

YOUNGER ABSTENTION AND ITS AFTERMATH: AN EMPIRICAL PERSPECTIVE

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ABSTRACT

This Article presents the results of an empirical survey examining the disposition of federal claims after Younger abstention litigation. It traces the expansion of the Younger doctrine over the past several decades and explains how it featured prominently in the judicial parity debate that occurred in earnest from the late 1970s until the early 1990s. It notes that despite the emergence of empiricism as a tool in that debate, no one has examined how federal claims are actually being resolved in post-Younger proceedings at the state and federal levels. The Article then undertakes that inquiry, observing a federal claim success rate in post-abstention proceedings in federal court nearly three times as high as the corresponding success rate at the state level. It compares these findings to other empirical comparative studies outside of the abstention context and concludes by proposing possible explanations for the results.

INTRODUCTION

Richard Canatella, a California lawyer, filed a federal lawsuit against the State Bar of California in March 2000 alleging that certain provisions of the bar's code of conduct governing attorney speech were impermissibly vague and overbroad in violation of both the First and Fourteenth Amendments.¹ Randy Bendel, another California attorney, learned of the lawsuit through a published interlocutory appeal.² In April 2002, the state bar began disciplinary proceedings against Bendel over his accusations of crimes, improper judicial conduct, and bias on the part of state judges, as well as his attacks on their honesty,

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¹ *Canatella v. California*, 304 F.3d 843, 847–48 (9th Cir. 2002) (describing lawsuit). *Canatella's* complaint was dismissed on February 2005. *See Canatella v. Stovitz*, 213 Fed. Appx. 515, 517–18 (9th Cir. 2006) (upholding dismissal).

² *Canatella v. California*, 404 F.3d 1106, 1109 (9th Cir. 2005).

character, or demeanor.³ Bendel moved to intervene in Canatella's lawsuit, asserting the same First Amendment claims.⁴

The state bar defendants asked the federal trial court to dismiss Bendel's complaint-in-intervention pursuant to the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971), which generally requires federal courts to decline to adjudicate the applicable federal claims in favor of ongoing parallel state judicial proceedings under certain circumstances.⁵ The trial court granted this motion, and Bendel appealed.⁶ The Ninth Circuit ran through the *Younger* analysis and held: (1) the state bar case constituted an ongoing judicial proceeding; (2) regulating attorney misconduct was an important state interest; and (3) Bendel had adequate opportunity to assert his federal defenses in a competent and unbiased state forum.⁷ The court thus upheld the abstention decision and affirmed the denial of the intervention motion.⁸

Bendel was undeterred. After briefing the appeal, but prior to the Ninth Circuit decision, he argued these same constitutional claims in the state bar proceedings.⁹ The Hearing Department of the State Bar Court issued its final decision on May 19, 2004.¹⁰ It decided against Bendel on numerous nonspeech grounds and ordered that he be suspended for six months, placed on probation for two years, and that he pay all restitution and comply with all other sanctions pending against him.¹¹ Yet Bendel's argument that his remarks were protected by the First Amendment was more successful. The bar court concluded that virtually all of the allegedly improper statements fell in the category of "opinion based on an assumed set of facts," and as such were protected speech.¹² It held that Bendel's "inappropriate" statements did not constitute actionable conduct, opining that "it is fundamental that we preserve the right of our citizens to speak freely about government officials, even if not done in particularly good taste."¹³

This partial success was a small consolation for Bendel. He remained suspended for six months, and it is unclear whether he ever resumed his law practice. In any event, he failed to comply with the terms of his probation, and the California state bar revoked it on April 4, 2006.¹⁴ It suspended Bendel again

³ Randy E. Bendel, Hearing Dep't of Cal. State Bar Ct., Case No. 00-O-13391-RAH, at 1-17 (May 19, 2004), <http://members.calbar.ca.gov/courtDocs/00-O-13391.pdf>.

⁴ See *Canatella*, 404 F.3d at 1109 (describing motion).

⁵ See *infra* Part I.B for a detailed discussion of the *Younger* abstention prerequisites.

⁶ *Canatella*, 404 F.3d at 1109.

⁷ *Id.* at 1110-12.

⁸ *Id.* at 1117.

⁹ *Bendel*, Case No. 00-O-13391-RAH, at 18-34.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 43-44. The bar court found Bendel culpable of the following: (a) employing means inconsistent with the truth and seeking to mislead a judge; (b) failing to obey a court order; (c) maintaining an unjust action; and (d) malicious prosecution. *Id.* at 18, 20, 31, 33.

¹² *Id.* at 29.

¹³ *Id.* at 29-30.

¹⁴ Randy E. Bendel, Hearing Dep't of Cal. State Bar Ct., Case No. 06-PM-10698-RAP, at 1 (Apr. 4, 2006), <http://members.calbar.ca.gov/courtDocs/06-PM-10698.pdf>.

for two full years.¹⁵ He was the subject of another State Bar Court order on December 6, 2007,¹⁶ and was disbarred on May 30, 2008.¹⁷

Bendel's case may not be remarkable for its merits, but it is unique for one main reason: the Ninth Circuit opinion is the only reported decision identified by the methodology used in this Article during the 2004 to 2006 period in which (i) a federal court abstained from hearing a federal claim in favor of a state tribunal pursuant to the *Younger* doctrine, and (ii) the claimant was clearly successful on his or her federal claim at the state level.¹⁸ In the other fifteen pro-*Younger* reported decisions from 2004 to 2006 selected by this methodology in which the parallel state forum identifiably resolved the asserted federal claim, the claimant lost every time.¹⁹ This should be contrasted with reported decisions refusing to abstain under *Younger* during that period.²⁰ In the 31 anti-abstention cases included by this Article's methodology in which the federal claim was identifiably decided, the claimant won in federal court a much more generous 38.7 percent of the time.²¹

The tiny success rate for federal claimants proceeding in state tribunals after²² *Younger* abstention during 2004–2006 may be a modest fluke or outlier, but not by much. A federal claim's chances of success in a state forum after *Younger* abstention always seem disproportionately low, at least during the time period from 1995 to 2006.²³ Based on the survey of several hundred federal trial and appellate decisions reported in this Article during those years, parties asserting such claims in post-*Younger* proceedings prevailed a small fraction (15.1 percent) of the time.²⁴ In comparison, federal courts retaining a case after declining abstention during that period ultimately sided with the federal claimant far more frequently (43.6 percent of the time)²⁵—nearly three times as often.

This is noteworthy for a number of reasons. First, although the success rate of federal claimants who stay in federal court is consistent with what others have found outside of the abstention context, the chances of success for those

¹⁵ *Id.*

¹⁶ Randy E. Bendel, Hearing Dep't of Cal. State Bar Ct., Case No. 07-N-12245-DFM, at 1 (Dec. 6, 2007), <http://members.calbar.ca.gov/courtDocs/07-N-12245.pdf>.

¹⁷ See Randy E. Bendel — #130569, CAL. ST. BAR, <http://members.calbar.ca.gov/fal/Member/Detail/130569> (last visited Dec. 11, 2011).

¹⁸ *Infra* Table A.

¹⁹ *Infra* Table A.

²⁰ *Infra* Table B.

²¹ *Infra* Table B.

²² The term “after” may be confusing in this context. *Younger* abstention requires that state proceedings must be ongoing when the federal litigation is commenced (or at least before there are federal proceedings of substance on the merits). See *infra* Part I.B.1. They need not be still ongoing when an abstention request is granted; indeed, it is conceivable that the state tribunal may have decided the federal claim by then, with the federal court effectively abstaining in favor of a known outcome. For ease of reference, however, I characterize all state proceedings that are the basis for abstaining as taking place “after” abstention.

²³ *Infra* Table A.

²⁴ *Infra* Part III.C.

²⁵ *Infra* Part III.C.

relegated to a state tribunal after abstention are not.²⁶ There must be something peculiar about *Younger* cases, then, explaining why state tribunals appear substantially less receptive to federal claims after abstention than those brought directly when compared to federal courts. Second, the requirement that a litigant must have an adequate opportunity to pursue a federal claim in the parallel state forum is the most fundamental prerequisite of *Younger* abstention.²⁷ The disproportionately low federal claim success rate in post-abstention state proceedings thus begs a critical question: is the presumption against inadequacy justified?

This Article is divided into five parts exploring many of these issues. Part I examines the broad expansion of the *Younger* doctrine to its current scope. Part II summarizes commentators' views on whether federal claimants can ever systematically receive a truly adequate hearing in state court, both in and out of the abstention context. It emphasizes the close relationship between *Younger* abstention and the parity debate that occurred in earnest from the late 1970s to the early 1990s, and the emergence of empirical analysis as a controversial but important tool in that conversation.

Part III-A observes that despite these last two important points, no one has applied that sort of empirical analysis to *Younger* cases to determine how the federal claims at issue are being resolved in post-abstention proceedings. Parts III-B and -C attempt to fill in that gap by presenting the results of a survey comparing the disposition of federal claims asserted in state tribunals or federal court after *Younger* litigation from 1995 to 2006. They discuss the purpose of the study, explain its methodology and typology, and attempt to highlight potential methodological flaws. Part IV-A compares the results with existing empirical studies examining how federal claims are resolved by state and federal courts generally. Part IV-B proposes potential explanations for the findings and suggests future research ideas. Part V concludes by briefly discussing the broad implications of the survey results.

I. *YOUNGER* ABSTENTION: NOT SO EXTRAORDINARY, NOT SO NARROW

A. *Legal Evolution of the Younger Abstention Doctrine*

Abstention doctrines are judge-created tests employed by federal courts that allow them to decline jurisdiction in cases or controversies where they would otherwise be authorized by Article III to exercise it.²⁸ Commentators trace them back to the early English chancery courts, which would refuse to

²⁶ See Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 239-40 (1983) [hereinafter Solimine & Walker, *Constitutional Litigation*]. The authors found that constitutional claims succeeded 41 percent of the time in federal court and 32 percent of the time in state court.

²⁷ *Moore v. Sims*, 442 U.S. 415, 430 (1979) (state court adequacy is "the only pertinent inquiry"); see also Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 626 (1981) (characterizing adequacy as the fundamental prerequisite for *Younger*); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1214 (1977) (adequacy is the "underpinning" of *Younger*).

²⁸ See *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (doctrine of abstention is one in which a court may decline or postpone the exercise of its jurisdiction).

hear cases in situations where adjudication would be contrary to the public interest.²⁹ In the contemporary American context, abstention generally is intended to minimize friction between federal and state courts.³⁰

The Supreme Court characterizes abstention as “an extraordinary and narrow exception to the duty of a [federal c]ourt to adjudicate a controversy properly [brought] before it.”³¹ Legal scholars nevertheless have attacked the propriety and constitutionality of these doctrines, beginning especially in the aftermath of the first controversial modern abstention decision, *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).³² Yet despite these objections, most scholars will concede—perhaps grudgingly and perhaps not—that abstention is here to stay.³³

It would be nice to be able to base the court-created exceptions to federal jurisdiction on a set of principles more specific and less amorphous than reducing federal-state friction, but this is impossible.³⁴ Abstention is best and per-

²⁹ See Webster C. Cash, III, Note, “Our Federalism” *Out West: The Tenth Circuit and Younger Abstention*, 87 DENV. U. L. REV. 669, 670 (2010) (discussing origins of abstention); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 571 (1985) (exercise of equitable jurisdiction by the English Chancery court actually pre-dated the division of legal and equitable tribunals by the fifteenth century).

³⁰ See, e.g., James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1051 n.6 (1994) (discussing references to federal-state “friction” in the abstention context).

