Hillier, Note, *The Necessity of an Equity and Comity Analysis in* Younger *Abstention Doctrine*, 46 CONN. L. REV. 1975, 1978 (2014) ("When a federal court invalidates a state law, the state's citizens and government officials might bristle at the federal court's interference. To the state legislator, the federal court represents a quasi-foreign power that need not have earned the approval of the state legislature, executive, or judiciary. The abstention doctrines also help federal courts to avoid erroneous interpretations of state law and unnecessary constitutional rulings.").

11. 312 U.S. 496 (1941); *see id.* at 501 ("This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority . . . .").

12. Thomas G. Buchanan, Note, Pullman *Abstention: Reconsidering the Boundaries*, 59 TEMP. L.Q. 1243, 1243 (1986).

13. *See* Staver, *supra* note 8, at 1102; *see also* Bedell, *supra* note 5, at 952, 957–58 (explaining that some forms of abstention require a full dismissal of the case from federal courts, while others require only a stay in the federal court proceedings while the state issues are handled in state court).

14. *See* Bedell, *supra* note 5, at 957–58.

15. *See supra* notes 8–10 and accompanying text.

16. For example, there is no clear answer as to whether abstention is mandatory or permissive. *See* Bedell, *supra* note 5, at 960. Furthermore, the Second, Third, Sixth, Ninth, and Tenth Circuits all adhere to one test in determining when *Pullman* abstention is appropriate, while the Fifth Circuit adheres to a different test. *See id.* at 960–61.

17. *See infra* notes 88–91 and accompanying text.

to further the "principles of comity and federalism."[18] The Seventh Circuit's November 2018 decision in *Courthouse News Service v. Brown*,[19] created a split with the Ninth Circuit's 2014 decision in *Courthouse News Service v. Planet*.[20] Both cases dealt with an allegation that state court filing procedures abridged the First Amendment rights of the Courthouse News Service ("CNS") organization, specifically the right of public access to judicial proceedings.[21] The Ninth Circuit opted not to abstain because the plaintiff's claims "raise[d] novel and important First Amendment questions that the federal courts ought to decide."[22] The Seventh Circuit, on the other hand, opted to abstain because "considerations of equity, comity, and federalism" mandated abstention.[23] This Recent Development will analyze the split between the Seventh and Ninth Circuits; explain how the two circuits came to opposite conclusions on a nearly identical issue; and argue the Ninth Circuit incorrectly applied *Younger* abstention, thus creating needless confusion within its own circuit and severely undermining the original purpose of *Younger* abstention—the preservation of comity and federalism.

Analysis proceeds in three parts. Part I delves into the abstention doctrines applied in both *Planet* and *Brown* and explains how each court reached its decision. Part II provides analysis as to why the Seventh Circuit's decision in *Brown* was the correct decision and how the Ninth Circuit seemingly ignored the purpose of *Younger* abstention in its improper application of the doctrine. Finally, Part III discusses the implications of this circuit split and considers the future of *Younger* abstention.

I. THE *YOUNGER* DOCTRINE

Federal abstention is the doctrinal mechanism by which federal courts decline to exercise constitutional or statutory jurisdiction[24] in deference to state

18. George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking* Younger *Abstention*, 59 GEO. WASH. L. REV. 114, 115–16 (1990) (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975)). The exact definition of comity is hard to pin down, *see* Thomas Schultz & Niccolò Ridi, *Comity in US Courts*, 10 NE. U. L. REV. 280, 285–88 (2018), but generally it "encompasses the notion that, based on judicial courtesy and deference, the courts of one jurisdiction will give credit and effect to the laws and judicial holdings of courts from another jurisdiction," Staver, *supra* note 8, at 1116 n.84 (citing Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930)).

19. 908 F.3d 1063 (7th Cir. 2018), *cert denied*, No. 18-1203, 2019 WL 5150484 (U.S. Oct. 15, 2019).

20. 750 F.3d 776 (9th Cir. 2014).

21. *See Brown*, 908 F.3d at 1065; *Planet*, 750 F.3d at 779.

22. *Planet*, 750 F.3d at 793.

23. *Brown*, 908 F.3d at 1075.

24. *See* Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375, 375–76 (2003).

court proceedings.[25] The circumstances in which the need for such deference arise are incredibly limited.[26] Abstention is typically regarded as "the exception, not the rule."[27] Despite the infrequency with which abstention is applied, there are at least four clearly identifiable abstention doctrines.[28] While each doctrine applies in distinct circumstances, all types of abstention are justified by the same general idea: federalism.[29] Federalism—the sharing of authority over one geographical area by multiple, coequal, governmental units[30]—serves as the primary justification for all variations of abstention, but perhaps none more so than *Younger* abstention.

