THE NINTH CIRCUIT'S MESSAGE TO NEVADA: YOU'RE NOT GETTING ANY *YOUNGER*

*Kevin Beck**

"Most essentially, federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order."[1] This passage penned by Justice Ginsberg recognizes the need for cooperation and comity between state and federal courts. These ideals are deeply imperiled when a federal court exercises its equitable discretion to enjoin ongoing state proceedings.[2] The Supreme Court sought to protect the state judiciary from unnecessary federal court intervention in *Younger v. Harris*.[3] However, the recent Ninth Circuit decision in *United States v. Morros*[4] threatens to significantly limit the application of *Younger* on the basis of party status.

I. INTRODUCTION

In 1982, Congress passed the Nuclear Waste Policy Act ("NWPA"), which set a schedule for the eventual construction of a national nuclear waste repository.[5] Although the NWPA originally provided that the Secretary of Energy would recommend three potential sites to the President, Congress amended the act in 1987 to designate Yucca Mountain, Nevada, as the sole location to be considered for site characterization.[6] Since the 1987 amendment, Nevada citizens, public and private entities, and politicians have adamantly opposed the site characterization at Yucca Mountain.[7] Nevada's resistance to

* J.D., William S. Boyd School, of Law, University of Nevada Las Vegas (2003). I would like to thank Professor Christopher Bryant for his insightful comments and direction in both choosing this topic and preparing this piece for publication. I am also thankful for Belinda, Riley, Carson, and Macy's never-ending support and patience over these last few years—I attribute any successes I may have enjoyed to them.

[1] Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999).

[2] *See* David Mason, *Slogan or Substance? Understanding 'Our Federalism' and* Younger *Abstention*, 73 CORNELL L. REV. 852, 867-68 (1988) (asserting that Our Federalism's "chief tenet" is the avoidance of interfering with the states' legislative process whenever possible).

[3] 401 U.S. 37 (1971).

[4] 268 F.3d 695 (9th Cir. 2001).

[5] *Id.* at 697. The NWPA is codified at 42 U.S.C. §§ 10101-10270 (2000).

[6] *Morros*, 268 F.3d at 697.

[7] See *infra* note 105 for a brief history of the published opinions dealing with Nevada's efforts to halt site characterization activities.

the Yucca Mountain project is evinced by a state statute that makes the storage of nuclear waste in Nevada by any person or governmental entity unlawful.[8]

One of Nevada's more recent attempts to thwart the progress of the Yucca Mountain site characterization culminated in the Ninth Circuit's decision in *United States v. Morros*.[9] In July 1997, the United States Department of Energy ("DOE") filed five permit applications for water appropriation with Nevada's state engineer.[10] In response to protests lodged by several Nevada entities, the state engineer conducted an administrative hearing on the permit applications in November 1999.[11] Although the DOE claimed the water was necessary for site characterization purposes on their applications, at the hearing a DOE witness admitted the water would also be used for construction and operation of the nuclear repository if Congress designated Yucca Mountain fit for such purposes.[12] Nevada law requires the state engineer to reject any permit application where the proposed use "threatens to prove detrimental to the public interest."[13] The state engineer determined the DOE was requesting the water for actual use in the storage of high-level nuclear waste at Yucca Mountain, an activity strictly forbidden by Nevada law.[14] He reasoned that Nevada, by enacting the law proscribing the storage of high-level nuclear waste, has determined that the storage of such waste is necessarily against the public interest.[15] On this basis, he denied the DOE's applications.[16]

Nevada law provides a party aggrieved by a state engineer's decision an opportunity for judicial review in the state courts.[17] Just one day before filing its appeal in state court, the DOE brought suit in the United States District Court for the District of Nevada, seeking a declaration that the Nevada statute relied upon by the state engineer was preempted by the NWPA, an order enjoining the state engineer to evaluate the DOE's application without reference to the Nevada statute, and a declaration that the state engineer's ruling was "arbitrary and capricious."[18]

The federal district court, in *United States v. Nevada*,[19] abstained from exercising jurisdiction over the case under the *Colorado River*,[20] *Burford*,[21]

---

[8] NEV. REV. STAT. 459.910(1) (2001) provides: "It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada."

[9] 268 F.3d 695 (9th Cir. 2001).

[10] *Id.* at 697. Applications numbered 63263-63267 were denied by the State Engineer's Ruling 4848 on Feb. 2, 2000. The DOE's then-existing permits did not expire until April 2002. However, the DOE claimed they wanted to get an "early start" so as to avoid any "difficulties or delays" in the permit process. United States v. Nevada, 123 F. Supp. 2d 1209, 1211 (D. Nev. 2000).

[11] *Morros*, 268 F.3d at 698.

[12] *Id.*

[13] NEV. REV. STAT. 533.370(3) (2001).

[14] *Morros*, 268 F.3d at 698; *see infra* note 105.

[15] *Morros*, 268 F.3d at 698.

[16] *Id.*

[17] NEV. REV. STAT. 533.450(1) (2001).

[18] *Morros*, 268 F.3d at 699. The complaint in the federal district court was filed March 2, 2000. The appeal of the state engineer's ruling in the state court was filed March 3, 2000.

[19] 123 F. Supp. 2d 1209 (D. Nev. 2000).

[20] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (permitting a federal court to refuse to exercise jurisdiction based on wise judicial efficiency).

and *Pullman*[22] abstention doctrines, concluding the Nevada state court was the appropriate forum.[23] The court reasoned *Younger*[24] abstention was inapplicable to the case, as it narrowly construed *Younger* as applying primarily to interference with criminal prosecutions.[25] The United States appealed the court's decision to abstain to the Ninth Circuit.

A divided Ninth Circuit panel reversed in *United States v. Morros*, holding that none of the abstention doctrines applied, and remanded the case to the district court for a ruling on the preemption issue.[26] The majority found abstention under *Younger* particularly inappropriate based on the parties to the suit, the United States and Nevada.[27] The court reasoned that policies of comity and "Our Federalism" at the heart of the *Younger* doctrine were inapplicable to a direct conflict between a state and the federal government.[28] The dissent, authored by Judge Hug, championed the view that *Younger* abstention was appropriate in this case, and disagreed with the majority's limitation on *Younger* abstention.[29]

This note examines the Ninth Circuit's decision to preclude reliance on the *Younger* doctrine when the federal government asserts a claim against a state. The analysis begins by providing a brief background of legislative and judicial attempts to preserve comity. Part III focuses on the *Younger* abstention doctrine, both as set forth in the *Younger v. Harris* decision, and as expanded by subsequent Supreme Court rulings. Part IV explains the rationale and holding of the *Morros* decision. Part V presents the argument that the Ninth Circuit's interpretation of the *Younger* doctrine does not comport with the broad principles of comity and Our Federalism that form the foundation for *Younger* abstention. Ultimately, the note concludes that the Ninth Circuit has unnecessarily restricted *Younger* abstention in certain instances.[30]

---

[21] Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention is appropriate when there are difficult questions of state law; federal judicial review would interfere with the state's attempts to establish a coherent policy to deal with issues of substantial public concern).

[22] R.R. Comm'n of Tex. v. Pullman, 312 U.S. 496 (1941) (abstention appropriate when resolution of an unsettled state law issue could eliminate or limit the need to decide a difficult federal question).