³¹ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *accord New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 368 (1989) (“[O]nly exceptional circumstances justify a federal court’s refusal to decide a case in deference to the States.”).

³² These commentators cite the principle that federal courts have a “virtually unflagging” duty to adjudicate Article III cases and controversies properly before them when Congress has conveyed the necessary jurisdiction, see, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), and they view abstention as abdicating this obligation. See, e.g., Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 337–38; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 (1984) [hereinafter Redish, *Limits of the Judicial Function*]; Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings*, 58 FORDHAM L. REV. 173, 211–12 (1989). Others argue that it violates constitutional separation-of-powers principles when courts decline jurisdiction expressly granted by Congress. See Redish, *Limits of the Judicial Function*, *supra*, at 112; Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987; see also Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 536–37 (1989) [hereinafter Friedman, *Revisionist Theory*]; Mark Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301, 1304 (1978). Critics also point to the oftentimes years-long delays associated with abstention. See 20 CHARLES ALAN WRIGHT & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 54 (2d ed. 2011). Finally, some are skeptical that the Court has announced a coherent and logically consistent basis for abstention. Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1154 (1974) (noting that the reasoning for certain types of abstention is “not clear”).

³³ See, e.g., Friedman, *Revisionist Theory*, *supra* note 32, at 533; William A. Calhoun, II, *Arthur Miller’s Death of a Doctrine or Will the Federal Courts Abstain from Abstaining? The Complex Litigation Recommendations’ Impact on the Abstention Doctrines*, 1995 B.Y.U. L. REV. 961, 978 (1995); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 654–55 (1999).

³⁴ See, e.g., Rehnquist, *supra* note 30, at 1053 n.10.

haps only understood in the specific contexts in which the branches of the doctrine arise.³⁵ The *Younger* abstention doctrine, as stated above, generally requires a federal court to decline jurisdiction in favor of parallel state enforcement proceedings if certain prerequisites are met.³⁶

In *Younger*, the plaintiff was charged in state criminal proceedings with violating the California Criminal Syndicalism Act.³⁷ He brought a federal lawsuit seeking to enjoin³⁸ this prosecution, arguing that the state law at issue was impermissibly vague and overbroad in violation of the First and Fourteenth Amendments.³⁹ The federal three judge court sided in his favor, but the Supreme Court reversed.⁴⁰ Justice Black, writing for the majority, opined that the lower court should have abstained from hearing the federal claims for multiple reasons.⁴¹

He began by alluding to the longstanding guideline that federal courts should not interfere with ongoing state criminal proceedings,⁴² though critics at the time (and since) attacked this reasoning as historically flawed.⁴³ His opinion then cited theories of both equity and comity or federalism to justify absten-

³⁵ *Id.* For example, the abstention doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is predicated on a desire to defer where the claim asserted in federal court potentially interferes with state efforts to regulate a complex area of law invoking local concerns, which is administered by state tribunals with special competence, and there is no overriding federal interest. *Id.* at 317–18; *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 103–04 (3d Cir. 1999); see also Lewis Yelin, *Burford Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1881 (1999). *Pullman* abstention, in contrast, is intended to avoid federal court interference in an important state program or statutory scheme based on an ambiguous and potentially unconstitutional state law. Either the federal court will interpret the statute in a way that requires it to undertake an otherwise needless constitutional inquiry, or it will interpret it narrowly in a way that potentially interferes with the state regime at issue. It is preferable to have a state court construe the law in the first instance. See, e.g., Field, *supra* note 32, at 1090.

³⁶ See, e.g., *Kirschner v. Klemons*, 225 F.3d 227, 236 (2d Cir. 2000) (“The defining feature of *Younger* abstention is that even though either a federal or a state court could adjudicate a given claim, when there is an ongoing state proceeding in which the claim can be raised, and when adjudicating the claim in federal court would interfere unduly with the ongoing state proceeding, the claim is more appropriately adjudicated in state court.”).

³⁷ See *Younger v. Harris*, 401 U.S. 37, 38–39 (1971).

³⁸ *Younger* also was accompanied by a companion case, *Samuels v. Mackell*, 401 U.S. 66 (1971), which extended the abstention holding to situations involving requests for declaratory relief. Justice Black noted in the decision that declaratory relief would entail the same disruption of ongoing state proceedings as would an injunction, and thus the same non-interference principles applied. *Id.* at 72.

³⁹ *Younger*, 401 U.S. at 39–40.

⁴⁰ *Id.* at 40, 54.

⁴¹ *Id.* at 43–45. John Harris, the federal plaintiff, had the last laugh. His constitutional claims prevailed at the state level. See *In re Harris*, 97 Cal. Rptr. 844, 846 (Cal. Ct. App. 1971).

⁴² *Younger*, 401 U.S. at 43.

⁴³ See generally Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979) (noting numerous instances where federal courts enjoined future prosecutions based on invalid state statutes); Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974) (arguing that pre-*Younger* federal courts routinely invalidated state criminal law and enjoined prosecutions based on statutes that violated federal law).

tion.⁴⁴ The former relied on the technical principle that a court sitting in equity should not exercise its jurisdiction to enjoin ongoing criminal proceedings where there is an adequate remedy at law;⁴⁵ the latter was based on the ephemeral notion that the parallel federal and state judicial systems function more smoothly and effectively if incidents of interference and intrusion are minimized.⁴⁶ This, of course, led to an academic debate over which of these theories was more fundamental to the decision,⁴⁷ and whether either of them can even be distinguished in any meaningful way.⁴⁸

It makes no difference in the end. Regardless of whether the initial basis for *Younger* abstention is attributed to equity, comity, federalism, or some combination thereof, the Court has long since rejected equitable principles as any real limitation on the scope of the doctrine.⁴⁹ Shortly after the *Younger* decision, the Court expanded its holding to require abstention in cases where there was a parallel state civil enforcement lawsuit.⁵⁰ It has since required abstention

⁴⁴ Compare *Younger*, 401 U.S. at 43 (one rationale “is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law”) with *id.* at 44 (a more fundamental basis is “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”). See generally Robert Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that “Interfere” with State Civil Proceedings*, 29 STAN. L. REV. 27, 33–34 (1976).

⁴⁵ See *Younger*, 401 U.S. at 43.

⁴⁶ See *id.* at 44; Bator, *supra* note 27, at 620–22 (generally discussing comity).

⁴⁷ Commentators focusing on the equitable basis concentrate on the last sentence of the opinion, which states that “our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention.” *Younger*, 401 U.S. at 54; see also Jeremy D. Sosna, Comment, *Quackenbush v. Allstate Insurance Co.: The Continuing Saga of the Younger Doctrine*, 82 IOWA L. REV. 275, 284 (1996). They dismiss the earlier passage characterizing comity as “an even more vital consideration.” *Younger*, 401 U.S. at 44; accord Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 248–49, 281 (1988) [hereinafter Chemerinsky, *Parity Reconsidered*] (conceding that comity was the basis for *Younger* “in large part”); see also Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051, 1060 (1988) [hereinafter Althouse, *Misguided Search*].

⁴⁸ Some commentators have “split the baby” in this regard, either by arguing that the Court’s analysis essentially combined and commingled the notions of equity, comity, and federalism, see Rehnquist, *supra* note 30, at 1066, or by asserting that “[i]n the context of *Younger* abstention, the language of equity was used exclusively to serve the interests of federalism,” Anthony J. Dennis, *The Illegitimate Foundations of the Younger Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311, 321 (1990) (emphasis added).

⁴⁹ Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1112–15 (1985) [hereinafter Wells, *Wrong About Abstention*] (discussing the erosion of the equitable bases for *Younger* abstention); see also 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4254, at 236 n.3 (3d ed. 2007) (citing commentary on the extension of *Younger* to civil litigation); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 OKLA. CITY U. L. REV. 185, 208–11 (1989) (discussing the expansion of *Younger* abstention).

⁵⁰ See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604–05 (1975).

in cases involving state administrative proceedings⁵¹ and even state civil proceedings involving private parties where an important state interest was at stake.⁵² Today, many of the state proceedings warranting *Younger* abstention do not involve a court at law capable of awarding an adequate legal remedy to address the equitable relief implicated by the federal claim; therefore, technical equitable jurisdiction rules cannot be dispositive.⁵³ The idea that contemporary *Younger* abstention is based on anything other than abstract notions of comity or federalism should be rejected.⁵⁴

The expansion of *Younger* abstention does not mean that the doctrine is limitless, however. The Supreme Court has devised a mechanical test to determine whether abstention is appropriate. In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court considered a case involving an attorney who made inflammatory comments impugning the competence and impartiality of a court overseeing a trial of his former client.⁵⁵ The county ethics committee initiated an investigation and eventually filed a bar complaint against him.⁵⁶ The lawyer responded by commencing a federal lawsuit asserting that the state bar disciplinary rules violated the First Amendment.⁵⁷ The Court held that comity and federalism concerns underlying the *Younger* doctrine mandated federal abstention, despite the fact that the state bar proceedings were purely administrative.⁵⁸ It formulated the now-familiar three-prong test for *Younger* abstention: First, is the parallel state matter that is the purported basis for abstention an “ongoing state judicial proceeding”? Second, does it implicate important state interests? And third, is there an adequate opportunity in the proceeding for the party resisting abstention to raise his or her federal claims?⁵⁹

This *Younger* test has endured until the present, at least subject to certain exceptions.⁶⁰ Courts can abstain only if all three of the requirements are met, but *Younger* abstention is mandatory under those circumstances, provided that

⁵¹ See, e.g., *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 424 (1982).

⁵² See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987).

⁵³ See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (“[W]e have not treated abstention as a ‘technical rule of equity procedure.’”).

⁵⁴ Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1169–91 (1977) (discussing the demise of equity as a limitation of *Younger* abstention); Wells, *Wrong About Abstention*, *supra* note 49, at 1113 (observing that “[f]ederal-state comity has become the sole foundation for *Younger* abstention.” (emphasis added)); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1042 (1985) (discussing the rejection of equity as the primary basis for *Younger* abstention); see also Daniel C. Norris, Comment, *The Final Frontier of Younger Abstention: The Judiciary’s Abdication of the Federal Court Removal Jurisdiction Statute*, 31 FLA. ST. U. L. REV. 193, 198 (2003) (same conclusion).

⁵⁵ See *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 427–29 (1982).

⁵⁶ *Id.* at 428.

⁵⁷ *Id.* at 429.

⁵⁸ *Id.* at 431–32, 437.

⁵⁹ *Id.* at 432–37.

⁶⁰ See, e.g., Larry W. Yackle, *Federal Courts 395–99* (2nd ed. 2003) (discussing exceptions); Daniel Jordan Simon, Comment, *Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of “Our Federalism”*, 99 NW. U. L. REV. 1355,

certain exceptions do not apply.⁶¹ This lack of discretion is problematic for two interrelated reasons. First, as discussed below, the three *Middlesex* factors have been expanded so broadly that most parallel state criminal, civil, or administrative enforcement or similar actions will satisfy them. It seems counterintuitive to announce that a court should only abstain in extraordinary or narrow circumstances, and only if certain prerequisites are met, but then relax the requirements so that they provide no real limitation.

Second, these expansive standards are reasonably clear, and state defendants contemplating abstention are not stupid. These defendants know if there is a pending state enforcement proceeding, and whether it provides an opportunity to adjudicate a federal claim. At that point—where a party considering abstention knows whether its request is likely to be granted—*Younger* abstention becomes less a narrow exception to the exercise of federal jurisdiction, and more an automatic right to a federal stay or dismissal.