Younger abstention ensures that federal courts "refrain from hearing constitutional challenges to state actions under . . . circumstances in which federal action is regarded as an *improper intrusion* on the right of a state to enforce its laws in its own courts."[31] The doctrine originated in *Younger v. Harris*[32] in which the Supreme Court reversed an order by a federal district court enjoining the California Attorney General from criminally prosecuting the respondent under a California state law that was "void for vagueness and overbreadth in violation of the First and Fourteenth Amendments."[33] The Court's decision focused primarily on policy concerns, namely Congress's "desire to permit state courts to try state cases free from interference by federal courts";[34] notions of comity, which recognize "proper respect for state

25. Marie R. Yeates, *Subject Matter Jurisdiction*, *in* 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 1:65, at 86 (Robert L. Haig ed., 4th ed. 2016).

26. Indeed, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996).

27. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). Federal courts are typically regarded as having a "duty . . . to adjudicate a controversy properly before [them]." *Id.* (quoting Cty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)).

28. Birdsong, *supra* note 24, at 377. The other three clearly identifiable abstention doctrines—not relevant to this Recent Development—are *Pullman* abstention, *Burford* abstention, and *Colorado River* abstention. *See generally Colo. River Water Conservation Dist.*, 424 U.S. 800; Burford v. Sun Oil Co., 319 U.S. 315 (1943); R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). *Pullman* abstention is appropriate when "state action is being challenged in federal court as contrary to the . . . Constitution, and there are questions of state law that may be dispositive of the case." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 52, at 292 (8th ed. 2017). *Burford* abstention is ordered, and the case dismissed from the federal docket, when trying to "avoid needless conflict with the administration by a state of its own affairs." *Id.* at 296. *Colorado River* abstention is utilized to "address specific situations involving parallel litigation" in state courts. Bedell, *supra* note 5, at 955.

29. *See* Birdsong, *supra* note 24, at 376 (citing Staver, *supra* note 8, at 1102).

30. Scott Michael Rank, *What Is Federalism?*, HISTORY ON NET, https://www.historyonthenet.com/what-is-federalism [https://perma.cc/9VAJ-K8BU].

31. Birdsong, *supra* note 24, at 377 (emphasis added) (quoting WRIGHT & KANE, *supra* note 28, at 306). Some situations in which *Younger* abstention is required to prevent a federal court from improperly intruding on a state's rights include civil actions, state criminal proceedings, and administrative actions. *See* Brown, *supra* note 18, at 119–20.

32. 401 U.S. 37 (1971).

33. *Id.* at 40.

34. *Id.* at 43.

functions";[35] and a "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[36] The Court referred to these concerns as "Our Federalism" and noted that "Our Federalism . . . occupies a highly important place in our Nation's history and its future."[37]

Younger abstention has been expanded and curtailed numerous times by the Court,[38] but it has always maintained its original purpose: ensuring that federal courts respect the boundaries of our federal republic and do not usurp states' rights. These federalism concerns can be said to underlie each type of abstention, but *Younger* is perhaps the most consequential as it is the most widely applied.[39]

A. *The* O'Shea *"Subcategory" of* Younger *Abstention*

Given the relative frequency with which *Younger* has been applied, and therefore expanded,[40] it is no surprise that the doctrine has become rather amorphous. One such expansion arguably occurred in *O'Shea v. Littleton*,[41] when the Supreme Court addressed *Younger* abstention despite dismissing the case on other grounds.[42] In *O'Shea*, residents of Illinois sued two state court judges who had allegedly engaged in a "pattern and practice of conduct . . . which assertedly deprived [the residents] . . . of their rights under the Constitution."[43] The state residents sought injunctive relief in federal court, hoping the district court would enjoin the state judges from engaging in unconstitutional bond setting, issuing discriminatory criminal sentences, and requiring payments for jury trials.[44] The Supreme Court dismissed for lack of jurisdiction because the complaint did not allege an "actual case or controversy."[45] However, after

35. *Id.* at 44.

36. *Id.*

37. *Id.* at 44–45.

38. *See generally* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (holding that *Younger* abstention can be appropriate in quasi-judicial state administrative proceedings); Juidice v. Vail, 430 U.S. 327 (1977) (dropping the requirement that the state is a party in the litigation); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying *Younger* to state civil proceedings); Samuels v. Mackell, 401 U.S. 66 (1971) (expanding *Younger* to federal declaratory relief).

39. *See* Brown, *supra* note 18, at 115 (citing Nancy Levit, *The Caseload Conundrum*, *Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 336 (1989) (stating that *Younger* is the broadest of the abstention theories)).

40. David Mason, Note, *Slogan or Substance? Understanding "Our Federalism" and* Younger *Abstention*, 73 CORNELL L. REV. 852, 871–76 (1988).