[23] United States v. Nevada, 123 F. Supp. 2d 1209, 1219 (D. Nev. 2000).

[24] Younger v. Harris, 401 U.S. 37 (1971) (a federal court should abstain from interfering with ongoing state criminal proceedings if the defendant will have an opportunity to raise constitutional issues in that forum).

[25] *United States v. Nevada*, 123 F. Supp. 2d at 1218-19. Although, in this case, the district court claimed it was unnecessary to "expand the effect of" the *Younger* decision, the United States Supreme Court has already expanded the *Younger* doctrine to apply outside the criminal context in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *see* discussion *infra* Part III.B.

[26] United States v. Morros, 268 F.3d 695, 709 (9th Cir. 2001).

[27] *Id.* at 707-09. The majority reasoned that the very fact that the national government was involved in a lawsuit against a state was sufficient to exclude the possibility of abstention under the *Younger* doctrine. The primary goal of preventing federal-state controversy was impossible at that point.

[28] *Id.*

[29] *Id.* at 709-12.

[30] This note does not consider whether *Younger* abstention was appropriate in the instant case under those arguments advanced by Judge Hug. Rather, the focus is on the inappropriateness of the Ninth Circuit's decision to limit the *Younger* abstention doctrine.

II. BACKGROUND

Federalism, a system by which the people are governed by two separate and distinct governments, was the unique contribution of the Framers of the Constitution to the realm of political theory.[31] Both the legislative and judicial branches of the national government have long recognized that comity, or respect for the states as independent sovereigns, is an essential element of federalism. Particularly, federal respect for the state courts is evidenced in the policies underlying the Anti-Injunction Act and judicial federalism.[32]

Congress, through the Anti-Injunction Act, acknowledged the independence and importance of the state courts as early as 1793 by prohibiting federal injunctions to stay state court proceedings.[33] The Supreme Court has characterized the Anti-Injunction Act as an effort to avoid conflict between the federal and state courts.[34] The Act limits the resentment and hostility that state courts would undoubtedly harbor towards their colleagues on the federal bench, were the latter frequently to enjoin state court proceedings.[35] State court judges justifiably view such an injunction as an affront to their ability to competently decide federal issues. The Anti-Injunction Act limits this potential for unnecessary friction between the state and federal judiciaries.[36]

Additionally, the United States Supreme Court has sought to protect comity between state and federal courts through various judicially-created abstention doctrines. Abstention is premised on a federal court's voluntary refusal to adjudicate a case or controversy that is properly within its jurisdiction, in deference to the state court's concurrent jurisdiction.[37] The federal court, out of a "scrupulous regard" for the independence of the state courts, abstains from exercising jurisdiction over the matter.[38] Including abstention under *Younger*, the Supreme Court has recognized five different types of cases that justify abstention.[39]

---

[31] United States v. Lopez, 514 U.S. 549, 575-76 (1995).

[32] Adam McLain, Comment, *The Rooker-Feldman Doctrine: Toward a Workable Role*, 149 U. PA. L. REV. 1555, 1591 (2001) (discussing the possibility of applying the Rooker-Feldman doctrine as a type of abstention rather than as a concept affecting subject matter jurisdiction).

[33] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 11.2.1, at 690 (3d ed. 1999). An act of March 2, 1793 provided that no injunctions shall be granted to stay the proceedings of any state court. This obscure provision was largely overlooked until 1874, when it was modified and placed in its own section. In 1948, Congress significantly revised the Anti-Injunction Act: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (2000).

[34] Leiter Minerals Inc. v. United States, 352 U.S. 220, 225 (1957).

[35] CHEMERINSKY, *supra* note 33, at 691.

[36] *Id.*

[37] 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 122.01[1] (3d ed. 1997) (hereinafter MOORE ET AL.) (the abstention doctrines are judicially created limitations on federal adjudication of cases that are rightfully within their jurisdiction to decide).

[38] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718 (1996) (federal courts can exercise their option to abstain only when the relief sought is equitable or discretionary).

[39] *See supra* notes 20-22, 24; *see* La. Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) (federal court abstained in diversity case where the state law was unclear and closely associ-

Although the Anti-Injunction Act and judicial federalism protect the state courts' autonomy to a degree, it is not at the expense of complete federal preclusion from the case. Federal interests are statutorily protected when a state court decides a case involving a federal issue.[40] A litigant may seek United States Supreme Court review of a decision by the state's highest court when the court was interpreting federal law.[41] Therefore, even if a state court wrongfully interpreted federal law, ultimately the United States Supreme Court can protect federal interests by exercising the option to review the decision.

III. THE *YOUNGER* DOCTRINE

Younger was, in many ways, an answer to, or limiting of, the 1965 case *Dombrowski v. Pfister*.[42] *Dombrowski* held that a federal court could issue an injunction to prevent state officers from prosecuting civil rights activists under a state law so broad and vague that it unconstitutionally infringed upon their First Amendment rights.[43] The significance of the holding is that, in order to obtain this injunction, the activitsts had to overcome the hurdles of the Anti-Injunction Act, the traditional notion that a court sitting in equity will not interfere with criminal prosecutions, and the established abstention doctrines.[44] In essence, the *Dombrowski* Court held that neither the Anti-Injunction Act, nor the traditional notions of equity jurisprudence, nor established abstention doctrines precluded an injunction against prosecution. In the short time between the *Dombrowski* decision and the *Younger* case, questions about the breadth of *Dombrowski* were often raised, but answers from the Supreme Court were seldom forthcoming.[45] However, in 1971, the much-awaited answer came.

A. Younger v. Harris

Harris was indicted in a California state court and charged with violation of the California Criminal Syndicalism Act.[46] He filed a complaint in the federal district court seeking an order to enjoin *Younger*, the district attorney, from further prosecuting him under the California statute.[47] Harris alleged the statute infringed on rights secured to him under the First and Fourteenth Amend-

---

ated with sovereign prerogative); *see also* 17A MOORE ET AL., *supra* note 37, at § 122.05[5] (discussing the prerequisites for applying the *Thibodaux* abstention doctrine).

[40] 28 U.S.C. § 1257 (2000) (providing for United States Supreme Court review of decisions of a state's highest court on federal issues).

[41] *See* 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4006 (2d ed. 1988) (hereinafter WRIGHT) (explaining that such review is supported by the Constitution, statutes, and case law dating back to 1816).

[42] 380 U.S. 479 (1965).

[43] *Id.*

[44] 17A WRIGHT, *supra* note 41, at § 4251.

[45] *Id.*

[46] Younger v. Harris, 401 U.S. 37, 38 (1971). Criminal syndicalism was defined as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." *Id.* at 39 n.1.