This is not to say that *Younger* abstention is always granted and never declined. Litigants test boundaries; they overestimate how closely their case matches a typical *Younger* fact pattern; and judges misapply established law. But the fact that the *Middlesex* factors are reasonably clear and broad, and abstention is nondiscretionary, means that a successful *Younger* request is anything but extraordinary. The statistics seem to bear this out, with the reported decisions selected by this Article's methodology indicating that courts grant *Younger* abstention requests roughly as often as they deny them.⁶²

So a *Younger* abstention request is not a slam dunk, but neither is it a desperation half-court shot. It is a request for relief that routinely is granted to halt a federal lawsuit when it involves claims also implicated by an ongoing parallel state judicial proceeding. And there is nothing wrong with that! A broad procedural rule that funnels federal claims to pending state enforcement proceedings, unless the claimant can prove that he or she will not get a fair and unbiased hearing, may well be advisable, at least as a policy matter. But this is no longer an extraordinary and narrow equitable exception to federal jurisdiction—it is more a broad jurisdictional mandate.

Therein lies the heart of the *Younger* debate. If the Court thinks that lower federal courts should unilaterally decline to hear a significant class of cases

1360 (2005); Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH L. REV. 137, 138–40 (1998).

⁶¹ See, e.g., *Colo. Riv. Water Conservation Dist. v. United States*, 424 U.S. 800, 816 n.22 (1976); *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 645 (2d Cir. 2009); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100–01 (2d Cir. 2004); see also Aaron R. Petty, *Matters in Abatement*, 11 J. APP. PRAC. & PROCESS 137, 161 (2010) (discussing the nondiscretionary nature of *Younger* abstention).

⁶² As discussed *infra*, of the 368 such decisions selected by this Article involving a definitive *Younger* ruling, the party seeking abstention was successful slightly more often than not (51.6 percent of the time). *Infra* at Section III.C. This is roughly consistent with another recent quantitative survey of *Younger* abstention requests, which observed a 44.8 percent success rate in 29 published circuit court cases from 2000 to 2003. 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, 410–18 (2003). The success rate for non-*Younger* abstention requests is much lower. For example, in the cases catalogued by Professor Birdsong, non-*Younger* abstention requests were successful 22.5 percent of the time. *Id.* at 418–19.

where Congress has otherwise conveyed jurisdiction to them, there should be an unimpeachable foundation for that decision. With respect to *Younger* abstention, that fundamental basis is the implied belief that state tribunals are presumptively competent to adjudicate federal claims unless proven otherwise. This notion is the *sine qua non* of the doctrine, and it has been hotly disputed by abstention critics.⁶³ Yet despite the centrality of this assumption and the controversy surrounding it, there has been surprisingly little effort by scholars to examine what actually happens when a federal court abstains (or not).⁶⁴ That empirical inquiry is this Article's focus. First, however, I should recount the evolution of the *Younger* doctrine to emphasize how it has become less a rare equitable exception to federal jurisdiction, and more a broad embodiment of the assumption of state court adequacy.

B. *The Expansion of the Middlesex Factors*

1. *Ongoing State Judicial Proceedings*

The first *Middlesex* prerequisite—that the state matter which is the basis for abstention be an “ongoing state judicial proceeding”—has been extended so far that two of those four words are misleading. The first is judicial. The Supreme Court expanded the scope of *Younger* abstention from state criminal proceedings to certain civil matters within a few years of handing down its seminal decision,⁶⁵ but even earlier than that, it suggested that abstention might be warranted where there is a pending administrative proceeding.⁶⁶ The Court dispelled all doubt in *Middlesex* itself, and a substantial number of *Younger* cases today involve parallel state administrative proceedings.⁶⁷ There is even authority that an administrative *investigation* will suffice once it passes the “initial stages,” though the Court is silent on the issue.⁶⁸

The requirement that the parallel state proceedings be “ongoing” at the time a federal lawsuit is filed is interpreted just as loosely. The Court long ago rejected a strict rule that *Younger* abstention will be warranted only if state

⁶³ It is important to note that almost all of the criticism of *Younger* abstention focuses on this subsequent expansion of the doctrine, and not the narrow result in the case itself. The original *Younger* decision was not controversial, as indicated by the Court's 8 to 1 vote. Indeed, a contrary holding would have led to the unworkable situation where criminal defendants could routinely interrupt ongoing state prosecutions to affirmatively assert their federal defenses in federal court. See, e.g., RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1095 (6th ed. 2009).

⁶⁴ *Infra* Section III.A (discussing relative lack of empirical work on *Younger* abstention).

⁶⁵ See *Judice v. Vail*, 430 U.S. 327, 335–36 (1977); *Huffman v. Pursue*, 420 U.S. 592, 604 (1975).

⁶⁶ See *Gibson v. Berryhill*, 411 U.S. 564, 576–77 (1973) (*Younger* abstention might be appropriate where there are pending administrative proceedings).

⁶⁷ See *Middlesex Cnty Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 437 (1982) (*Younger* abstention warranted where there were pending administrative proceedings). Subsequent federal decisions have been similarly clear. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627–28 (1986); *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163–65 (10th Cir. 1999).

⁶⁸ See *Amanatullah*, 187 F.3d at 1163–64; *Crenshaw v. Supreme Court of Ind.*, 170 F.3d 725, 728 (7th Cir. 1999). *But see* *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1002 (9th Cir. 1995) (classifying such investigations as “executive” and not “judicial”).

proceedings are commenced prior to the federal lawsuit.⁶⁹ Under the Court's current application of the doctrine, abstention is warranted no matter which proceeding was filed first if the state matter was commenced prior to any hearings of substance on the merits in federal court.⁷⁰

So if administrative and possibly even investigative proceedings are judicial, and matters commenced after the filing of the federal action can be ongoing, then what limitation does the first *Middlesex* factor impose? The Court expressly addressed this question in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), when it declined to abstain under *Younger* from hearing a preemption challenge by utilities companies to the decision by local regulators to reject a proposed utilities rate increase, which was also pending in a state appellate court.⁷¹ Justice Scalia held for the majority that the denial of the rate increase request and the subsequent state court review that followed the administrative decision may have been ongoing, but they were not judicial.⁷² He distinguished between a court's or administrative agency's action to enforce or punish a violation of a rate order, and the separate and distinct task of setting that rate.⁷³ While the former is judicial no matter who undertakes it (*i.e.*, court or administrative tribunal), the latter is "legislative" and falls outside the scope of *Younger* abstention.⁷⁴

Thus, *NOPSI* stands for the proposition that the proceedings providing a basis for *Younger* abstention must be primarily judicial and not legislative. This is not intuitive. A state easily may have a stronger interest in holding legislative administrative proceedings without interference than it does in conducting its own unimpeded judicial administrative proceedings, and there is nothing inherent in the notions of comity or federalism dictating different results in the two cases.⁷⁵ Nor does *NOPSI* provide an easy formula to ascertain whether a proceeding is judicial or legislative.⁷⁶ Nonetheless, where a state proceeding is cited as the basis for abstention, courts will ask whether it "declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," or whether it "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some

⁶⁹ See *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); see also *Majors v. Engelbrecht*, 149 F.3d 709, 713 (7th Cir. 1998) (discussing and applying *Hicks*).

⁷⁰ *Majors*, 149 F.3d at 713. The *Hicks* rule means that a state can block previously-filed federal litigation by commencing an action before any proceedings on the merits in the federal case. This phenomenon has been called "reverse removal." See Bryce M. Baird, Comment, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 531 (1994); Norris, *supra* note 54, at 201-02.

⁷¹ See *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 350 (1989).

⁷² See *id.* at 369-70.

⁷³ *Id.* at 371-73.

⁷⁴ *Id.* at 369-73.

⁷⁵ See, e.g., Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 954 (1991) [hereinafter Althouse, *State Court Resource*]; Lee & Wilkins, *supra* note 32, at 355-56; Vairo, *supra* note 32, at 212.

⁷⁶ Lee & Wilkins, *supra* note 32, at 355-56.

part of those subject to its power.’”⁷⁷ The former will be judicial and susceptible to abstention; the latter will be legislative and not.⁷⁸

2. Important State Interest

The second *Middlesex* factor—that important state interests must be implicated by the parallel state proceedings—is the most amorphous of the *Younger* requirements because almost any state interest can be compelling if formulated broadly enough. For example, if the proceedings ultimately relate to the spheres of criminal, education, family, property, public health, or corporate law, they will involve an important state interest.⁷⁹ Furthermore, *NOPSI* cautions that courts should not narrowly inquire as to whether the particular state litigation itself involves an important state interest—instead, they should look to whether generic proceedings of that type, when viewed in the aggregate, implicate an interest that is important to the state.⁸⁰ If the interest is such that the exercise of federal jurisdiction “would disregard the comity between the States and the National Government,” that is enough.⁸¹ This expansion of the state interest requirement to encompass such broad-based concerns understandably has been criticized as virtually eliminating the second *Middlesex* requirement.⁸²

The fact that this *Younger* prerequisite is so malleable has not rendered it wholly ineffective, however. A common approach is to determine whether the asserted state interest overlaps or impinges upon a clear federal one.⁸³ If the court concludes that the state interest lies in an area that is primarily federal in nature, the second *Middlesex* factor will be unmet.⁸⁴ The formulation, in effect,

⁷⁷ *NOPSI*, 491 U.S. at 370–71 (citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226–27 (1908)).

⁷⁸ The rough rule is that courts generally view rule- or rate-making proceedings to be legislative, but administrative enforcement actions as judicial. *See, e.g.*, *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 479 (8th Cir. 1998); *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 481–82 (6th Cir. 1997). These fine distinctions are interesting but largely irrelevant. While the first *Middlesex* requirement is the one most often successfully challenged—parties opposing abstention prevail on this issue 27.1 percent of the time (56.2 percent of all anti-abstention cases)—it is usually because there is no ongoing state proceeding that arguably might interfere with the federal lawsuit. *Infra*, at Section III.A.

⁷⁹ *See Harper v. Pub. Serv. Comm’n of W. Va.*, 396 F.3d 348, 352–53 (4th Cir. 2005) (cataloguing areas that have been important state interests).

⁸⁰ *Id.* at 353–54. So, for example, the question of whether a particular airport shuttle service is licensed or not may be relatively unimportant or trivial, but the state’s interest in regulating intrastate carriers will not be. *See, e.g.*, *Trans Shuttle, Inc. v. Pub. Util. Comm’n of Colo.*, No. 01-1025, 2001 WL 1355987, at *2, 5 (10th Cir. Nov. 5, 2001).

⁸¹ *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10–11 (1987).

⁸² *Id.* at 30 n.2 (Stevens, J., concurring); Althouse, *State Court Resource*, *supra* note 75, at 997–98; Baird, *supra* note 70, at 540–41 (noting the shift in focus from the federal plaintiff’s posture to the state’s interests, so perhaps any interest warrants abstention); Simon, *supra* note 60, at 1375–79; Patrick J. Smith, Note, *The Preemption Dimension of Abstention*, 89 COLUM. L. REV. 310, 324 (1989). Parties successfully oppose abstention on these grounds only 6.0 percent of the time (i.e., in 12.4 percent of anti-abstention decisions). *Infra*, Section III.A.

⁸³ *See* Simon, *supra* note 60, 1372 n.135 (cataloguing state decisions adopting this analysis); *see also* Althouse, *Misguided Search*, *supra* note 47, at 1084–89 (advocating such an approach in the aftermath of *Pennzoil*).