41. 414 U.S. 488 (1974). As this Recent Development will argue, *O'Shea* was not intended to be and is not currently an illustrative application of *Younger* and should not be considered by lower courts when applying *Younger*. *See infra* Part II.

42. *O'Shea*, 414 U.S. at 489.

43. *Id.* at 488.

44. *Id.* at 492.

45. *Id.* at 493.

spending significant time explaining the plaintiffs' lack of standing[46] (and thus a lack of jurisdiction), the Court went on to discuss why the *Younger* abstention doctrine would compel dismissal of the complaint even if the standing requirements were met.[47]

O'Shea's discussion of *Younger* abstention was a direct reproach to the lower court's decision that equitable relief would be appropriate, noting that the order the district court would have imposed would have likely interfered with the state proceedings.[48] The Court was unequivocal in stating that "[t]his seems to us nothing less than an ongoing federal audit of state . . . proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent."[49] While the Court's condemnation of an injunction requiring "continuous supervision by the federal court" and "monitoring of the operation of state court functions"[50] was incredibly clear, the precedential value of this discussion is less so.

Justice Blackmun noted in his concurrence that, while he agreed with the majority's finding that the plaintiffs had failed the standing requirement, the "additional discussion" of whether *Younger* abstention was appropriate was nothing more than an "advisory opinion that [the Court was] powerless to render."[51] In a word, the Court's discussion regarding *Younger* abstention and its underlying principles was merely dicta.[52] Despite the clear nonbinding effect of the abstention discussion, the Ninth Circuit's *Planet* decision failed to sufficiently consider federalism and comity and instead expanded *Younger* abstention by incorrectly giving *O'Shea* binding precedential consideration.[53]

B. *The Ninth Circuit's Application of* Younger *Abstention*

In *Planet*, the Ninth Circuit overturned the Central District of California's decision[54] to abstain under *Younger* from hearing the merits of a case challenging the constitutionality of a state court's filing procedures.[55] CNS, a news agency

46. *See id.* at 493–99.

47. *Id.* at 499–504.

48. *See id.* at 500.

49. *Id.*

50. *Id.* at 501. Notably, the Court specifically highlighted the principle of comity in its discussion. *Id.*

51. *Id.* at 504 (Blackmun, J., concurring).

52. Dicta is "an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight." *Judicial Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

53. *See* Courthouse News Serv. v. Planet, 750 F.3d 776, 789–792 (9th Cir. 2014).

54. The district court, and thus the Ninth Circuit, technically abstained under *O'Shea v. Littleton*, 414 U.S. 488 (1974), which, according to the Ninth Circuit, is an extension of *Younger*, *see Planet*, 750 F.3d at 789.

55. *See Planet*, 750 F.3d at 779.

that reviews court complaints and reports of civil lawsuits,[56] covers courthouses all over the country.[57] Beginning in 2010, it began reporting daily on the lawsuits filed in Ventura County Superior Court for the State of California.[58] The court, however, withheld complaints until they were fully processed by the clerk's office, effectively preventing CNS reporters from accessing newly filed complaints without delay.[59] CNS filed its lawsuit in federal district court seeking injunctive relief to require the Ventura County Superior Court to ensure immediate or near-immediate access to complaints.[60] CNS's claim was based on the theory that withholding the complaint "violate[d] [CNS's] right of access . . . under the First Amendment."[61] The district court dismissed on the basis of *Younger* abstention,[62] but the Ninth Circuit reversed and remanded.[63]

After de novo review, the Ninth Circuit found the district court had improperly abstained under *Younger*. In reaching that conclusion, the Ninth Circuit erroneously used *O'Shea* as a conduit for its analysis.[64] Looking to its own prior interpretation of "*O'Shea* abstention," the Ninth Circuit incorrectly ignored the importance of comity and federalism in a *Younger* analysis, and instead created a relatively bright-line rule: "*O'Shea* abstention is inappropriate where the requested relief may be achieved without an ongoing intrusion into the state's administration of justice, but is appropriate where the relief sought would require the federal court to monitor the substance of individual cases on an ongoing basis to administer its judgment."[65]

With the creation of the "*O'Shea* abstention" rule, the court reasoned that the plaintiff's requested relief—an injunction preventing the defendant from maintaining filing procedures that resulted in delayed access to newly filed civil complaints—would not require an "ongoing federal audit" of the state court.[66] The federal court suggested various procedures the state court could adopt to ensure compliance with a federal order granting injunctive relief to the plaintiff, such as keeping preprocessed complaints in a locked room and giving a key to

56. *Id.* at 780.

57. *See id.*

58. *Id.* at 781.