[47] *Younger*, 401 U.S. at 39.

ments.[48] The district court agreed, and enjoined *Younger* from further prosecution of Harris under the Act.[49] The California district attorney appealed the decision to the United States Supreme Court.[50]

Justice Hugo Black delivered the opinion of the court. He noted that since this country's beginnings, Congress had manifested the importance of permitting state courts to try their cases free from federal court interference, citing specifically to the Anti-Injunction Act and its predecessor.[51] Black contended that the primary sources for prohibiting federal intervention in state prosecutions were readily apparent.[52] First was the "basic doctrine of equity jurisprudence."[53] Additionally, Justice Black cited to the fundamental concepts unique to our system of government in the following oft-quoted discourse, illuminating the underpinnings of "Our Federalism":

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, *a proper respect for state functions*, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that *the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.* This perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."[54]

The *Younger* abstention doctrine was born out of the longstanding concepts of comity and federalism, unique to our country.[55] The coexistence of state and national powers embodies a system in which there must be sensitivity by both sovereigns to protect the other's legitimate interests.[56] Justice Black noted, "the National Government, anxious as 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."[57] This foundation creates a system that is governed by neither blind deference to state rights nor centralized control of every important issue by the national government.[58]

The *Younger* Court was cautious not to overturn the *Dombrowski* decision, but quick to limit that case to its facts.[59] The Court held that the possible

---

[48] *Id.*

[49] *Id.* at 40.

[50] *Id.*

[51] *Id.* at 43; *see supra* note 33. Notably, the Court did not hold that the Anti-Injunction Act precluded the injunction.

[52] *Younger*, 401 U.S. at 43.

[53] *Id.* A court, sitting in equity, should restrain from interfering with a criminal prosecution when the movant has an adequate legal remedy and will not suffer irreparable harm or injury if the equitable relief is denied.

[54] *Id.* at 44 (emphasis added).

[55] 17A MOORE ET AL., *supra* note 37, at § 122.05[1][b] (stating that the Supreme Court based its decision on the notion of comity between the federal and state courts).

[56] *Younger*, 401 U.S. at 44.

[57] *Id.* at 44-45.

[58] *Id.* at 44.

[59] *Id.* at 47-49. In *Dombrowski*, the complaints included substantial allegations that the prosecutions were being brought in bad faith, with no real intent to secure convictions but

unconstitutionality of a statute on its face could not justify an injunction against good faith attempts by state officials and courts to enforce it.[60] *Younger* has become the watershed case, standing for the principle that a federal court, subject to very narrow exceptions, should not exercise its equitable jurisdiction to interfere unnecessarily with state prosecutions.

Younger abstention is distinguished from the other abstention doctrines in that it is premised on considerations of comity and equity jurisprudence.[61] A court sitting in equity should not interfere with the ongoing proceedings of a state criminal prosecution.[62] The *Younger* court expressly noted that its decision – and the creation of this new abstention doctrine – was based on notions of comity and Our Federalism, not the Anti-Injunction Act.[63]

B. Younger*'s Progeny*

The doctrine of Our Federalism is more controversial and quickly changing than any other doctrine in the federal courts.[64] The courts have expanded the *Younger* doctrine's principles of comity, Our Federalism, and respect for state rights far beyond the context in which they first appeared. This section briefly highlights some of the significant extensions of the *Younger* doctrine.

Samuels v. Mackell was a companion case to *Younger*, decided on the same day. Justice Black delivered the opinion in that case as well.[65] *Samuels*, based on policy concerns similar to those voiced in *Younger*, expanded the *Younger* abstention doctrine to apply to federal *declaratory* relief that interferes with state prosecutions.[66] The Court stated that a declaratory judgment will normally "result in precisely the same interference with, and disruption of, state proceedings that the long-standing policy limiting injunctions seeks to avoid."[67]

The Court, in *Steffel v. Thompson*, ruled that deference to the state's criminal process was required only where actual proceedings *were pending* in the state court; threats of future prosecution were deemed insufficient to compel federal court abstention.[68] In both *Younger* and *Samuels*, the federal plaintiffs were actually facing prosecution in the state courts.[69] Three years after these decisions, the Court was faced with a case involving a federal plaintiff who sought declaratory and injunctive relief based on a state's threat of arrest and

---

rather to harass the civil rights activists. Multiple bad-faith prosecutions establish the kind of irreparable harm and injury necessary for a federal court injunction to issue. However, where there is a single prosecution, brought in good faith, irreparable injury is not established, and thus the federal court is to stay its hand.

[60] *Id.* at 54.

[61] 17A MOORE ET AL., *supra* note 37, at § 122.05[1][c] (distinguishing *Younger* abstention from the Anti-Injunction Act).

[62] *Younger*, 401 U.S. at 55-56.

[63] *Id.* at 54 (the Court had "no occasion to consider" whether the Anti-Injunction Act applied to the instant case); *see also* 17A MOORE ET AL., *supra* note 37, at § 122.05[1][c].

[64] 17A WRIGHT, *supra* note 41, at § 4251.

[65] 401 U.S. 66 (1971).

[66] *Id.* at 73.

[67] *Id.* at 72.

[68] 415 U.S. 452 (1974).

[69] Harris was charged with violating the Criminal Syndicalism Act and Mackell was charged under the state anarchy statutes.

prosecution.[70] Though the district court dismissed the case under the *Younger* doctrine, the Supreme Court reversed.[71] In the absence of pending state proceedings, there was no risk of federal intervention with the state's criminal justice system, or inference that the state court is incapable of enforcing constitutional principles.[72]

In *Hicks v. Miranda*, the Court elevated substance over form by requiring the federal court to abstain under the *Younger* doctrine despite the fact that plaintiff filed the case in federal court one day before becoming the defendant in the state prosecution.[73] The Court held that the *Younger* doctrine should "apply in full force" so long as the state criminal proceedings are initiated prior to any proceedings of substance on the merits in the federal court.[74]

The Court first extended the *Younger* doctrine to a state civil proceeding in *Huffman v. Pursue, Ltd.*[75] In *Huffman*, the sheriff and prosecuting attorney sought to enforce the state's public nuisance statute by closing down a theater that showed pornographic movies.[76] The state court, applying state law, held that the theater was a nuisance and ordered that the theater be closed for one year.[77] Rather than appeal the state court decision, the defendant filed a case in federal court challenging the state statute.[78] On appeal, the Supreme Court found the principles of comity and Our Federalism expressed in *Younger* merited abstention in the civil context in cases like this nuisance proceeding, where the state civil enforcement proceedings were, according to the Court, akin to a criminal prosecution.[79] The Court was cautious to limit *Huffman*'s extension of *Younger* to the facts; they expressly denounced having extended *Younger*'s applicability to all civil litigation at that time.[80]

In *Trainor v. Hernandez*, the Court expanded upon the decision in *Huffman* by permitting *Younger* abstention in all civil enforcement actions brought by the state.[81] Trainor, Director of the Illinois Department of Public Aid, sought to recover, in state court, monies from the defendants who had fraudulently received state welfare funds.[82] The defendants did not appear in the state court action, but rather brought suit in federal court.[83] The *Trainor* Court held that the principles of comity expressed under *Younger* and *Huffman* are "broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign

---

[70] *Steffel*, 415 U.S. at 452. Steffel was threatened with prosecution under a state trespass statute when he and a friend were handing out flyers protesting the Vietnam war at a shopping center. Significantly, Steffel's friend was actually arrested and charged.

[71] *Id.* at 475.

[72] *Id.* at 462.

[73] 422 U.S. 332, 348-49 (1975).

[74] *Id.* at 349.

[75] 420 U.S. 592 (1975).

[76] *Id.* at 595-96.

[77] *Id.* at 598.

[78] *Id.*

[79] *Id.* at 604.

[80] *Id.* at 607.