⁸⁴ *See, e.g.*, *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2001); *Ayers v. Phila. Hous. Auth.*, 908 F.2d 1184, 1188 (3rd Cir. 1990).

equates an important state interest with an important interest that does not overlap with a federal one. This presents two problems. First, the Supreme Court's *Younger* analysis only requires an important state interest; it says nothing about a countervailing federal concern. The fact that the former exists should satisfy this *Middlesex* requirement on its face.⁸⁵

Second, even if there were some merit to the artificial notion that a state cannot have a *Younger* interest in an area that overlaps with a federal interest, applying the second *Middlesex* factor in this way frequently puts the cart before the horse. Current *Younger* cases often involve a preemption claim.⁸⁶ Yet if a state interest cannot exist when there is an overlapping federal concern, in order to determine that the second *Younger* factor is met, a federal court effectively would need to resolve the preemption claim in order to decide whether to abstain from hearing it.⁸⁷

3. *An Adequate Opportunity to Raise the Federal Claim in an Unbiased State Forum*

The third *Middlesex* factor—that there must be an adequate opportunity in the applicable state forum for the party opposing abstention to adjudicate his or her federal claim—traces back to *Younger* itself. Justice Black's opinion is clear that deference to ongoing state proceedings will not apply if “it plainly appears that [pursuing federal claims in state court] would not afford adequate protection.”⁸⁸ Subsequent Supreme Court decisions are also unambiguous: “a

⁸⁵ Take, for example, air ambulance licensing. On the one hand, regulating emergency medical services—by ensuring that ambulances are properly equipped, adequately stable, reliable, etc.—is a crucial part of the important state interest in protecting public health. *See, e.g.*, *Barsky v. Bd. of Regents of N.Y.*, 347 U.S. 442, 449 (1954) (“It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there.”); *Overman v. Occoquan, Woodbridge, Lorton Vol. Fire Dept., Inc.*, No. 90-2475, 1991 WL 255849, at *3 (4th Cir. Dec. 6, 1991) (Virginia municipal codes emphasize the state interest in regulation of emergency vehicles). On the other hand, regulating interstate air transportation is an undeniable federal interest that statutorily preempts most competing state regulation. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 379, 390–91 (1992); *see also* 49 U.S.C. § 41713 (2006) (expressly preempting all state laws relating to air carrier “price, route or service”). This scenario has been addressed by two courts recently. One ordered abstention and one did not. *Compare* *Air Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713, 716 (M.D. Tenn. 2007) (declining to abstain), *with* *Eagle Air Med Corp. v. Colo. Bd. of Health*, 570 F. Supp. 2d 1289, 1295 (D. Colo. 2008) (abstaining).

⁸⁶ *See, e.g.*, *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 364–67 (1989); *see also* *Simon*, *supra* note 60, at 1370–71 (discussing *NOPSI*'s treatment of preemption).

⁸⁷ *See* *Midwestern Gas*, 270 F.3d at 539. Judge Posner held that because the interest implicated by the state proceedings (i.e., the regulation of the interstate natural gas market) unquestionably lay in the federal sphere, no important state interest was at stake. However, he recognized the tension between this logic and the *NOPSI* dictate that federal preemption claims are well-suited for *Younger* abstention, and he limited his holding to cases involving “defiance of clear federal law.” *Id.* at 539. It is important to emphasize, however, that a *Younger* analysis comparing overlapping state and federal interests certainly might be an improvement over the current toothless “state interest” requirement. *See* *Althouse, Misguided Search*, *supra* note 47, at 1084–90.

⁸⁸ *Younger v. Harris*, 401 U.S. 37, 45 (1971).

necessary [*Younger*] predicate . . . is, ‘the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.’”⁸⁹

There is some confusion as to whether this factor is separate and distinct from a *Younger* exception, which precludes abstention when the state tribunal is “incompetent by reason of bias to adjudicate the issues pending before it,”⁹⁰ or whether it subsumes the exception. The Court has portrayed the issue both ways.⁹¹ Commentators are similarly inconsistent,⁹² and several lower courts specifically have noted the confusion on this issue.⁹³ Yet regardless of whether the third *Middlesex* factor is a two-part test requiring an adequate forum and a lack of bias, or whether the presence of such a forum is the third requirement and bias constitutes a separate but related exception, or even whether adequacy/bias itself is a two-prong exception, the analysis is unchanged.⁹⁴ In order to abstain, a federal court must conclude that a claimant has an adequate opportunity to pursue his or her claim in an unbiased, competent state tribunal.

a. An Adequate Opportunity to Raise the Federal Claim

It should not be surprising, then, that the third *Younger* requirement effectively takes the form of a two-part test. First, there must be an actual opportunity for the federal claimant to raise his or her claim. The Supreme Court first addressed this principal in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which Florida inmates brought a class action challenging their pretrial detention without a probable cause hearing. Justice Powell, writing for the majority, noted that the pending state proceedings—the criminal trials—necessarily would occur too late to address the alleged constitutional violation resulting from *pre-trial* detention.⁹⁵ Thus, the claimants had no opportunity to pursue their claims at the state level, and abstention was inappropriate.⁹⁶

Commentators observe that this scenario in which a federal claimant is actually precluded from asserting his or her claim is perhaps the best example

⁸⁹ *Huffman v. Pursue*, 420 U.S. 592, 594 (1975) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577) (1973).

⁹⁰ *Gibson*, 411 U.S. at 577–80; *accord* *Kugler v. Helfant*, 421 U.S. 117, 125 n.4 (1975) (existence of biased tribunal is one of the extraordinary circumstances alluded to in *Younger* where abstention is inappropriate even though all of the *Younger* elements have ostensibly been met); *see also* *Althouse, State Court Resource, supra* note 75, at 999–1001 (bias is an exception).

⁹¹ *Compare Gibson*, 411 U.S. at 577–80 (analyzing bias as part of the “adequate forum” inquiry), *with Kugler*, 421 U.S. at 125 n.4 (analyzing bias as a separate exception).

⁹² *See, e.g., Althouse, State Court Resource, supra* note 75, at 999–1001; *Sosna, supra* note 47, at 277 n.9; *Stagner, supra* note 60, at 137.

⁹³ *See, e.g., Trust & Inv. Advisors, Inc. v. Hogsett*, 43 F.3d 290, 293 (7th Cir. 1994) (discussing confusion); *Yamaha Motor. Corp. v. Riney*, 21 F.3d 793, 797 n.10 (8th Cir. 1994) (same); *Partington v. Gedan*, 880 F.2d 116, 125 n.3 (9th Cir. 1989), vacated on other grounds and remanded, 497 U.S. 1020 (1990), *aff’d on reh’g*, 914 F.2d 1349, vacated in part on other grounds, 923 F.2d 686 (9th Cir.1991).

⁹⁴ *See Stagner, supra* note 60, at 172.

⁹⁵ *See Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975).

⁹⁶ *Id.*; *see also Friedman, Revisionist Theory, supra* note 32, at 553 n.109 (discussing the requirement for an opportunity to litigate the federal claim as set forth in *Gerstein*).

of a procedurally inadequate state forum.⁹⁷ Yet it is not easy for a party opposing *Younger* abstention to prevail on these grounds. For example, many administrative proceedings are limited in what defenses or counterclaims may be raised, but this generally is not an impediment to abstention. If the federal claimant can raise his or her claim in a judicial appeal or review of the administrative hearing (as is usually possible⁹⁸), then this is enough to satisfy the third *Middlesex* requirement.⁹⁹ That is true even if judicial review is discretionary.¹⁰⁰ Nor is there a mechanism for a federal claimant to preserve his or her claim for subsequent federal review in a *Younger* abstention case.¹⁰¹ Regardless of whether the claim is actually brought at the state level, it cannot be heard later in federal court.¹⁰²

The fact that federal claimants opposing *Younger* abstention have the burden to prove that state procedural laws bar the presentation of their claims at all points during the litigation makes matters even more difficult for these litigants.¹⁰³ In other words, the adequacy of state tribunals to adjudicate the asserted federal claims is the baseline presumption for courts considering the issue.¹⁰⁴ The existence of dispositive—and unfavorable—state authorities on the substantive issue also will be irrelevant. There is no requirement for the federal plaintiff to have a real chance of success at the state level, only that he

⁹⁷ See Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Proceedings*, 66 N.C. L. REV. 49, 68 (1987) (“The best example of a purely procedural inadequacy occurs when the state system forbids raising the federal issue that requires a prompt decision in an ongoing state court lawsuit.”).

⁹⁸ See *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053–56 (7th Cir. 1990) (Easterbrook, J., concurring) (noting that state administrative decisions are usually subject to judicial review).

⁹⁹ See, e.g., *Ohio Civil Rights Comm’n v. Dayton Christian Sch.*, 477 U.S. 619, 629 (1986); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 425 (1982) (a federal court should not exert jurisdiction if the plaintiffs had an opportunity to present their federal claims in the state proceedings); see also Rehnquist, *supra* note 30, at 1110; Eric Turner, Comment, *You Say Remedial, I Say Coercive, Let’s Call the Whole Thing Off: Why the Remedial/Coercive Distinction Is Not Critical in Younger Abstention*, 49 WASHBURN L.J. 629, 640 (2010). This is true even if it is ambiguous whether the federal claimant could even raise his or her claim at all—writing for the majority in *Dayton Christian*, Justice Rehnquist noted that in that scenario, the federal claimant should put his or her federal defense before the state tribunal and allow it to construe its own statutory mandate in light of the Constitution. See *Dayton Christian*, 477 U.S. at 629 (“But even if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine, and one not supported by the cited case, to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles.”).

¹⁰⁰ See *Fieger v. Thomas*, 74 F.3d 740, 747–48 (6th Cir. 1996); *Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995).

¹⁰¹ See, e.g., *Los Altos El Granada Inv. v. City of Capitola*, 583 F.3d 674, 680 (9th Cir. 2009) (discussing the inapplicability of an *England* reservation of rights in a *Younger* case); *United Parcel Serv., Inc. v. Cal. Pub. Util. Comm’n*, 77 F.3d 1178, 1184 n.5 (9th Cir. 1996); see also *Huffman v. Pursue*, 420 U.S. 592, 608–10 (1975) (implying the same).

¹⁰² See, e.g., *Juidice v. Vail*, 430 U.S. 327, 337 (1977); *Partington v. Gedan*, 880 F.2d 116, 123–24 (9th Cir. 1989); see also Baird, *supra* note 70, at 538–39.

¹⁰³ *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987); *Moore v. Sims*, 442 U.S. 415, 427 (1979).

¹⁰⁴ *Pennzoil*, 481 U.S. at 15; 31 *Foster Children v. Bush*, 329 F.3d 1255, 1279 (11th Cir. 2003).

or she has a legitimate opportunity to assert his or her claim.¹⁰⁵ In the end, the only thing rendering the third *Younger* factor unmet will be if the federal claimant shows that he or she is actually precluded from asserting the claims at the state level.¹⁰⁶

It may be hard to believe that federal claimants ever prevail on this issue, but they do.¹⁰⁷ One common scenario in which a state tribunal will be inadequate is when the federal claimant is not a party to the related state proceedings, and it is unlikely the court will resolve his or her claim.¹⁰⁸ Another situation where abstention will be inappropriate is when the federal claim invokes exclusive federal jurisdiction and cannot be heard at the state level.¹⁰⁹

b. Bias

The second part of the adequate opportunity/no-bias *Younger* requirement precludes abstention where the state tribunal is impermissibly biased against the federal claimant. The Court first invoked this restriction in *Gibson v. Berryhill*, 411 U.S. 564 (1973), when it refused to abstain from hearing a Civil Rights Act lawsuit involving federal claims that were also implicated by parallel administrative proceedings before the Alabama State Board of Optometry. Justice White concluded for the majority that the tribunal consisting of a separate group of licensed optometrists had a distinct pecuniary and competitive interest in seeing the claimants' licenses revoked.¹¹⁰ As a result, he opined that this rendered the tribunal impermissibly biased, and thus the *Younger* prerequisite requiring an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved" was not met.¹¹¹

A party opposing abstention will not easily prevail on this argument. It is true, on the one hand, that bias is the only abstention exception (if properly viewed as such) that the Court has successfully invoked.¹¹² But perhaps fearing that this exception was inviting decades of litigation over whether particular

¹⁰⁵ See, e.g., *Duty Free Shop, Inc. v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1183 (1st Cir. 1989). The Supreme Court has noted that "courts . . . sometimes change their minds." *Hicks v. Miranda*, 422 U.S. 332, 350 n.18 (1975).