59. *See id.* at 781–82. Specifically, the court limited reports to "viewing twenty-five complaints each day" and withheld complaints until they had been fully processed. *Id.* at 781. In one instance, one CNS reporter was prevented from accessing civil complaints for up to thirty-four days. *Id.* at 782.

60. *See id.* at 779. CNS took issue with the state court's withholding of complaints for "days or weeks," depending on the processing time. *Id.*

61. *Id.*

62. *See* Courthouse News Serv. v. Planet, No. CV11-08083 R (MANx), 2011 WL 11715054, at *1 (C.D. Cal. Nov. 30, 2011), *rev'd*, 750 F.3d 776, 789 (9th Cir. 2014).

63. *Planet*, 750 F.3d at 779.

64. *Id.* at 789.

65. *Id.* at 790. This rule was developed by reading two prior Ninth Circuit cases in tandem. *See* E.T. v. Cantil-Sakauye, 682 F.3d 1121, 1124–25 (9th Cir. 2012); L.A. Cty. Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992).

66. *See Planet*, 750 F.3d at 790–91.

CNS reporters or allowing the reporters to view cover pages of complaints and request further access to newsworthy cases, neither of which would require an ongoing federal audit.[67]

However, the court casually dismissed the realistic concerns that the state court would not sufficiently comply with a federal injunction and simply noted that it "trust[ed]" the state court.[68] The Ninth Circuit asserted that further federal proceedings to ensure compliance—an ongoing federal audit, of sorts—would be unlikely.[69] The court concluded its opinion by noting that the "First Amendment issues . . . may be adjudicated . . . in federal court, where they belong."[70] Notably absent from the *Planet* decision, however, was any substantial discussion of the principles underlying *Younger* or "*O'Shea* abstention."[71] The Ninth Circuit's failure to consider comity and federalism betrays its underlying belief that state courts are less fit to adjudicate First Amendment claims than are the federal courts—a belief which is squarely at odds with *Younger* and the concept of "Our Federalism":

> [Our Federalism] represent[s] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[72]

C. *The Seventh Circuit's Application of* Younger *Abstention*

In *Brown*, the Seventh Circuit was presented with a situation similar to that in *Planet*, albeit with an opposite procedural posture. The court reversed the district court's refusal to abstain from hearing the merits of a challenge to an Illinois state court's filing procedures.[73] CNS had brought suit against the Cook County Clerk's Office ("Clerk's Office") contesting filing procedures that led to delays in CNS reporters' access to newly filed civil complaints.[74] From 2009 to 2015, the Clerk's Office filing procedures allowed same-day access to electronically filed complaints, but in 2015, the Clerk's Office began

67. *See id.* at 791 (explaining that the state court could give CNS reporters a "key to a room where new complaints are placed in boxes for review . . . [or] place paper versions of new complaints in a secure area behind the counter . . . [or] allow a credentialed reporter . . . to go behind the counter and pick up a stack of papers that already exists").

68. *Id.* at 792.

69. *See id.* at 791–92.

70. *Id.* at 793.

71. *See infra* Part II.

72. Younger v. Harris, 401 U.S. 37, 44–45 (1971).

73. Courthouse News Serv. v. Brown, 908 F.3d 1063, 1065–66 (7th Cir. 2018), *cert denied*, No. 18-1203, 2019 WL 5150484 (U.S. Oct. 15, 2019).

74. *See id.* at 1066.

withholding the electronically filed complaints from both reporters and the public until they were fully processed and officially accepted by the court.[75] The new administrative process led to delays in access of usually no more than one business day.[76]

In 2018, the Illinois Supreme Court mandated electronic filing of all complaints in Illinois state courts, presumably leading to delays in access to newly filed complaints in all civil cases.[77] In anticipation of these delays, CNS attempted to negotiate with the Clerk's Office in hopes of coming to a mutually beneficial arrangement that would allow for more immediate access to electronically filed complaints.[78] However, CNS was unsuccessful: the filing procedures remained the same, and CNS sued in federal district court.[79] As in the *Planet* decision, CNS's claim in *Brown* was premised on violations of the public's right of access to judicial proceedings under the First Amendment.[80] However, unlike in *Planet*, the district court refused to abstain under *Younger*, and the Seventh Circuit reversed.[81]

The Seventh Circuit's decision to abstain under *Younger* was "ultimately base[d] . . . on the more general principles of federalism that underlie all of the abstention doctrines."[82] The court acknowledged that *Younger* abstention did not neatly align with the facts at issue in the case at bar,[83] but that the *O'Shea* extension of the *Younger* doctrine compelled abstention.[84] The Seventh Circuit

75. *See id.*

76. *Id.*

77. *Id.* Prior to this mandate, complaints filed in hard copy format were presumably accessible the same day they were filed. *See id.*

78. *Id.*

79. *Id.* at 1066–67.