[81] 431 U.S. 434 (1977).

[82] *Id.* at 435.

[83] *Id.* at 437-38.

capacity."[84] The Court dropped the requirement implied in *Huffman* that the civil proceedings resemble a criminal prosecution.[85]

The Court applied *Younger* principles when the state government was not a party to the action for the first time in 1977.[86] In *Judice v. Vail*, the defendant, a class of judgment debtors, brought a federal action against the plaintiff judges for their use of allegedly unconstitutional contempt powers.[87] The Court quoted from Justice Black's discourse on comity, and concluded *Younger* abstention encompassed principles broad enough to extend to suits between private parties based on the states' strong interest in the contempt process.[88] Ten years later, the Court reaffirmed the applicability of *Younger* abstention where the case implicates the states' interest in the enforcement of state court judgments and orders.[89]

The Supreme Court has further required federal court abstention under *Younger* when the state action is an administrative proceeding that is judicial in nature.[90] In *Middlesex County Ethics Commission v. Garden State Bar Ass'n*, a lawyer brought an action in federal court to challenge the constitutionality of a rule the ethics commission accused him of violating.[91] The relevant inquiry, according to the Court, was whether the administrative proceedings, and available review by the state court, afforded the lawyer the opportunity to raise his constitutional claims.[92] The Court established a three-prong test that has been applied by numerous cases since *Middlesex*.[93] For abstention, the Court required that the state judicial proceedings (1) be ongoing, (2) implicate an important state interest, and (3) provide adequate opportunity for the presentation of constitutional challenges.[94]

In *Ohio Civil Rights Commission v. Dayton Christian Schools*, the Supreme Court applied the *Middlesex* test in determining that *Younger* abstention was appropriate, even though the judicial nature of the state proceedings was not facially obvious.[95] The Court distinguished a prior case wherein state law expressly indicated that the proceedings at issue were not "judicial in nature."[96] The Court held that, even if a constitutional issue could only be

---

[84] *Id.* at 444.

[85] The Court, in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), somewhat limited the holding in *Trainor v. Hernandez*. That Court indicated that there is no requirement for abstention in deference to a judicial proceeding reviewing a legislative or executive action. *Id.* at 367-68. Because the Court found the underlying action in the case to be legislative, the justices held abstention was inappropriate.

[86] Judice v. Vail, 430 U.S. 327, 334 (1977).

[87] *Id.* at 330.

[88] *Id.* at 335.

[89] *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (reversing a district court's grant of an injunction to enjoin the plaintiff from executing on a state court judgment).

[90] Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

[91] *Middlesex*, 457 U.S. at 423.

[92] *Id.* at 432.

[93] *Id.*

[94] *Id.*

[95] *Ohio Civil Rights Comm'n*, 477 U.S. at 619 (the civil rights commission was investigating discrimination charges against the defendants).

[96] *Id.* at 627 n.2 (distinguishing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

raised via state court judicial review of the administrative proceeding, *Younger* abstention was required.[97]

As evinced in the above-cited cases, the Court has considerably expanded the applicability of *Younger* abstention since its creation in 1971. This trend toward expanding *Younger*'s scope was abruptly reversed by the Ninth Circuit's recent decision in *United States v. Morros.*[98]

IV. THE *UNITED STATES V. MORROS* DECISION

The *Morros* decision resulted from the DOE's attempt to obtain injunctive and declaratory relief in the federal courts against the State of Nevada. The district court dismissed the case based on multiple theories of abstention.[99] However, the court too hastily concluded that an extension of *Younger* beyond the criminal context was not warranted in the instant case.[100]

In reviewing the district court's decision, the Ninth Circuit dealt much more extensively with the issue of *Younger* abstention.[101] The court reasoned that the basic policy underlying *Younger* abstention is to "avoid unnecessary conflict between the state and federal governments."[102] The majority ruled that *Younger* abstention is inappropriate in situations where the United States seeks relief against a state, or its agency, due to the impossibility of avoiding conflict between the two sovereigns in those situations.[103] "By the time the United States brings suit in federal court against a state, any attempt to avoid a federal-state conflict would be futile."[104] The opinion noted that the conflict between Nevada and the United States was particularly accentuated in this situation, as they had been at "loggerheads" over the siting of the repository in Nevada for over a decade.[105] Abstention based on attempts to avoid unnecessary federal-state conflict would be "disingenuous," considering the battles that have been waged between Nevada and the United States on this issue.[106] The court concluded that dismissal of the case by the district court was not warranted under

---

[97] *Id.* at 629.

[98] 268 F.3d 695 (9th Cir. 2001).

[99] United States v. Nevada, 123 F. Supp. 2d 1209 (D. Nev. 2000). *See supra*, notes 20-22 for abstention doctrines applied by the district court.

[100] *United States v. Nevada*, 123 F. Supp. 2d at 1218-19. As indicated in the preceding Part, *Younger* has been formally extended by the Court beyond the criminal context.

[101] *Morros*, 268 F.3d at 695. It is interesting that the Ninth Circuit chose to deal extensively with the *Younger* doctrine in this case. Neither party, in their appellate briefs, made mention of the *Younger* case, nor argued its applicability.

[102] *Id.* at 707 (quoting United States v. Composite State Bd. of Med. Exam'rs, 656 F.2d 131, 136 (5th Cir. Unit B Sept. 1981)

[103] *Morros*, 268 F.3d at 707.

[104] *Id* at 708.

[105] *Id.* The Court cited to the cases between United States and Nevada with regard to the nuclear repository: Nevada v. Herrington, 777 F.2d 529 (9th Cir. 1985) (holding Nevada was entitled to federal funds to study Yucca Mountain's suitability); Nevada v. Burford, 708 F. Supp. 289 (D. Nev. 1989) (Nevada alleged a political conspiracy to make it the unwilling host of the repository); Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990) (holding Nevada's attempt to block site characterization was preempted by the NWPA); Nevada v. United States Dep't of Energy, 133 F.3d 1201 (9th Cir. 1998) (holding DOE's denial of funds to Nevada for the purpose of evaluating DOE's site characterization activities was appropriate).

[106] *Morros*, 268 F.3d at 708.

any of the abstention doctrines, including *Younger*, and remanded the case for adjudication on the merits.[107]

Judge Hug dissented from the majority opinion on the grounds that *Younger* abstention was applicable to the case.[108] He interpreted *Younger*'s respect for comity and federalism to extend specifically to the state's interest in ongoing proceedings within their forums and for deference to the state's ability to hear and decide constitutional claims.[109] The ongoing state and federal government controversy would not automatically render *Younger* inapplicable, as concerns remain that the federal court is interfering with a state's ongoing proceedings.[110] This type of interference by the federal courts exhibited a "lack of respect for the State as sovereign."[111] Upon determining that this case implicated *Younger*'s policy concerns, Judge Hug analyzed whether abstention was appropriate under the three-prong test established in *Middlesex*[112] and *Fresh International*.[113] He determined each prong of the abstention test was satisfied in the instant case and dissented on the ground that the district court should have abstained under the *Younger* abstention doctrine.[114]

V. THE *MORROS* OPINION IS INCONSISTENT WITH *YOUNGER*'S KEY POLICIES OF COMITY AND OUR FEDERALISM

The majority's conclusion that *Younger* is inapplicable in a case between the federal government and a state improperly restricts the *Younger* doctrine, undermining the doctrine's protection of the broad notions of comity and Our Federalism.