¹⁰⁶ *Moore*, 442 U.S. at 430–31; *Dubinka v. Judges of Superior Court of Cal., Cnty. of L.A.*, 23 F.3d 218, 224 (9th Cir. 1994).

¹⁰⁷ *Younger* abstention is declined because this factor is not met 15.5 percent of the time, or in 32.0 percent of anti-abstention decisions. *Infra*, Section III.A.

¹⁰⁸ See, e.g., *Lannan v. Maul*, 979 F.2d 627, 631 (8th Cir. 1992); *Bunting ex rel. Gray v. Gray*, No. 99–1752, 2001 WL 69347, at *3 (6th Cir. Jan. 17, 2001); *N.J. Sports Prod., Inc. v. Don King Prod., Inc.*, 15 F. Supp. 2d 534, 542–43 (D.N.J. 1998).

¹⁰⁹ See, e.g., *Kan. Pub. Emp. Ret. Sys. v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1071 (8th Cir. 1996); *S.W. Shattuck Chem. Co. v. City & Cnty of Denver*, 1 F. Supp. 2d 1235, 1237 (D. Colo. 1998).

¹¹⁰ See *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973). The state optometry board essentially attempted to revoke the licenses of all optometrists employed by business corporations, which would have greatly benefited the "private practice" optometrists adjudicating the matter. *Id.*

¹¹¹ *Id.* at 577. This analysis indicates that the bias analysis is part of the third *Middlesex* factor, though as noted above, other Court decisions portray it as a *Younger* exception. See *Kugler v. Helfant*, 421 U.S. 117, 125 n.4 (1975) (biased tribunal is one of the "extraordinary circumstances" alluded to in *Younger* where abstention is inappropriate even though all of the *Younger* elements have ostensibly been met).

¹¹² *Gibson*, 411 U.S. at 577–80; see also *Stagner*, *supra* note 60, at 165.

state tribunals were impermissibly biased, federal courts have since limited the doctrine so that it is far from helpful in opposing abstention.¹¹³

First, mere allegations of bias are insufficient. Federal courts will not lightly conclude that a state court is anything but fair and impartial,¹¹⁴ and a litigant asserting “bias must overcome a presumption of honesty and integrity in those serving as adjudicators.”¹¹⁵ A party arguing that he or she lacks an adequate opportunity to litigate a federal claim due to bias therefore must allege concrete and specific facts indicating that the state tribunal at issue is improperly biased¹¹⁶—for example, that it has a financial interest in the matter,¹¹⁷ or that it has already prejudged the claim.¹¹⁸ And even this will not end the inquiry. If the party opposing abstention alleges bias on the part of a single judge or member of an administrative tribunal, he or she generally must have attempted to seek recusal, or showed that there was no procedural mechanism to do so.¹¹⁹ Litigants occasionally assert that recusal is impractical because the bias is institutional or structural.¹²⁰ Courts are especially critical of such arguments, which require substantial factual support and rarely succeed.¹²¹

¹¹³ See, e.g., *Kugler*, 421 U.S. at 125 n.4 (bias is one of *Younger*'s “extraordinary circumstances” alluded to by *Younger*); *United Books, Inc. v. Conte*, 739 F.2d 30, 34 (1st Cir. 1984) (“[The bias exception] to *Younger*'s policy of abstention ha[s] been very narrowly construed by the [Supreme] Court.”); see also ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 13.4, at 753–54 (2d ed. 1994) (noting the substantial difficulties of showing that a *Younger* state forum is biased); *Stagner*, *supra* note 60, at 174. *Younger* abstention is successfully opposed for bias only 0.8 percent of the time (or in 1.7 percent of anti-abstention decisions). *Infra*, Section III.A.

¹¹⁴ See, e.g., *Althouse*, *State Court Resource*, *supra* note 75, at 1001 (quoting *Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1 (1987)); see also *Danner v. Bd. of Prof'l Responsibility of Tenn.* Supreme Court, No. 07-5647, 2008 WL 1987043, at *4 (6th Cir. May 6, 2008) (“While bias is an exception to *Younger* abstention, it is an extraordinary one, and the petitioner alleging such must offer ‘actual evidence to overcome the presumption of honesty and integrity in those serving as adjudicators’” (quoting *Canatella v. California*, 404 F.3d 1106, 1112 (9th Cir. 2005))).

¹¹⁵ *Hirsh v. Justices of Supreme Court of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (internal quotation marks omitted); *accord Neal v. Wilson*, 112 F.3d 351, 357 (8th Cir. 1997).

¹¹⁶ See, e.g., *Gibson*, 411 U.S. at 577–79; *Brooks v. N.H. Supreme Court*, 80 F.3d 633, 640 (1st Cir. 1996); *Bettencourt v. Bd. of Registr. in Med. of Mass.*, 904 F.2d 772, 776 (1st Cir. 1990).

¹¹⁷ See *Yamaha Motor. Corp. v. Riney*, 21 F.3d 793, 798 (8th Cir. 1994).

¹¹⁸ *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992).

¹¹⁹ See *Kugler v. Helfant*, 421 U.S. 117, 125–29 (1975); *Brooks*, 80 F.3d at 640. Additionally, even where a state forum presents significant questions of bias, some courts require a further showing that this bias constitutes “irreparable harm” to the party opposing abstention. See *Esso Standard Oil Co. v. López-Freytes*, 522 F.3d 136, 143 (1st Cir. 2008) (citing *Gibson*, 411 U.S. at 577). For example, if a federal claimant can pursue an interlocutory appeal of the purportedly biased decision through an impartial judicial review process, the exception will not apply. *Id.*; *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27, 38 (1st Cir. 2004).

¹²⁰ See, e.g., *Cobb v. Supreme Judicial Court of Mass.*, 334 F. Supp. 2d 50, 57–58 (D. Mass. 2004) (describing the general assertion); *Brooks*, 80 F.3d at 640 (same); *Stagner*, *supra* note 60, at 171.

¹²¹ See, e.g., *Brooks*, 80 F.3d at 640 n.9 (characterizing structural bias claims as “weak” generally); see also *Danner v. Bd. of Prof'l Responsibility of Tenn.* Supreme Court, No. 07-5647, 2008 WL 1987043, at *4 (6th Cir. May 6, 2008).

II. CRITICAL VIEWS ON *YOUNGER* ABSTENTION AND THE PARITY DEBATE

A. *Criticisms of the Fundamental Assumption of State Court Adequacy*

Commentators generally agree that this last adequacy requirement lies at the heart of the entire *Younger* doctrine. The first two *Middlesex* factors are largely formalistic; they define the practical circumstances under which abstention may be possible.¹²² The third prong, in contrast, is the essential safeguard that explains why a federal court is even permitted to decline jurisdiction in favor of a parallel state forum at all.¹²³ This distinction between the procedural requirements of the *Younger* doctrine and the fundamental basis behind it is perhaps the reason that the Supreme Court has characterized the adequacy of the state tribunal as “the only pertinent inquiry” in the analysis.¹²⁴ It is also why commentators observe that state forum adequacy is the fundamental assumption underlying the doctrine.¹²⁵ This importance is underscored by the various *Younger* exceptions, which mostly address scenarios in which there is a concern that a timely, competent, and unbiased resolution might be jeopardized.¹²⁶

In other words, if federal claims cannot systematically be decided fairly and competently by state tribunals, there can be (or should be) no *Younger* doctrine.¹²⁷ Perhaps for that reason, this aspect of *Younger* abstention has

¹²² See *Mounkes v. Conklin*, 922 F. Supp. 1501, 1511 (D. Kan. 1996) (“The first two requirements address whether *Younger* principles . . . are present.”).

¹²³ See, e.g., Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 248–49 (“It is precisely because state courts can be trusted to uphold federal interests that it is unnecessary for federal courts to intervene and enjoin allegedly unconstitutional proceedings.”); Collins, *supra* note 97, at 51–52; Comm. on Fed. Courts of the N.Y. State Bar Ass’n, *The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, in 122 F.R.D. 89, 106–07 (1988) [hereinafter *Abstention Doctrine*]; Friedman, *Revisionist Theory*, *supra* note 32, at 540 (presumed state court adequacy is a “key ingredient” of *Younger* abstention).

¹²⁴ *Moore v. Sims*, 442 U.S. 415, 430 (1979); see also Weinberg, *supra* note 27, at 1214 (state forum adequacy is the “underpinning” of *Younger*). This primacy is reflected in *Younger* itself, which is expressly premised on the notion that there can be no irreparable injury to a federal claimant as a result of abstention if his or her claim can be resolved in a fair and timely manner by a state tribunal. See *Younger v. Harris*, 401 U.S. 36, 47–48 (1971).

¹²⁵ See, e.g., Althouse, *State Court Resource*, *supra* note 75, at 957–58 (noting that many Supreme Court doctrines, including *Younger* abstention, are predicated on the assumption of parity); Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 244–49 (noting that *Younger* abstention is based on an assumption of parity); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1117–18 (1977) [hereinafter Neuborne, *Myth of Parity*] (“However, by uncritically assuming parity, the Supreme Court has avoided the difficult, but critical, issue of whether concerns for federalism, efficiency, and caseload outweigh the importance of having constitutional claims heard by the more sympathetic and competent forum.”).

¹²⁶ See, e.g., YACKLE, *supra* note 60, at 523 (characterizing *Younger* exceptions as part of a “process model” designed to ensure an adequate state forum); Althouse, *State Court Resource*, *supra* note 75, at 999–1004 (discussing rationale for *Younger* exceptions).

¹²⁷ See, e.g., Bator, *supra* note 27, at 626 (noting that the state court will be allowed to adjudicate only if there was, or will be, a “full and fair opportunity” to litigate the constitutional question in the state court); Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 319–20 (1988) [hereinafter Wells, *Disparity*] (emphasizing that *Younger* is premised on the notion that there is an adequate state forum to hear the federal claim, and that abstention

drawn extensive scholarly criticism.¹²⁸ Commentators frequently reject the notion—implicitly or explicitly—that it is possible, at least in many circumstances, for state forums to provide a sufficiently adequate and unbiased opportunity to litigate a federal claim.¹²⁹

Several point out, for example, the fundamental tension between the second and third *Younger* requirements.¹³⁰ They observe that if a particular state proceeding invokes an important state interest, it is unrealistic to expect a state tribunal to disregard that interest and provide an adequate opportunity to litigate a federal claim where doing so negatively impacts the state's interest.¹³¹ Especially in these sorts of situations, the state forum seems likely to give federal claims short shrift.¹³²

Professor Ann Althouse, while arguing that there was not an important state interest at stake in *Pennzoil*, even has suggested (perhaps tongue-in-cheek) that such “unimportant” cases logically are the type best suited for *Younger* abstention, because they present the smallest concern that the state tribunal will be influenced by the implicated state interest.¹³³ Professor Barry Friedman provides a more earnest view on this issue: “Where the state's interest in the outcome of the dispute is very high, however, so is the potential for state court bias against the federal claimant, because a finding of merit in the federal claimant's constitutional claim often will defeat the state prosecution or enforcement effort.”¹³⁴

Not all *Younger* commentators are as nuanced in their criticism of the adequacy of state tribunals. Many simply reject the underlying presumption that state courts are a fair and unbiased place to adjudicate federal claims. It is not that these commentators think that there is a tension between the second and third *Middlesex* factors, or (for example) that making a litigant argue a federal claim as a defense in a criminal or quasi-criminal state matter puts him or her at a disadvantage vis-à-vis a federal civil plaintiff,¹³⁵ or that abstention cases otherwise present some sort of special difficulty for federal claimants at the state level. These critics just have pervasive doubts that state courts gener-

will be inappropriate if not); see also *Moore*, 442 U.S. at 430 (suggesting that the comity concerns underlying the *Younger* doctrine would be outweighed if state courts were not competent to adjudicate federal claims).