80. *Id.* at 1065.

81. *Id.* at 1066.

82. *Id.* at 1071; *see supra* text accompanying note 29; *see also* Staver, *supra* note 8, at 1102 (noting that the purpose of the abstention doctrines is to preserve the balance between federal and state sovereignty). The general principles of federalism and comity were ultimately the impetus for the various iterations of abstention—different cases and situations demanded different levels of respect for state interests over federal interests and vice versa. *See* Birdsong, *supra* note 24, at 376. Furthermore, the Seventh Circuit pointed to the state courts' need to "work[] through . . . implementation challenges and resource limitations" associated with altering their complaint filing procedures. *Brown*, 908 F.3d at 1074. The court also noted that federal oversight would be required if the state court clerk did not comply with a federal injunction as additional justification for abstaining. *See id.*; *cf.* Courthouse News Serv. v. Planet, 750 F.3d 776 (9th Cir. 2014) (failing to consider similar implementation challenges and resource limitations that the state court may need to work through).

83. *See Brown*, 908 F.3d at 1072. *Younger* abstention has traditionally been found to be appropriate only in cases where there is a pending state proceeding. *See* Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous."). In *Brown*, no state proceeding had been initiated. *See Brown*, 908 F.3d at 1072.

84. *Brown*, 908 F.3d at 1072–73. The court also discussed an extension of *Younger* and its underlying principles. *Id.* at 1073 (citing Rizzo v. Goode, 423 U.S. 362, 378–79 (1976)). However, as

highlighted that the *O'Shea* Court relied on the principles underlying the *Younger* doctrine when it noted in dicta that the federal judiciary should abstain in situations where an injunction would require an "ongoing federal audit," which would be inconsistent with notions of federalism and comity.[85]

The Seventh Circuit noted abstention was warranted because the relief sought by CNS was "simply too high" a level of intrusion into state court operations—*Younger* compelled "the assumption that state courts are co-equal to the federal courts and are fully capable of respecting and protecting CNS's substantial First Amendment rights."[86] It was the Seventh Circuit's accurate understanding that "cooperation and comity, not competition and conflict" most effectively further the "federal design" envisioned by the Framers.[87] The Seventh Circuit acknowledged its conclusion directly contradicted that of the Ninth Circuit[88]:

> [W]e respectfully disagree with our colleagues in the Ninth Circuit. If the state court clerk refuses or fails to comply with the federal court's injunction or complies only partially, the federal court's involvement would certainly continue as it oversees the implementation of its order. Further, we have no doubt CNS would attempt to use a different decision in this case to force the hand of other state courts that do not provide immediate press access to court filings. This would likely lead to subsequent litigation in the federal courts. We want to avoid a situation in which the federal courts are dictating in the first instance how state court clerks manage their filing procedures and the timing of press access. We also want to avoid the problems that federal oversight and intrusion of this sort might cause.[89]

The court thus assessed the realistic implication that a federal injunction against a state court could create an ongoing federal audit and correctly decided that such an injunction "would run contrary to the considerations of equity, comity,

this case is not at issue in *Planet*, the Seventh Circuit's analysis of *Rizzo* will not be discussed in this Recent Development.

85. *Brown*, 908 F.3d at 1072 (quoting O'Shea v. Littleton, 414 U.S. 488, 499–500 (1974)).

86. *Id.* at 1074.

87. *Id.*

88. The Seventh and Ninth Circuits seem to have differing opinions on the capabilities of state courts to understand and apply federal law. Given this difference, it is perhaps more understandable why the Ninth Circuit flatly rejected the underlying principles of the *Younger* abstention doctrine; indeed, there is only a single reference to notions of comity in the *Planet* decision. *See* Courthouse News Serv. v. Planet, 750 F.3d 776, 789 (9th Cir. 2014).

89. *Brown*, 908 F.3d at 1074–75. The Seventh Circuit further noted that, because its decision would create a circuit split with the Ninth Circuit, it circulated the opinion to all judges in active service. *Id.* at 1075 n.6. None requested to rehear the case en banc. *Id.*

and federalism,"[90] and "unduly interfere with the legitimate activities of the States."[91]

II. WHY THE NINTH CIRCUIT WAS WRONG

The Ninth Circuit's decision in *Planet* that abstention was improper illustrates an incorrect application of the *Younger* doctrine. Both the Seventh and Ninth Circuits relied heavily on *O'Shea* in their analyses; however, only the Seventh Circuit characterized *O'Shea*'s discussion of *Younger* abstention as simply an "extension" of the principles underlying *Younger* abstention.[92] While the Seventh Circuit properly used the abstention dicta in *O'Shea* as an influential, nonbinding[93] guide, and focused instead on the core principles of the *Younger* doctrine, the Ninth Circuit treated *O'Shea* as binding precedent, thus completely disregarding the original purposes for the abstention doctrines.