A. *Unnecessary Federal Court Interference*

The United States has evinced a deep-rooted trust in the ability of state courts to adjudicate difficult issues of federal and constitutional concern. Among the earliest, and most obvious, illustrations of the nation's confidence in state courts' competence is the Madisonian Compromise.[115] The Framers were sharply divided on the issue of the constitutional establishment of inferior

[107] *Id.* at 709.

[108] *Id.* at 709-12.

[109] *Id.* (quoting United States v. Ohio, 614 F.2d 101, 104 (6th Cir. 1979)).

[110] *Id.*

[111] *Id.* (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 369 (1989)). *See also* Moore v. Sims, 442 U.S. 415, 423 (1979).

[112] Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (requiring (1) an ongoing state judicial proceeding, (2) that the proceedings implicate an important state interest, and (3) that there is adequate opportunity in the state proceedings to raise any federal constitutional challenges).

[113] Fresh Int'l Corp. v. Agric. Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986) (applying the three-prong test from *Middlesex* to administrative proceedings).

[114] *Morros*, 268 F.3d at 712.

[115] MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM 29-30 (1999). Solimine claims that debates over parity spring from the initial establishment of federal courts under the Constitution, providing for one Supreme Court and other lower courts as established by Congress. The fact that the Framers did not create lower federal courts is significant in that until Congress took affirmative action to create these courts, the only forum for federal claims would be the state courts. However, this argument is contrasted with the fact that Congress has provided for lower

federal courts.[116] The resolution, suggested by James Madison, was that the inferior courts would not be created under the Constitution, rather Congress would possess the power to establish the inferior courts at their option.[117] This compromise quieted the concerns of those who thought inferior federal courts were necessary, and those who viewed them as duplicative of the then-existing state court systems that were able to decide federal cases.[118]

As evidenced by the Madisonian Compromise, parity between state and federal courts has been debated since the drafting of the Constitution, and continues to be a focus of modern legal scholarly debate.[119] Although the theoretical arguments on parity continue to rage, Congress has demonstrated confidence in the state courts through their restrictions on federal subject matter jurisdiction, never having permitted the federal courts to exercise jurisdiction to the full extent permitted under Article III of the Constitution.[120] Although Congress granted the federal courts general federal question jurisdiction in 1875, they also imposed an amount in controversy requirement on federal question cases until 1980.[121] Federal court jurisdiction was further limited by such restraints as the well-pleaded complaint rule.[122] State courts have historically served as the default forum for federal claims falling outside of Congress' restrictions on federal court jurisdiction. The state courts, bound by the Supremacy Clause and judicial oaths to uphold the Constitution, provide an alternative, and sometimes exclusive, forum to decide cases based on federal laws.[123]

The Supreme Court of the United States has often referred to the need to protect the integrity of the state courts. In *Douglass v. City of Jeannette*,[124] a

federal courts since the First Congress, suggesting that these courts, too, play an indispensable role.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 30.

[119] *See* Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233 (1999) (demonstrating empirical support of parity based on a single takings case); *see also* Michael E. Solimine & James E. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (concluding that statistical variances between state and federal court's upholding constitutional rights were unimportant; the studies evidenced parity between the state and federal courts); *but cf.* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 261-69 (1988) (pointing out several methodological problems with the Solimine & Walker empirical comparison of federal and state courts); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing federal courts are generally more appropriate forums for federal claims because federal judgeships are more prestigious, federal judges enjoy life tenure, and federal courts have a tradition of protecting constitutional rights).

[120] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.2, at 9 (3d ed. 1999) (although the lower federal courts have existed since 1789, Congress has yet to grant federal courts the full jurisdiction permitted by Article III of the Constitution).

[121] *Id.* at 27.

[122] Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (requiring that the federal issue must be present in the plaintiff's complaint; an anticipated federal defense will not suffice to provide federal court jurisdiction).

[123] MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS 30 (1999).

[124] 319 U.S. 157 (1943).

case predating *Younger* by nearly thirty years, the Court recognized that Congress generally intended to allow state courts to try criminal cases without federal intervention.[125] *Douglass* expressed the policy that federal courts sitting in equity should refuse "to interfere or embarrass threatened proceedings in state courts save in [ ] exceptional cases . . . ."[126] The *Younger* Court added, "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."[127] In *Pennzoil v. Texaco*, the Court cautioned, "proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand."[128] The federal courts must assume that the state courts will competently decide the merits of any federal issues presented.[129]

When a federal court exercises equity jurisdiction to enjoin or interfere with state proceedings, it implies a patent distrust of the state court's competence to decide federal issues.[130] In doing so, the federal court tramples beneath its feet the longstanding principles of comity, Our Federalism, and respect for the states. The *Morros* opinion advocates a narrow conception of these fundamental notions.

The Ninth Circuit's limitation of *Younger* abstention in cases where the federal government and a state are adverse parties ignores the deference properly due to state courts. The court's justification for not applying the *Younger* doctrine was based primarily on the fact that the state and federal government were already involved in a drawn out controversy, thus eliminating any possibility of avoiding conflict.[131] While this argument appears facially meritorious, the court failed to recognize that *Younger* abstention was premised on preventing unnecessary conflicts between the *federal and state judiciaries*, not intending to prevent all federal-state conflict. Problematically, the court adopts an all-encompassing interpretation of "conflict," and narrows the traditionally broad interpretations of comity and Our Federalism.

It is undisputed that the United States and Nevada are in conflict generally over the siting of a nuclear repository in Nevada, and specifically over the DOE's water rights applications. However, it does not necessarily follow that, because the state is involved in a conflict, the state judiciary's impartiality is necessarily compromised. The *Morros* court views the conflict as encompassing the entirety of the state, including the judicial branch. Although issues as monumental and controversial as the siting of a nuclear repository may cause critics of the legal system to question the impartiality of a judge, the federal appellate judiciary should have more confidence in their state court colleagues, crediting them with the ability to place impartiality above an opportunity to

---

[125] *Id.* at 163.

[126] *Id.*

[127] Younger v. Harris, 401 U.S. 37, 44 (1971).

[128] 481 U.S. 1, 14 (1987).

[129] Ahernsfeld v. Stephens, 528 F.2d 193, 198 (7th Cir. 1975); Duty Free Shop, Inc. v. Administracion de Terrenos de Puerto Rico, 889 F.2d 1181, 1183 (1st Cir. 1989).

[130] Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 91 (1982) (noting that *Younger* abstention seeks to avoid the inference that state judges are incompetent to decide federal issues).

[131] United States v. Morros, 268 F.3d 695, 707-09 (9th. Cir. 2001).

exercise an unfair advantage. State court judges, in fulfilling their constitutional duties, are often required to enter rulings adverse to the very state that employs them. The finding of the *Morros* court, that *Younger* abstention would be futile where a state and the national government are parties, ignores the fact that conflict may nonetheless be avoided between the state and federal judiciary.[132] Although *Morros* does not directly assert that Nevada's state court impartiality is compromised, the court's adoption of this new restriction on *Younger* abstention is premised on this corrosive assumption.