¹²⁸ See Friedman, *Revisionist Theory*, *supra* note 32, at 537–39 & n.36 (cataloguing criticisms based on the notion that state courts cannot adequately protect federal rights).

¹²⁹ *Id.* at 537 n.36; see also Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 483 (1978) [hereinafter Redish, *Younger v. Harris*] (“Harsh reality may justify doubts about the competence of state courts in enforcing federal rights.”).

¹³⁰ See, e.g., Althouse, *Misguided Search*, *supra* note 47, at 1083–84; Friedman, *Revisionist Theory*, *supra* note 32, at 542–43.

¹³¹ Friedman, *Revisionist Theory*, *supra* note 32, at 542–43.

¹³² *Id.*

¹³³ See Althouse, *Misguided Search*, *supra* note 47, at 1083–84.

¹³⁴ See Friedman, *Revisionist Theory*, *supra* note 32, at 542–43.

¹³⁵ Though, of course, some commentators do make this argument. See Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193 (1977); Chemerinsky, *Parity Revisited*, *supra* note 47, at 255.

ally protect federal rights as well as their federal counterparts.¹³⁶ They oppose *Younger* abstention, at least in part, because they believe that it rests on a flawed assumption of state forum adequacy.¹³⁷

Some *Younger* sympathizers belittle this view as nothing more than naked forum-shopping.¹³⁸ They assert that regardless of how *Younger* critics dress their objections, what they really want is to have federal claims heard in a perceived sympathetic forum.¹³⁹ This characterization is unfair, of course. *Younger* critics identify a number of conceptual and legal flaws in the doctrine unrelated to the concern that state tribunals are inadequate to protect federal rights. Professor Martin Redish, for example, has argued at length that *Younger* abstention amounts to the improper judicial veto of the Article III jurisdiction conveyed by Congress in the Civil Rights Act of 1871, the precursor to 42 U.S.C. § 1983.¹⁴⁰ He and other commentators also assert that *Younger* abstention lacks a logically coherent foundation,¹⁴¹ and that several of the proffered basis for the doctrine conflict with one another.¹⁴²

Pro-*Younger* commentators often dismiss these well-taken legal arguments with a wave of the hand. So what, they ask? They assert that in the absence of any policy arguments as to why abstaining in favor of parallel state proceedings is a bad thing, these are unpersuasive technical objections.¹⁴³ And because the systematic state forum inadequacy is the only imaginable reason

¹³⁶ See, e.g., Neuborne, *Myth of Parity*, *supra* note 125, at 1117–18 (arguing that doctrines like *Younger* abstention that assume state court parity are flawed); Redish, *Younger v. Harris*, *supra* note 129, at 483 (“Harsh reality may justify doubts about the competence of state courts in enforcing federal rights.”); Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 897 (1985) [hereinafter Redish, *Supreme Court Review*] (calling assumption of adequacy underlying *Younger* abstention “inaccurate”); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 686 (1987) (*Younger* abstention routinely results in denial of constitutional rights).

¹³⁷ Friedman succinctly summarizes this position in his 1989 article, *A Revisionist Theory of Abstention*, in which he states:

Implicit in every criticism of abstention is the assumption that, absent a federal forum, federal rights will not be vindicated. Abstention’s critics are of the view that state courts are not as sensitive to claims of federal rights as are federal courts. Thus, denial of a federal forum runs the risk of effectively denying the plaintiff a federal right.

Supra note 32, at 537–38 (footnotes omitted).

¹³⁸ See, e.g., *id.* at 530; Wells, *Disparity*, *supra* note 127, at 298 (critics of doctrines such as *Younger* abstention largely base their opposition on the “gap between federal and state courts in their treatment of federal claims”); see also Julie A. Davies, Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases, 20 U.C. DAVIS L. REV. 1, 2–3 (1986) (“Those who believe that federal courts are particularly qualified to protect constitutional claims view abstention as threatening that protection.”).

¹³⁹ See Davies, *supra* note 138, at 2–3.

¹⁴⁰ See Redish, *Limits of the Judicial Function*, *supra* note 32 at 71.

¹⁴¹ See Redish, *Younger v. Harris*, *supra* note 129, at 465.

¹⁴² See Redish, *Supreme Court Review*, *supra* note 136, at 897.

¹⁴³ See Redish, *Limits of the Judicial Function*, *supra* note 32 at 77 (suggesting that the separation-of-powers argument against abstention is a red herring); see also Friedman, *Revisionist Theory*, *supra* note 32, at 537 (“Missing from this summary of the debate, of course, is any explanation of why abstention’s critics believe it matters if a plaintiff is denied a federal forum.”).

that would undercut *Younger* proponents' favorable views of abstention, those supporters assume that this is the true basis of critics' objections.¹⁴⁴

Trying to determine what *Younger* critics (or supporters, for that matter) really believe is a fool's errand. It is also unnecessary. Regardless of whether they are exclusively, or primarily, or merely substantially, motivated by a belief that federal courts treat federal claims more generously, the fact remains that many do actually cite state forum inadequacy as a prominent argument against abstention.¹⁴⁵ *Younger* proponents unfairly disparage this as simple forum-shopping, and they certainly are too quick to dismiss rule-based objections to the doctrine as unpersuasive unless accompanied by policy arguments. But these *Younger* supporters are justified in offering a legitimate response to the also-legitimate objection of *Younger* critics that the doctrine fundamentally is based on the incorrect premise that state courts systematically provide an adequate forum to resolve federal claims. This has always been central to the debate. There is nothing wrong in treating it as such.

B. *The Broader Parity Debate*

Nor is the issue an esoteric discussion of an obscure jurisdictional quirk. The debate over the fundamental *Younger* assumption that state tribunals can competently and fairly adjudicate federal claims was a substantial part of the larger, decades-long argument about federal and state court "parity" that reached a crescendo from the late 1970s until the late 1980s.¹⁴⁶ This broader conversation centered on the question of whether state courts generally can be trusted to adjudicate federal constitutional and statutory rights as well as federal courts, or whether they are indifferent or hostile to such claims.¹⁴⁷ The academic controversy saw such leading federal courts scholars as Professor Redish, on the one hand, argue at length that state courts are both technically less competent than their federal counterparts and more biased against federal

¹⁴⁴ The general belief that opponents are arguing in bad faith runs both ways. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1221 (2004) [hereinafter Friedman, *Allocating Cases*] (discussing the claim that views on parity "merely disguise the expression of nakedly ideological preferences"). For example, there is a sense that some *Younger* critics believe that their opponents are motivated more by a desire to see the expansion of federal constitutional rights halted by hostile state courts, than they are by notions of comity or federalism. See, e.g., Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 254 (discarding this view as unproductive).

¹⁴⁵ See *supra* note 136.

¹⁴⁶ *Infra*, Section II.C.

¹⁴⁷ There is significant debate even over the definition of the term parity. See Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 651–53 (1989) (discussing the various definitions). Professor Erwin Chemerinsky, for example, defines it as "whether, overall, state courts are equal to federal courts in their ability and willingness to protect federal constitutional rights." Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 233 n.1. Professor Michael Solimine, on the other hand, defines it as "the concept that state judges are presumed at some level to be as willing and capable of giving claims of federal rights a fair hearing as would federal judges." Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1457 (2005) [hereinafter Solimine, *Future of Parity*] (internal quotation marks omitted). The description I use here roughly combines the two.

claims.¹⁴⁸ The opposing side featured, at least at the outset, the late and inestimable Professor Paul Bator, who argued that state court detractors mischaracterize many of the forum's purported weaknesses and ignore a number of its advantages.¹⁴⁹

Professor Burt Neuborne's *The Myth of Parity* is widely credited with sparking the debate.¹⁵⁰ He opened his discussion of contemporary institutional considerations on the issue with the following observation:

The Supreme Court, however, presently seems bent on resolving forum allocation decisions by assuming that no factors exist which render federal district courts more effective than state trial or appellate courts for the enforcement of federal constitutional rights. I hope to challenge the Court's present assumptions, and to support my own, by focusing on institutional characteristics relevant to assessing the relative competence of state and federal courts as constitutional enforcement mechanisms.

. . . [B]y uncritically assuming parity, the Supreme Court has avoided the difficult, but critical, issue of whether concerns for federalism, efficiency, and caseload outweigh the importance of having constitutional claims heard by the more sympathetic and competent forum.¹⁵¹

Interest in the topic began to wane by the early 1990s, when most of the parity arguments had been made and participants were mainly speaking past one another. The fact that the federal bench was becoming increasingly dominated by Republican appointees and thus (purportedly) was increasingly hostile to constitutional rights did not encourage continued discourse.¹⁵² This sentiment is perhaps captured best by Professor Chemerinsky in a 1991 article:

During the 1950s and 1960s, the Supreme Court legitimately feared that state courts would frustrate federal decisions protecting civil rights and civil liberties. . . . With conservative Reagan and Bush nominees dominating the federal bench, it is unrealistic to assume that federal courts are more likely than state courts to protect constitutional liberties.¹⁵³

There was modest agreement between the various participants by that time. The general—though not universal—consensus was that there was a “weak parity” between the state and federal courts.¹⁵⁴ State courts are not fun-

¹⁴⁸ See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333–36 (1988) [hereinafter Redish, *Judicial Parity*] (arguing that federal courts are superior at enforcing constitutional rights); see also Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 233–36 (discussing the debate).

¹⁴⁹ See generally Bator, *supra* note 27; Solimine, *Future of Parity*, *supra* note 147, at 1457–61 & nn. 2–3 (discussing Bator's article).

¹⁵⁰ Timothy L. Gartin, *Parity and the Litigation of Private Property Rights in the United States and Germany: Evidence in Support of Chemerinsky's Litigant Choice Principle*, 15 N. ILL. U. L. REV. 747, 750 (1995).

¹⁵¹ Neuborne, *Myth of Parity*, *supra* note 125, at 1117–18 (footnote omitted).

¹⁵² Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 593–94 (1991) [hereinafter Chemerinsky, *Ending the Parity Debate*]; Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797–99 (1995) [hereinafter Neuborne, *Parity Revisited*].

¹⁵³ Chemerinsky, *Ending the Parity Debate*, *supra* note 152, 593–94.