In its analysis, the Ninth Circuit regarded *O'Shea* as standing solely for the proposition that abstention is mandatory when "the plaintiff seeks an 'ongoing federal audit' of the state judiciary, whether in criminal proceedings or in other respects."[94] This misses the point of *O'Shea* in two respects: first, the Ninth Circuit entirely ignored that the primary issue in *O'Shea* was the plaintiff's lack of standing and that the abstention discussion was merely dicta;[95] and second, the court ignored *O'Shea*'s insistence that "monitoring . . . state court functions [would be] antipathetic to established principles of comity."[96] The Ninth Circuit's handling of *O'Shea* stands in contrast to the Seventh Circuit's treatment where the court acknowledged, albeit briefly, that *O'Shea*'s holding rested on a lack of standing, not *Younger* abstention; yet, the Seventh Circuit nonetheless acknowledged that the *O'Shea* Court's treatment of *Younger* required an analysis of comity and federalism.[97] By briefly highlighting the actual holding of *O'Shea* and acknowledging *O'Shea*'s discussion of comity and

90. *Id.* at 1075.

91. Younger v. Harris, 401 U.S. 37, 45 (1971).

92. *Brown*, 908 F.3d at 1072.

93. *See supra* notes 82–85 and accompanying text.

94. Courthouse News Serv. v. Planet, 750 F.3d 776, 790 (9th Cir. 2014) (quoting E.T. v. Cantil-Sakauye, 682 F.3d 1121, 1124 (9th Cir. 2012)).

95. *See supra* notes 46–47, 52 and accompanying text. Moreover, numerous law review articles extensively discuss *Younger* abstention and none treat *O'Shea* as an extension or subset of *Younger*. *See, e.g.*, James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1084–92 (1994). *See generally* Beth Shankle Anderson, *"Our Federalism" The* Younger *Abstention Doctrine and Its Companions*, 81 FLA. B.J. 9–10, 12, 14 (2007) (explaining the *Younger* doctrine and its major expansions and curtailments, none of which include *O'Shea*).

96. O'Shea v. Littleton, 414 U.S. 488, 501 (1974).

97. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1072 (7th Cir. 2018), *cert denied*, No. 18-1203, 2019 WL 5150484 (U.S. Oct. 15, 2019) ("The Supreme Court [in *O'Shea*] . . . reversed this court, finding that the claims were not ripe because there was an insufficient probability that the plaintiffs would be brought before the . . . courts again on criminal charges.").

federalism, the Seventh Circuit properly contextualized *O'Shea*'s abstention discussion as dicta, which is intended to be "influential," but "[has] no direct precedential weight."[98] Because the Seventh Circuit treated *O'Shea* as influential rather than binding, it retains a level of flexibility unavailable to the Ninth Circuit as a result of treating *O'Shea* as a bright-line rule that incorrectly ignores consideration of comity and federalism.[99]

Unlike the Seventh Circuit, some lower courts treat "all considered statements" by a higher court, dicta or otherwise, as binding.[100] As such, it can be fairly argued that the Ninth Circuit treated *O'Shea*'s abstention dicta as binding in a prudent move to avoid being overruled.[101] Indeed, the Ninth Circuit subsequently relied on *O'Shea* in holding that abstention was proper in *Miles v. Wesley*.[102] There, the Ninth Circuit was presented with a group of plaintiffs who sued in federal court seeking an injunction to prevent the Los Angeles County Superior Court from consolidating tenant eviction actions into "hub courts."[103] The consolidation plan was part of a larger restructuring of the state court system due to budget cuts, and the plaintiffs argued that the consolidation plan would "disproportionately impact[] poor, disabled, and minority residents" under a variety of statutes and constitutional provisions.[104] The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' claim on the basis of "*O'Shea* abstention," reasoning that the plaintiffs' requested injunction would require the type of "'heavy federal interference in . . . state activities . . .' that *Younger* and *O'Shea* sought to prevent."[105] In conclusion, the court again framed *O'Shea* in terms of binding precedent, which ignored comity and federalism, rather than influential dicta, noting that "[t]he district court properly abstained under *O'Shea*."[106]

98. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2006 (1994).

99. Notably, the *Younger* abstention doctrine was born out "of the flexible resources of equitable discretion." *See* Rehnquist, *supra* note 95, at 1109 (citing Younger v. Harris, 401 U.S. 37, 43–44 (1971); and then citing R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941)). This suggests that *Younger* was not intended to serve as a rigid framework for lower courts to follow. In fact, the Supreme Court has expressed this sentiment. *See* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.").