The *Morros* court, by limiting the applicability of the *Younger* doctrine, diminished the very notions of comity and Our Federalism established by the founding fathers and long heralded by the courts. Justice Black's admonitions that we are a "[u]nion of separate state governments," and that the national government must seek to protect its interests in a manner that does not "unduly interfere with the legitimate activities of the States,"[133] were extinguished by allowing the *Morros* case to proceed in federal court. The words "*unduly* interfere"[134] and "avoid *unnecessary* conflict"[135] mandate that the federal court exercise great restraint before interfering with a state's ongoing proceedings. The fact that it is the United States requesting federal court relief should have no impact on the decision to abstain. The United States, as an independent sovereign, anxiously strives to protect her own interests, evident in the instant case by the filing of the preemption claim in federal court.[136] Our Federalism burdens the federal judiciary with the responsibility to ensure that, in its haste to protect federal interests, it does not unnecessarily imperil the autonomy of the states.[137]

The exercise of federal jurisdiction in the *Morros* case directly interferes with Nevada's ongoing proceedings. The conflict between Nevada and the United States regarding the Yucca Mountain project, though certainly real, should not be seen as so infectious as to affect the state judiciary's impartiality. Furthermore, limiting *Younger* abstention purely on the basis of the identity of the parties to the suit is inconsistent with the underlying doctrines of comity and Our Federalism.

B. The United States' Attempt to Change Horses Midstream

The policy of proscribing *Younger* abstention in conflicts between the national government and a state, proffered in *Morros*, seems particularly inappropriate where the national government itself initiated proceedings in the state forum. Judge Hunt, in *Morros*' underlying district court decision, *United States v. Nevada*,[138] noted the significance of the United States' decision to

---

[132] *Id.* at 708-09.

[133] Younger v. Harris, 401 U.S. 37, 44 (1971).

[134] *Id.* (emphasis added).

[135] *Morros*, 268 F.3d at 707 (quoting United States v. Composite State Bd. of Med. Exam'rs, 656 F.2d 131, 136 (5th Cir. Unit B Sept. 1981)) (emphasis added).

[136] *Younger*, 401 U.S. at 44.

[137] David Mason, *Slogan or Substance? Understanding 'Our Federalism' and* Younger *Abstention*, 73 CORNELL L. REV. 852, 866-67 (1988).

[138] 123 F. Supp. 2d 1209 (D. Nev. 2000).

apply to the state engineer for the water appropriation.[139] By so doing, the United States voluntarily subjected itself to Nevada's administrative proceedings, which provide for judicial review of adverse decisions in a state court.[140] As Judge Hunt pointed out, if the United States believed it was necessarily entitled to the water rights under the NWPA and Supremacy Clause, as it claimed in the federal court, it could have appropriated such water without submitting to the state's processes.[141] Only after the state engineer denied the DOE's applications did the United States claim entitlement to the water as a matter of right in federal court.[142] Judge Hunt identified this as an attempt by the United States to "change jurisdictional horses midstream."[143]

The Supreme Court has emphasized that federal restraint is necessary when a state court is exercising jurisdiction over a controversy in ongoing proceedings.[144] In these situations, the Court has required that federal courts abide by standards of restraint that far exceed those exercised in private equity jurisprudence.[145] In *Huffman v. Pursue*, the Court established that *Younger* abstention was appropriate when the federal plaintiff had failed to exhaust his state appellate remedies.[146] The Ninth Circuit has followed *Huffman*'s lead in requiring a litigant to exhaust state appellate remedies.[147] Lower federal and state court jurisdictions are entirely independent; a federal district court may not act as an appellate court to an adverse state court decision.[148] Courts have applied the exhaustion requirement even when the appellant believed an appeal would be futile.[149]

The Court in *Middlesex County Ethics Commission v. Garden State Bar Ass'n*[150] held that the subsequent filing of a state action might require the federal court to abstain under *Younger*, even where the federal district court had rightfully obtained jurisdiction over a case first.[151] The decision was founded on a similar extension of the *Younger* doctrine in the criminal context.[152] The *Middlesex* court found federal court abstention was warranted in both civil and criminal contexts, provided there had been no proceedings of substance on the merits in the federal court.[153]

---

[139] *Id.* at 1215.
[140] NEV. REV. STAT. 533.450(1) (2001).
[141] *United States v. Nevada*, 123 F. Supp. 2d at 1215.
[142] *Id.* at 1216.
[143] *Id.*
[144] Huffman v. Pursue, Ltd., 420 U.S. 592, 603 (1975).
[145] *Id.*
[146] *Id.* at 609.
[147] World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987).
[148] Dubinka v. Sup. Ct. of Cal., 23 F.3d 218, 221 (9th Cir. 1994); *see also* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 133.02[3][a] (3d ed. 1997) (describing the Rooker-Feldman doctrine, whereby a federal district court has no jurisdiction to review a state court decision).
[149] Duty Free Shop, Inc. v. Administracion de Terrenos de Puerto Rico, 889 F.2d 1181, 1183 (1st Cir. 1989).
[150] 457 U.S. 423 (1982).
[151] *Id.* at 436-37.
[152] Hicks v. Miranda, 422 U.S. 332 (1975) (requiring the federal court to abstain based on criminal prosecution proceedings that began subsequent to the filing of the federal case but prior to any substantial proceedings on the merits in the federal court).
[153] *Middlesex*, 457 U.S. at 437; *Hicks*, 422 U.S. at 349.

In the *Morros* case, the court should have resisted the attempt by the United States to change judicial forums on two fronts. First, the United States had not exhausted its state appellate remedies. Second, consistent with *Middlesex*, United States' subsequent filing of an appeal in the state court triggered federal abstention. Upon the state engineer's denial of the DOE's request for water, their appropriate remedy under Nevada law was judicial review in state court.[154] The United States opted to disregard proper procedure and filed for declaratory and injunctive relief in federal court one day prior to filing their appeal in state court.[155]

Huffman[156] and the other Ninth Circuit cases referenced above[157] direct federal courts to exercise restraint in retaining jurisdiction over a case prior to the exhaustion of state appellate remedies. *Morros'* permissive federal court intervention ignores comity and respect for state courts by converting the federal district court into a court of appeals, superior to state courts. Under this scheme, the DOE, in essence, sought and obtained federal district court review of the state engineer's ruling.[158] The United States, through its conduct, evidenced more trust in the state engineer's neutrality than its respect and confidence in the impartiality of the Nevada judiciary.[159] The DOE willingly submitted to the state's administrative process for water allocation, confident the state engineer would review the petitions fairly. However, the United States refused to follow protocol and seek judicial review in Nevada's courts; fearing the state judiciary's putative prejudice would be insurmountable, the government filed its claim in federal court. This course of action showed complete disdain for Nevada courts specifically, and a general distrust in the state courts throughout the nation.

The United States' choice to file for relief in district court one day prior to appealing the state engineer's decision was more than coincidental. It is easily inferred that the United States was attempting to both establish federal jurisdiction and still preserve an appeal in the state court in case the federal court abstained. Regardless of the rationale underlying the decision to file an appeal, *Middlesex*[160] compels federal abstention once the United States filed its appeal in the state court. In the one day that elapsed between filing the claim in the district court and filing the appeal in state court, no proceedings of substance occurred in the federal case.[161] Even if a court ignored the exhaustion of state

---

[154] NEV. REV. STAT. 533.450(1).