¹⁵⁴ See, e.g., Neuborne, *Parity Revisited*, *supra* note 152, at 797 (acknowledging that he initially envisioned a “weak” parity); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 610–11

gible with federal courts in that they provide identical results in a given case, or that they side for or against federal claimants an equal percentage of the time as their federal counterparts.¹⁵⁵ But at the same time, state courts do rule in the favor of such claimants at a respectable though perhaps numerically inferior clip, and they certainly seem to give federal claimants a bona fide opportunity to present their claims.¹⁵⁶

To be sure, commentators on both sides of the issue strenuously disagree as to whether this is enough. Proponents of the notion that there is sufficient parity view a real but comparatively lesser chance of success as sufficient to conclude that state courts are competent to adjudicate federal claims,¹⁵⁷ while opponents of the proposition believe that a situation where federal courts are more responsive to federal claims is, by definition, the antithesis of state court adequacy.¹⁵⁸ Yet this is more an unresolvable philosophical debate than anything else.

And both sides have their drawbacks. With respect to those who believe that weak parity is sufficient to support the fundamental assumption of state court adequacy, they often fail to identify the inevitable point at which a legitimate but numerically inferior chance of success in state court becomes just too small. Perhaps there is adequate parity if (for example) the federal claimant is two-thirds as likely to prevail in state court as in federal court. But what about half as likely? A third? A tenth? A hundredth? The claimant eventually will face such a numerically arduous road in state court that whatever weak parity exists cannot support the notion that state courts systematically provide an adequate forum to adjudicate federal claims.¹⁵⁹

Those who argue that weak parity is insufficient to support the federal doctrines that assume state court adequacy, on the other hand, tend to ignore litigation realities. Perhaps federal claimants face a somewhat more hostile reception in state court—but is the difference any more attenuated than the one between certain federal courts? And at the risk of perpetuating stereotypes, would it be advisable to have constitutional claims systematically transferred to

(1991) [hereinafter Wells, *Parity Debate*] (arguing that there is general consensus that weak parity exists); Chemerinsky, *Ending the Parity Debate*, *supra* note 152, at 602–03 (conceding that a “milder” form of parity exists, but calling the conclusion incomplete); *see also* Herman, *supra* note 147, at 654–55 (noting that Court jurisprudence seems to accept weak parity).

¹⁵⁵ *See, e.g.*, Herman, *supra* note 147, at 652 (explaining “strong” and “weak” parity); Wells, *Parity Debate*, *supra* note 154, at 610. *But see* Solimine, *Future of Parity*, *supra* note 147, at 1469.

¹⁵⁶ MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* 58–59 (1999) [hereinafter SOLIMINE & WALKER, *RESPECTING STATE COURTS*] (distinguishing between “weak” and “strong” parity).

¹⁵⁷ *See id.* at 58; *see also* Wells, *Disparity*, *supra* note 127, at 313.

¹⁵⁸ *See, e.g.*, Redish, *Supreme Court Review*, *supra* note 136, at 897.

¹⁵⁹ Professor Herman alludes to this in her *Why Parity Matters*, *supra* note 147, at 652. She correctly observes that merely concluding that weak parity exists is not enough to justify federal doctrines that assume parity (such as *Younger*)—instead, at that point, “a range of views exists on the issue of how much federal and state courts must differ before the factor of parity should affect jurisdictional decisions.” *Id.* In other words, the dispositive question is not whether there is strong or weak parity. The question that we should be asking is, given that there appears to be some degree of parity, precisely how weak or strong is it?

the Ninth Circuit from the Fourth or Fifth Circuits if, for example, the latter two were statistically less likely to side with such claimants? At some point, even the most adamant federal court proponent must accept that some courts—even fair, impartial, and competent courts—can intrinsically or subconsciously favor or disfavor some classes of claims.¹⁶⁰ A procedural rule channeling all federal claims to the most sympathetic forum would be both unrealistic and hopelessly unfair to defendants resisting such claims.¹⁶¹

In any event, the debate over parity has not faded away entirely. Law review articles discussing the topic pop up more-or-less regularly,¹⁶² and litigators in the business of asserting novel constitutional claims often chime in to compare their experiences with these new legal theories in state and federal courts.¹⁶³ From the early 1970s to the present, there have been tens of thousands of pages of articles and books dedicated to this debate. I do not attempt to relitigate any of it.

C. *The Centrality of Younger in the Parity Debate, and the Increasing Role of Empirical Analysis*

Nevertheless, there are two important points to emphasize about the overarching question of parity: first, *Younger* abstention was central to the conversation; and second, empirical analysis emerged as a contested but important way to examine the issue. As for the first of these points, it is crucial to note that the *Younger* doctrine was not just some tangentially-related side issue that parity scholars occasionally referenced. To the contrary, the *Younger* doctrine has been cited as one of perhaps two¹⁶⁴ primary examples of Supreme Court jurisprudence that fundamentally rely on an assumption of parity.¹⁶⁵ The parity debate was, in large part, a debate over the propriety and wisdom of *Younger* abstention—and vice versa.

¹⁶⁰ This raises a separate objection. State courts may be relatively hostile to some claims, but some is not all. Would abstention be proper in the remainder of cases?

¹⁶¹ See Bator, *supra* note 27, at 631–35. Professor Bator rejected the notion that any forum automatically favoring federal claimants is superior to one that does not. He argued that constitutional claims are often counterbalanced by other constitutional structural principles, including the separation of powers, and that state courts may well be superior at protecting and enforcing them. Presumably, a rule systematically funneling cases to a forum disfavoring such constitutional principles would be unfair to the state defendants who have a vested interest in interpreting and enforcing their own laws.

¹⁶² See generally Friedman, *Allocating Cases*, *supra* note 144; Solimine, *Future of Parity*, *supra* note 147.

¹⁶³ Gay rights litigation is perhaps the most prominent example of this. In the past decade or so there have been several books and articles suggesting that there is a sense of “reverse parity” at play with respect to these sorts of claims—in other words, state tribunals are actually more protective of gay rights than are their federal counterparts. See, e.g., DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* 110 (2003); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT, 599, 623 (1999).

¹⁶⁴ The other involves how federal courts should resolve Fourth Amendment habeas claims first brought at the state level. See *Stone v. Powell*, 428 U.S. 465, 529 (1976).

¹⁶⁵ See, e.g., Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646–47 (1991) (*Younger* abstention is “where the parity debate in the courts has been fought in recent years.”).

For example, the above quotation from Professor Neuborne's *Myth of Parity* includes two footnotes citing examples of the Court's "uncritical" assumption of parity. The first lists four cases, including *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), in which the Court first applied *Younger* abstention principles to state civil enforcement proceedings.¹⁶⁶ The second is even more explicit. As support for his proposition that the Court has "avoided" weighing federalism and other concerns against the interest in having a sympathetic and competent forum, Neuborne specifically discusses the expansion of the *Younger* doctrine to that point.¹⁶⁷ Based on this observation, he clearly saw *Younger* abstention as one of the principal developments—if not *the* principle development—in Court jurisprudence driving his discussion.

Younger sympathizers were no less sanguine about the implications of the parity debate. Professor Bator, for example, in his article entitled *The State Courts and Federal Constitutional Litigation*, highlighted *Younger* abstention as one of several doctrines designed to "smooth over" federal-state friction by channeling federal claims to state court if—but only if—they would get a full and fair hearing.¹⁶⁸ In their important but controversial 1983 article, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, Professors Michael Solimine and James Walker similarly listed *Younger* abstention first among their examples of jurisprudence that highlights the parity debate.¹⁶⁹ They characterized the doctrine as a "primary focus for the critics of parity."¹⁷⁰

This pattern of *Younger* abstention assuming a central role as the practical manifestation of the parity debate continued in earnest throughout the 1980s and into the 1990s. Professor Chemerinsky echoed the sentiment in his *Parity Reconsidered: Defining a Role for the Federal Judiciary*, in which he called *Younger* expansion "[o]ne of the most important legacies of the Burger Court."¹⁷¹ He argued that *Younger* abstention directly implicated and rejected notions of state court inferiority, and he went on to characterize parity as "a central concern in the Supreme Court's jurisdictional decisions."¹⁷² A vocal proponent of federal-state parity, Professor Michael Wells, similarly has called the *Younger* decision the "primary vehicle" for restricting federal court access under notions of parity.¹⁷³ In sum, the *Younger* doctrine was more than just an outcropping of the larger parity debate; it largely was the debate.¹⁷⁴

¹⁶⁶ See Neuborne, *Myth of Parity*, *supra* note 125, at 1117 n.47.

¹⁶⁷ *Id.* at 1118 n.48.

¹⁶⁸ See Bator, *supra* note 27, at 621–22.

¹⁶⁹ See Solimine & Walker, *Constitutional Litigation*, *supra* note 26, at 216.

¹⁷⁰ *Id.* at 218.

¹⁷¹ Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 248–49.

¹⁷² *Id.* at 249, 253.

¹⁷³ See Michael Wells, *Disparity*, *supra* note 127, at 313.

¹⁷⁴ See, e.g., Herman, *supra* note 147, at 662 (discussing the ramifications of the parity debate on *Younger* abstention, and characterizing it as one of the main practical contexts in which parity arises); see also Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J. L. & PUB. POL'Y 127, 128–29 (1989) [hereinafter Solimine & Walker, *State Court Protection*] (abstention is normally justified or attacked based on arguments over parity).

The second important thing to note about the parity debate is the emergence of empiricism as an analytical tool used to examine the issue. In his 1977 article, Neuborne observed that he “know[s] of no empirical studies that prove (or undermine) [the assumption]” that federal courts are more sympathetic to federal claims.¹⁷⁵ Indeed, in an accompanying footnote he elaborates: “No comparative study of the relative performance of state and federal courts in the enforcement of constitutional rights appears to exist.”¹⁷⁶ Perhaps scholars took this as a challenge,¹⁷⁷ or perhaps it is coincidence, but Neuborne’s remarks soon were proven outdated.

Solimine and Walker unveiled their unprecedented comparative analysis of federal and state adjudication of constitutional claims in a 1983 article.¹⁷⁸ They aggregated over one thousand state appellate and federal trial court decisions involving First, Fourth, and Fourteenth Amendment claims, coded each case according to a number of variables, and then crunched the numbers.¹⁷⁹ The authors reached several interesting conclusions. First and foremost, they found that the studied claims were successful in federal court 41 percent of the time, and in state court 32 percent of the time.¹⁸⁰ This discrepancy was statistically significant, though Solimine and Walker argued that it was not meaningful.¹⁸¹ They further broke down their results by types of claims and found that there was not even a statistically significant difference in state and federal courts’ treatment of some claims.¹⁸²

The study attracted substantial criticism, with Chemerinsky taking the lead role. He argued that by focusing only on court decisions, the authors ignored cases that might settle or not even be filed due to perceived judicial hostility.¹⁸³ He theorized that the state court decisions examined by Solimine and Walker would be self-selected to be the most meritorious constitutional claims because litigants would have abandoned them otherwise—and vice versa for federal cases and less meritorious claims.¹⁸⁴ The results thus would skew toward federal claimants in state court and against them in federal court, suggesting a misleadingly small discrepancy.¹⁸⁵

Chemerinsky also objected to the study because it conflated civil and criminal cases and challenges to state and federal statutes.¹⁸⁶ He argued that differences in the likelihood that a state or federal legislature would enact an unconstitutional statute, as well as differences in how courts treat a constitu-

¹⁷⁵ Neuborne, *Myth of Parity*, *supra* note 125, at 1116.

¹⁷⁶ *Id.* at n.46.

¹⁷⁷ 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, 249–51 (1999) (attributing subsequent empirical parity studies to Neuborne’s observation).

¹⁷⁸ Solimine & Walker, *Constitutional Litigation*, *supra* note 26, at 213.

¹⁷⁹ *Id.* at 232–46.

¹⁸⁰ *Id.* at 240.