100. Dorf, *supra* note 98, at 2026.

101. *See id.* Beyond simply embarrassing a lower court in its incorrect application of the law, overruling a decision by a lower court has important legal implications, particularly regarding retroactive application of legal rules imposed by a higher court. For a description of the legal implications for parties involved in a controversy where a decision is overruled, see generally James A. Spruill, Jr., *The Effect of an Overruling Decision*, 18 N.C. L. REV. 199 (1940).

102. 801 F.3d 1060 (9th Cir. 2015).

103. *Id.* at 1061 (defining hub courts as "specialized courts that hear only one type of case").

104. *Id.*

105. *See id.* at 1064 (quoting L.A. Cty. Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992)).

106. *Id.* at 1066.

The Ninth Circuit's recommitment to *O'Shea* as a standalone abstention doctrine in *Miles* suggests that the court was indeed treating the abstention dicta in *O'Shea* as binding insofar as it indicated what the Supreme Court would have done if presented with the abstention issue under the same facts as *O'Shea*.[107] However, the facts in *Miles* are very similar to those in *Planet*[108]—thus, the effectiveness of utilizing "*O'Shea* abstention" should be called into question because of the differing results in each case.[109]

The anomalous result—an *intra*-circuit split—in the Ninth Circuit demands the question: What happened? Although the Ninth Circuit incorrectly applied *O'Shea* instead of *Younger* in both *Miles* and *Planet*, the *Miles* court's correct decision to abstain suggests the Ninth Circuit does understand that *Younger* abstention—or any derivation therefrom—requires a flexible, but intentional, analysis of comity and federalism.[110] Such analysis mandates a federal court to use its discretion to determine if the particular controversy demands restraint from interfering in legitimate state interests.[111] A flexible and intentional analysis is impossible with the rigid rule taken from *O'Shea*[112] and used in *Planet*, which allows courts to base their abstention decision on whether or not they can come up with a set of procedures that would not, in the court's opinion, require an ongoing federal audit.

Thus, the problem with the inconsistent application in *Miles* and *Planet* results in a predicament for lower courts in the circuit: When considering *Younger* abstention, does the analysis require application of the more relative bright-line rule that ignores comity and federalism as applied in *Planet* or application of the flexible concepts of comity and federalism? To answer this question, lower courts in the Ninth Circuit—and perhaps the Ninth Circuit itself—should look to the heart of *Younger* abstention, as illustrated by Supreme Court precedent,[113] or to the Seventh Circuit's thorough analysis of comity and

107. *See* Dorf, *supra* note 98, at 2026 (noting that a lower court can reasonably "view the higher court's dicta as a fairly reliable prediction of what the higher court would do if it actually had to decide the question previously addressed only in dictum").

108. Both cases concern a plaintiff who is suing a state court defendant for violations of constitutional protections in hopes of achieving a federal injunction mandating the actions of a state judiciary's administrative procedures and allocation of its resources. *Compare Miles*, 801 F.3d at 1060, *with* Courthouse News Serv. v. Planet, 750 F.3d 776, 779 (9th Cir. 2014).

109. In *Miles*, the Ninth Circuit affirmed the lower court's decision to abstain under *Younger* and *O'Shea*. *See Miles*, 801 F.3d at 1061. In *Planet*, the Ninth Circuit reversed, abstaining under *Younger* and *O'Shea*. *Planet*, 750 F.3d at 779.

110. *See supra* note 99 and accompanying text.

111. *See supra* text accompanying notes 86–87. "This analysis . . . must outweigh federal adjudications." Birdsong, *supra* note 24, at 376; *see supra* text accompanying notes 105–06.

112. *See supra* text accompanying notes 65, 94.

113. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 364 (1989) (explaining that the Court's decision in *Younger* rested on the "'more vital consideration' of comity" (quoting Younger v. Harris, 401 U.S. 37, 44 (1971))). Some commentators have noted that "[t]he idea that contemporary *Younger* abstention is based on anything other than abstract notions of comity or

federalism, which easily conforms to what the Supreme Court envisioned when it established *Younger* abstention.[114]

III. THE FUTURE OF COMITY AND FEDERALISM IN THE NINTH AND SEVENTH CIRCUITS

The Ninth Circuit's failure to consider notions of federalism and comity in *Planet* undermines the purposes the Supreme Court sought to achieve in developing *Younger* abstention, particularly when contrasted with the Seventh Circuit's decision, which sought to further effectuate those notions in the Seventh Circuit. This circuit split will likely create unclear boundaries between state courts' power and federal courts' ability to address state interests even when premised on questions of federal law. It is not difficult to envision a situation in which tension, conflict, and competition will arise between a state and its federal counterpart if notions of federalism and comity are abandoned. Indeed, it is precisely this fear that lead the Supreme Court to develop abstention in the first place.[115] In *Younger*, the Supreme Court emphasized the importance of "a proper respect for state functions" and recognized "that the entire country is made up of a Union of separate state governments."[116] Subsequently, in *Brown*, the Seventh Circuit relied on its own precedent in highlighting the importance of comity and federalism in a *Younger* analysis,[117] indicating that comity and federalism are firmly embedded in the Seventh Circuit's *Younger* jurisprudence.