[155] United States v. Morros, 268 F.3d 695, 699 (9th Cir. 2001).

[156] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[157] *See supra* notes 111-113.

[158] Under the *Rooker-Feldman* doctrine, the United States District Court for the District of Nevada has no jurisdiction to review a Nevada state court decision. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 133.02[3][a] (3d ed. 1997).

[159] The United States' disrespect for the Nevada judiciary is evident by the fact that they assumed the state engineer was capable of greater impartiality; judges have a formal legal training, less partisan elections, and are subject to appellate review, up to and including review by the United States Supreme Court on federal issues.

[160] Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[161] *Middlesex* and *Hicks* both found *Younger* abstention appropriate when there was a lack of proceedings of substance on the merits. United States v. Nevada, 123 F. Supp. 2d. 1209, 1218-19 (D. Nev. 2000).

court remedies requirement, once the United States filed its appeal in the state court, the core concepts of comity and Our Federalism demand the state court be the forum for that appeal.

The Ninth Circuit's refusal to permit *Younger* abstention when the national government is pitted against a state implicates two paramount policy concerns. The first of these is the now-familiar interest in preserving the designs of comity and Our Federalism underlying *Younger* abstention. A second concern is that, under the Ninth Circuit's decision, the United States is given two bites at the judicial apple. The federal government or its agencies, when in controversy with any state, may, at first, acquiesce to state administrative or judicial proceedings. Then, if the result in that forum proves unfavorable to the United States in any manner, they may initiate litigation anew in the federal district court. Assuming no other abstention doctrines apply, the state and federal government could potentially be in the midst of an appeal in the state's highest court, when the United States, fearing an adverse ruling, could suddenly file suit in the federal district court.[162] The governments attempt to "change jurisdictional horses midstream" and selectively re-litigate issues in the face of an unfavorable outcome yield an absurd result.[163]

C. *Other Cases on Conflicts Between the United States and a State*

Conflicts between the national government and individual states are an inherent result of federalism. The *Morros* opinion cites three circuit court cases as supporting the majority's decision to restrict *Younger* abstention.[164] However, these cases are easily distinguished from the *Morros* facts, and support for abstention is substantial.

1. *Cases Relied Upon by the* Morros *Majority*

The majority cites to three circuit court decisions to support the restriction of the *Younger* abstention doctrine when the case involves a conflict between the federal government and a state: *United States v. Composite State Board of Medical Examiners*,[165] *United States v. Pennsylvania*,[166] and *United States v. Dicter*.[167] This section analyzes the applicability of each of these cases individually.

Composite State Board is factually distinguished from *Morros* because the United States was not permitted to intervene in the pending state court action in *Composite State Board*, whereas the United States was the plaintiff in *Morros*. The federal government, in *Composite State Board*, filed suit in district court to

---

[162] *See* Kline v. Burke Constr. Co., 260 U.S. 226 (1922) (when a suit is brought in both federal and state courts, there is a race to judgment. The case decided first would have the effect of precluding the other case).

[163] *United States v. Nevada*, 123 F. Supp. 2d at 1216. Allowing the United States to change forums implicates concerns of wasting scarce judicial resources and causing deep insult to the dignity of state courts. Even the historic *Bush v. Gore*, with all of its national significance, was permitted to proceed through the Florida state courts undisturbed before receiving federal review. *See* Bush v. Gore, 531 U.S. 98 (2000).

[164] United States v. Morros, 268 F.3d 695, 707 (9th Cir. 2001).

[165] 656 F.2d 131 (5th Cir. Unit B Sept. 1981).

[166] 923 F.2d 1071 (3d Cir. 1991).

[167] 198 F.3d 1284 (11th Cir. 1999).

enjoin Georgia from suspending the license of a National Health Service physician and from regulating the service's activities.[168] The United States brought the federal action only after the state court refused its request to intervene.[169] Thus, but for the federal action, the United States would have been denied the opportunity to participate in the litigation. The court made similar policy arguments to those advanced in *Morros* about limiting *Younger* abstention when a controversy between the national government and a state exists, comparing the Anti-Injunction Act to *Younger* abstention.[170] The court reasoned that *Younger* abstention and the Anti-Injunction Act are based on similar policies of comity, federalism, and avoiding unnecessary conflict.[171] *Composite State Board* concluded that because the Supreme Court had previously found the Anti-Injunction Act inapplicable to state-federal controversies, *Younger* abstention was equally inappropriate.[172]

The key distinguishing characteristic between *Composite State Board* and *Morros* is the United States' ability to be heard in the state court action. Not only is the United States able to be heard on their constitutional claims in *Morros*, it is the plaintiff in the state court action. Furthermore, *Composite State Board* assumes too much in reasoning that since the Anti-Injunction Act does not apply to the case, and its underpinnings are the same as *Younger* abstention, *Younger* abstention is inappropriate. *Younger* abstention is clearly broader than the Anti-Injunction Act. The court in *Younger v. Harris* specifically recognized the existence of the Anti-Injunction Act, but based its decision to abstain on the broader notions of comity and Our Federalism, forming the foundation of the doctrine.[173] If the Anti-Injunction Act paralleled *Younger* abstention in its application, the *Younger* doctrine would have fizzled long ago as a meaningless redundancy. Aside from the strained policy arguments of *Composite State Board*, the fact that the United States was not permitted to join the state court litigation significantly differentiates that case from *Morros*.

The second case relied upon by the majority, *United States v. Pennsylvania*,[174] is equally distinguishable from the *Morros* case. *Pennsylvania* was an appeal from the district court's grant of dismissal based on its discretion under the Declaratory Judgment Act and the *Colorado River*[175] doctrine. The State of Pennsylvania, in the state action, sought to enjoin the United States to clean up certain environmental hazards.[176] The United States unsuccessfully attempted to have the case removed to federal court, and then brought separate suit in federal court for injunctive relief.[177] The Third Circuit, in *Pennsylvania*, based its decision on the applicability of the Declaratory Judgment Act, not any

---

[168] *Composite State Bd. Of Med. Exam'rs*, 656 F.2d at 133-34.

[169] *Id.* at 133.

[170] *Id.* at 134-36.

[171] *Id.* at 135-36.

[172] *Id.* at 134-36.

[173] 401 U.S. 37, 44-54 (1971).

[174] 923 F.2d 1071 (3d Cir. 1991).

[175] Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

[176] *United States v. Pennsylvania*, 923 F.2d at 1072-73.

[177] *Id.* at 1072-74.

of the abstention doctrines.[178] The court reasoned that, because the district court had more discretion with respect to declaratory relief than it does to defer under *Colorado River*, the exercise of federal jurisdiction was appropriate.[179] Furthermore, while the factors considered under both the Declaratory Judgment Act and *Colorado River* are similar, *Colorado River* requires exceptional circumstances.[180] Therefore, the court focused solely on the Declaratory Judgment Act, ultimately deciding the district court should have exercised jurisdiction.[181]

In the *Morros* case, the United States voluntarily submitted to the state forum. This is in stark contrast to the *Pennsylvania* case, wherein the United States was an unwilling defendant in the state forum. It was only after the state engineer denied the DOE's applications that the United States decided it wanted to litigate in the federal court system. Further, the *Pennsylvania* case dealt with *Colorado River*[182] deferral as opposed to the *Younger* abstention doctrine at issue in *Morros*. The standards under these two distinct doctrines are nearly polar opposites. As stated in the *Pennsylvania* opinion, deferral under *Colorado River* requires exceptional circumstances, whereas *Younger* abstention is required "absent extraordinary circumstances."[183] The *Pennsylvania* court never explored the central policies of comity and Our Federalism associated with *Younger* abstention, but rather dealt solely with the Declaratory Judgment Act.