The Ninth Circuit, on the other hand, dismissed comity and federalism when it failed to abstain and concluded its opinion by noting that First Amendment claims belong in federal court, revealing its failure to give proper respect to state functions.[118] Where the Seventh Circuit addressed the arguments against applying *Younger* abstention, and thus sought to use *O'Shea* as influential,[119] the Ninth Circuit quickly disposed of the arguments in favor of abstention and turned to an erroneous bright-line rule.[120] Further, in a

federalism should be rejected." Joshua G. Urquhart, Younger *Abstention and Its Aftermath: An Empirical Perspective*, 12 NEV. L.J. 1, 8 (2011).

114. *See* Birdsong, *supra* note 24, at 382 (stating comity and federalism lay "at the heart" of the *Younger* decision).

115. *See supra* notes 8–12 and accompanying text.

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

117. *See* Courthouse News Serv. v. Brown, 908 F.3d 1063, 1073 (7th Cir. 2018), *cert denied*, No. 18-1203, 2019 WL 5150484 (U.S. Oct. 15, 2019) (explaining the "importan[ce] for federal courts to have 'a proper respect for state functions'" (quoting SKS & Assocs., Inc., v. Dart, 619 F.3d 674, 678 (7th Cir. 2010))).

118. *See supra* notes 68–70 and accompanying text.

119. *See Brown*, 908 F.3d at 1072 ("The situation here is not a traditional *Younger* scenario: there is no individual, ongoing state proceeding that plaintiffs seek to enjoin.").

120. *See supra* text accompanying notes 64–65, 94.

subsequent case, the Ninth Circuit *did* emphasize comity and federalism,[121] thus creating an intra-circuit split. As such, it is unclear as to whether comity and federalism have a part to play in the Ninth Circuit's *Younger* jurisprudence at all.[122]

CONCLUSION

"No matter what goals one thinks abstention should achieve, the lower courts' ability to fulfill those objectives can work only as long as they understand when to abstain and when not to abstain from hearing a case."[123] The differences between the Seventh Circuit's decision in *Brown* and the Ninth Circuit's decision in *Planet* serve as a perfect example of the growing inability of the federal judiciary to fulfill the goals of *Younger* abstention. The tension created by two circuits applying the same law—or rather, applying the same nonbinding dicta in *O'Shea*—indicates the amount of confusion at play with respect to *Younger* abstention. While the Seventh Circuit's application of *O'Shea* furthers the goals of the doctrine and has created a flexible framework through which the circuit may analyze any *Younger* abstention case, the Ninth Circuit's interpretation of the same case has created a more rigid rule that has led to conflicts within its own circuit and an inability to effectively maintain notions of comity and federalism. *Brown* was the only case of the two submitted to the Supreme Court for review and certiorari was denied on October 15, 2019.[124] Accordingly, the Seventh Circuit's decision to abstain in *Brown* stands. The Supreme Court may have felt that the split between the Seventh and Ninth Circuits was not sufficiently problematic to warrant review; however, the Court's denial of certiorari implies that the Seventh Circuit was indeed correct in framing comity and federalism as the guiding principles of *Younger* abstention and that "*O'Shea* abstention" is not a proper extension of *Younger*. Nevertheless, the circuit split—and the lack of clarity as to the necessity of comity and federalism in a *Younger* analysis—remains. Accordingly, the Supreme Court should take its next opportunity to establish firmly that *Younger* abstention requires a thorough analysis of comity and federalism, thus reinforcing the principled underpinnings of our federal republic.

121. *See* Miles v. Wesley, 801 F.3d 1060, 1063 (9th Cir. 2015) ("We have stated that generally, when 'principles of federalism, comity, and institutional competence' are implicated, a federal court 'should be very reluctant to grant relief . . . .'" (quoting L.A. Cty. Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992))).

122. *See supra* Part III.

123. Bedell, *supra* note 5, at 959.

124. Courthouse News Serv. v. Brown, No. 18-1203, 2019 WL 5150484 (U.S. Oct. 15, 2019) (mem.), *denying cert to* 908 F.3d 1063 (7th Cir. 2018).

JESSICA O'BRIEN**

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