Interestingly, in the *Pennsylvania* court's discussion of *United States v. California*,[184] the court advanced arguments that would favor abstention in *Morros*.[185] The court distinguished *California* by stating, "the suit concerned the division of water rights – a task the Supreme Court has noted that state courts particularly are capable of performing."[186] Water rights were at the basis of the *Morros* dispute, a topic that *Pennsylvania* conceded was a state court issue.[187]

The third case cited by the *Morros* majority as supporting the restriction of *Younger* is *United States v. Dicter*.[188] *Dicter* offered very limited support for the *Morros* majority. The entirety of the Eleventh Circuit's analysis of the inappropriateness of *Younger* abstention when the United States is asserting a federal interest consisted of a parenthetical summary of *Composite State Board* after citation to that case.[189] The *Morros* majority's inclusion of the *Dicter* dicta in its analysis attributed too much weight to *Dicter*'s brief, parenthetical discussion of the issue.

---

[178] *Id.* at 1073-74.
[179] *Id.*
[180] *Id.*
[181] *Id.* at 1079.
[182] *See supra* note 14.
[183] New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 364 (1989).
[184] 529 F. Supp. 303 (E.D. Cal. 1981).
[185] *United States v. Pennsylvania*, 923 F.2d at 1077-79.
[186] *Id.* at 1077.
[187] *Id.*
[188] 198 F.3d 1284 (11th Cir. 1999).
[189] *Id.* at 1291.

2. Cases Supporting Abstention in Nation v. State Controversies

Judge Hug's dissent in *Morros* cited the Sixth Circuit decision of *United States v. Ohio*[190] in opposition to the cases relied upon by the majority.[191] In *Ohio*, the state tax commissioner levied tax assessments against certain contractors doing work for national government entities.[192] The United States filed for declaratory relief in the federal court.[193] The Sixth Circuit found that the federal government had no need for immediate access to the federal forum.[194] Rather, the court claimed the United States could intervene in the state proceedings, even though those proceedings were administrative, rather than judicial, proceedings.[195] Under the principles of *Younger*, the court found no reason to interfere with the ongoing state administrative proceedings.[196] *Ohio* held that, although the United States is entitled to jurisdiction as a plaintiff in its federal courts,[197] the exercise of such jurisdiction "must be tempered by the judicial doctrine of abstention whenever the interest of states in administering their own laws . . . would be unnecessarily hampered . . . ."[198]

Morros presents a more compelling argument for abstention than *Ohio*, given that the United States is the plaintiff in the state action. Similar to *Ohio*, the Ninth Circuit should have stayed their hand under *Younger* abstention; there is simply no need advanced by the government that would require a federal forum. The United States could have freely raised constitutional issues directly in the state court. *Ohio* required the United States to intervene in the state administrative proceeding where constitutional issues would have to wait for appeal. The facts of the *Morros* case present a more compelling argument for *Younger* abstention than those of *Ohio*, yet the majority ignored this persuasive holding.

The Supreme Court's decision in *Colorado River* provides further support that *Younger* abstention should not be restricted simply because the controversy is between a state and the national government.[199] In that case, Colorado was involved in litigation against the United States. The Court reviewed the district court's decision to abstain on the authority of various abstention doctrines. After analyzing each of the abstention doctrines, including *Younger*, the court concluded that none of them were appropriate and formulated a new doctrine for federal court deferral to state court proceedings.[200] If the Court intended to restrict *Younger* abstention to those case involving a dispute between a state and the national government, it would seem likely that they would have disqualified *Younger*'s applicability on those grounds. Rather, the court relied on other grounds, which were inapplicable to *Morros*, to distinguish the *Younger*

---

190 614 F.2d 101 (6th Cir. 1979).
191 United States v. Morros, 268 F.3d 695, 709 (9th Cir. 2001).
192 *United States v. Ohio*, 614 F.2d at 103.
193 *Id.*
194 *Id.* at 104.
195 *Id.*
196 *Id.* at 105.
197 *See* 28 U.S.C. § 1345 (2000).
198 *United States v. Ohio*, 614 F.2d at 105.
199 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).
200 *Id.* at 813-18.

doctrine and determine its inapplicability in this case between the United States and Colorado.[201]

The court in *United States v. California,* another state-national controversy, upheld a finding of *Younger* abstention.[202] The court focused primarily on the policy argument advanced by Justice Black in *Younger*. *California* reasoned that "an interference of the state court proceeding is not 'automatically granted simply on the application of the United States.'"[203] Courts must also look to the circumstances of the case to determine whether an injunction is proper.[204]

VI. CONCLUSION

Justice Black captured the essence of comity and Our Federalism in his opinion in *Younger*. Those notions not only form the basis for the *Younger* abstention doctrine, they are the core concepts at the foundation of our governmental structure. This nation's historical practice of respecting the courts of individual states dates back to the drafting of the Constitution. The federal government has taken great lengths to ensure that state courts are not unnecessarily intruded upon, including passing statutes (Anti-Injunction Act), the Court's creation of judicial federalism, and the use of equitable restrictions on the power of federal courts to issue injunctive relief.

The decision in *Morros* turns a blind eye to the notions of comity and Our Federalism with respect to Nevada courts. Although conflict between Nevada and the United States appears unavoidable with regard to the prospective siting of a federal nuclear repository at Yucca Mountain, unnecessary conflict may be avoided by permitting state courts to perform their function. *Younger* abstention is not only appropriate, but essential in this case where the United States is the plaintiff in both the state and federal actions. Allowing the United States to change forums mid-process, in reaction to an adverse ruling, is dangerously shortsighted. State court review of the state engineer's decision would allow the United States ample opportunity to present its constitutional challenges in the proper state forum, ultimately reviewable by the United States Supreme Court.

The decision of *Morros* unnecessarily limits *Younger* abstention in a manner inconsistent with the core concepts of comity and Our Federalism. *Morros* necessarily forecloses any opportunity that issues related to Yucca Mountain will be heard in Nevada courts as any controversy would involve the same parties. However, the decision reaches far beyond Nevada and strips the nine states within the Ninth Circuit of the significant protection formerly provided to their individual court systems under *Younger*. Under *Morros*, the comity and Our Federalism, revered by Justice Black in *Younger*, are tossed aside if a state is unfortunate enough to litigate against the federal government or its agencies.

---

[201] *Id.* at 816-17.

[202] United States v. California, 639 F. Supp. 199 (E.D. Cal. 1986).

[203] *Id.* at 206 (quoting United States v. Certified Indus., 361 F.2d 857, 859 (2d Cir. 1966)).

[204] *United States v. California*, 639 F. Supp. at 206 (quoting United States v. Certified Indus., 361 F.2d 857, 859 (2d Cir. 1966)).