¹⁸¹ *Id.* at 241.

¹⁸² *Id.* at 242–46.

¹⁸³ Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 262.

¹⁸⁴ *Id.* at 262–63.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 263–64.

tional claim versus a constitutional defense, would substantially skew the results.¹⁸⁷ Another of his many criticisms was that the study compared federal trial courts with state appellate courts, which (he concluded) is a flawed apples-to-oranges comparison.¹⁸⁸ In the end, Chemerinsky fundamentally rejected that parity could ever be empirically measured.¹⁸⁹

The general criticism of empirical analysis has been echoed by a number of scholars on both sides of the parity debate. Bator, for his part, essentially viewed the anti-parity arguments as non-empirical in nature.¹⁹⁰ Professor Redish doubted that the issue of parity could ever benefit much from empirical analysis,¹⁹¹ which was a view that has been shared by more recent commentators.¹⁹² And specifically with respect to Solimine and Walker's study, scholars who were dubious about the existence of parity in the first place were nearly as critical as Chemerinsky about their purported empirical demonstration of it.¹⁹³ Solimine and Walker's study has even drawn criticism from otherwise sympathetic commentators for its purported use of "rudimentary" statistical methods.¹⁹⁴

Yet despite these misgivings, the empiricists have persisted as an important voice in the parity debate. A smattering of empirical studies comparing state and federal court outcomes popped up in the aftermath of Solimine and Walker's article.¹⁹⁵ Not all of them reached the same conclusion as Solimine and Walker did. Professor Thomas Marvell conducted a survey in 1984 of attorneys who had been involved in student rights litigation in state or federal court.¹⁹⁶ He reported that the lawyers generally viewed federal courts as more receptive to students' constitutional claims, and that attorneys asserting such claims chose federal court far more frequently than their opponents.¹⁹⁷

Solimine followed up on his 1983 article with a similarly-purposed empirical study in 1991 in which he compared the treatment of section 1983 claims in state and federal courts during 1987.¹⁹⁸ This piece was not nearly as compre-

¹⁸⁷ *Id.* at 264.

¹⁸⁸ *Id.* at 267.

¹⁸⁹ *Id.* at 262. Solimine and Walker responded to these methodological criticisms in a 1989 article. See Solimine & Walker, *State Court Protection*, *supra* note 174, at 141–42.

¹⁹⁰ See Bator, *supra* note 27, at 623. Though it should be pointed out that Professor Bator made this observation prior to Solimine and Walker's study.

¹⁹¹ See generally Redish, *Judicial Parity*, *supra* note 148 (broadly agreeing with Chemerinsky that parity cannot be empirically proven).

¹⁹² See Friedman, *Allocating Cases*, *supra* note 144, at 1221 n.25 (cataloguing authorities doubting that parity can be empirically demonstrated).

¹⁹³ See, e.g., Herman, *supra* note 147, at 658 n.29; Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1337–39 (1984); Redish, *Judicial Parity*, *supra* note 148, at 332 (agreeing with Chemerinsky's criticisms of the Solimine and Walker study).

¹⁹⁴ See PINELLO, *supra* note 163, at 107.

¹⁹⁵ See Gerry, *supra* note 177, at 253–57 (generally discussing the actions of state courts when deciding constitutional claims).

¹⁹⁶ See Marvell, *supra* note 193, at 1343–52.

¹⁹⁷ *Id.* at 1371–72. Professor Marvell found that at least half of the lawyers representing students chose federal court, whereas only one-seventh of the lawyers representing schools did the same.

¹⁹⁸ See Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 415 (1991) [hereinafter Solimine, *Exclusive Federal Jurisdiction*].

hensive as his prior effort, and he only included 114 state and 20 federal opinions in his analysis.¹⁹⁹ Nonetheless, Solimine's conclusion echoed his previous finding that there was little meaningful difference in how often the federal claimant prevailed.²⁰⁰

A few more recent commentators attempted the sort of comparative analysis first employed by Solimine and Walker, though there has been surprisingly little work on the topic.²⁰¹ In 1999, Brett C. Gerry, then a clerk for Judge Silberman on the D.C. Circuit (and subsequently Justice Kennedy on the Supreme Court) and now apparently an Assistant Attorney General with the Department of Justice, undertook a study to empirically explore how state courts were reacting to the significant Supreme Court decision in *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987). *Nollan* fundamentally altered the scrutiny applied in takings cases, but it also left a number of unanswered questions about the deference to be afforded to governments exercising their eminent domain powers and how narrowly or broadly the decision should be construed.²⁰² Gerry examined how state or federal courts were answering these outstanding issues and concluded that there generally was no difference in their treatment, regardless of the forum.²⁰³ In 2003, Professor Daniel Pinello published a book empirically examining the treatment of gay rights claimants over two decades.²⁰⁴ He found that state tribunals sided with the federal claimants much more often than did federal courts (47.2 percent to 30.2 percent).²⁰⁵

III. THE SURVEY

A. Existing Empirical or Quantitative Studies Focusing on Abstention (and Lack Thereof)

The last two points bear repeating. First, the *Younger* doctrine was central to the broader conversation about parity, and second, empirical analysis became a controversial but important analytical tool to address that overarching issue. Given these facts, one might suspect that there is at least a modest commentary

¹⁹⁹ *Id.* at 415–18.

²⁰⁰ *Id.* at 419.

²⁰¹ See PINELLO, *supra* note 163, at 106–08 (observing that only the Solimine and Walker, Solimine, and Gerry studies involve a comparative aspect); Gerry, *supra* note 177, at 251 (discussing paucity of empirical literature). Far more common have been studies focusing on how state courts resolve claims under state or federal laws without comparing that to federal courts' performance. For example, in 1988, Professor Craig Bradley published an empirical study examining how state courts were applying and enforcing Fourth Amendment search and seizure protections, as interpreted by the Supreme Court. See generally Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L. J. 251 (1988). In a particularly broad 1992 study, Professors Craig Emmert and Carol Ann Traut examined nearly 3,000 state court decisions involving the facial constitutionality of state statutes. They observed that the statute in question was ruled unconstitutional 5.4 percent of the time on federal grounds, 9.0 percent of the time on state grounds, and 4.5 percent of the time on both grounds. See Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 42 (1992).

²⁰² See Gerry, *supra* note 177, at 260–64.

²⁰³ *Id.* at 284–85.

²⁰⁴ See PINELLO, *supra* note 163, at 116.

²⁰⁵ *Id.* at 111.

applying an empirical approach to *Younger* cases to explore the parity question directly in the abstention context.

That logical suspicion would be wrong. There has not been a single study to date comparing how federal courts and state tribunals resolve the federal claims raised in *Younger* cases after the initial federal court either decides to abstain and effectively remands the matter to a state forum, or declines to abstain and keeps the case.²⁰⁶ In fact, the entire academic *Younger* field is largely devoid of any empirical or even basic quantitative analysis that might help academics and practitioners understand when and why courts are abstaining, and what happens after abstention.

The only works to even tangentially approach *Younger* abstention from an empirical perspective are a 1982 article by Professor Theodore Eisenberg,²⁰⁷ a 1988 student note by David Mason in which he expanded on Professor Eisenberg's data,²⁰⁸ the 2003 article by Professor Birdsong,²⁰⁹ and a 1988 study conducted by the Committee on Federal Courts of the New York State Bar Association.²¹⁰

Eisenberg's piece presented the results of an empirical analysis of section 1983 claims resolved in unpublished decisions by a single federal district court from 1975–1976.²¹¹ He included a brief discussion of the results of abstention arguments in such cases, but he does not distinguish between different types of abstention, and his anecdotal discussion of various cases implies that the vast majority involved *Pullman* abstention.²¹² It thus is difficult to draw any empirical conclusions about *Younger* abstention from Eisenberg's work.

Mason's note, which used the raw data from Eisenberg's 1982 article as well as two more of Eisenberg's studies not involving abstention,²¹³ actually focused on the *Younger* doctrine, but it nonetheless suffers from the same

²⁰⁶ This lack of interest in what happens after *Younger* abstention is not limited to the empirical context. As noted above, the federal plaintiff in the *Younger* case itself successfully pursued his federal constitutional claims in state court after abstention—yet very few commentators (and virtually none of the canonical ones) acknowledge it. *But see* WRIGHT ET AL., *supra* note 49, § 4251 at n.22 (noting that Harris was ultimately successful in state court). One possible explanation for the disinterest, suggested by Professor Solimine in correspondence, is that scholars generally view the issue of *Younger* abstention as settled. This is for good reason—the Supreme Court has shown little inclination to revisit the doctrine in the two decades since *NOPSI*, its last major *Younger* decision.

²⁰⁷ *See generally* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

²⁰⁸ *See generally* David Mason, Note, *Slogan or Substance? Understanding “Our Federalism” and Younger Abstention*, 73 CORNELL L. REV. 852 (1988).

²⁰⁹ *See generally* Birdsong, *supra* note 62.

²¹⁰ *See generally* *Abstention Doctrine*, *supra* note 123.

²¹¹ *See generally* Eisenberg, *supra* note 207.

²¹² *Id.* at 539–43. This should not be surprising, given that Eisenberg was looking at a period predating *Younger* expansion.

²¹³ Specifically, Mason used the data from Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642–43 (1987), and Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 720 (1988). These studies also looked at the performance of a few federal district courts over a small period (typically less than two years), but they did not focus on abstention.

flaws. First, Mason also commingles the data involving various types of abstention, thus rendering it unhelpful for a *Younger*-specific analysis.²¹⁴ Second, all of the data comes from time periods during 1975–1976 or 1980–1981, which largely predate the expansion of the *Younger* doctrine.²¹⁵ Nonetheless, this was a laudable step towards the goal of at least trying to determine how often *Younger* abstention is pled and granted.

Birdsong's purpose was less ambitious. He merely catalogued *Younger* abstention circuit court decisions from 2000 to 2003 and concluded that in those 29 cases the appellate courts ultimately abstained 44.8 percent of the time.²¹⁶ Birdsong then discussed a number of these *Younger* cases in detail but made no effort to determine why, statistically speaking, courts decided to abstain under *Younger* (or not), or how the underlying federal claims were resolved after an abstention determination.²¹⁷

The last attempt to empirically examine the *Younger* doctrine, the New York State Bar report from 1988, held the most potential to reach the question that is this Article's focus. The Committee on Federal Courts sent an extensive questionnaire out to certain practitioners inquiring about their experience with abstention.²¹⁸ A subsequent article by Professor Georgene Vairo, chairperson of the drafting subcommittee, disclosed that 39 such questionnaires were sent to counsel-of-record in *Younger* abstention decisions handed down by the Second Circuit since 1971, and that approximately half of the attorneys responded.²¹⁹ It specifically asked participants whether and how the federal claim asserted in the federal lawsuit was resolved by a state court after abstention²²⁰—obviously the type of information that is relevant to the question of whether state tribunals systematically provide a fair and adequate forum to resolve federal claims as assumed by the *Younger* doctrine. However, the committee report did not provide these survey results.²²¹

It is difficult to understand why there has been so little interest in analyzing *Younger* abstention from an empirical or quantitative perspective. Counting cases is not hard, after all. For example, as previously noted, in the 368

²¹⁴ See Mason, *supra* note 208, at 858. My suspicion is that this is because Eisenberg did not distinguish between the various types of abstention when he collected the data—and since this was not his focus, why should he? Regardless, Mason argues that the “distortion” is insignificant, but this cannot be true. As noted above, *Younger* abstention appears to be granted far more routinely than other types of abstention, *supra* note 62, and Eisenberg's 1982 data suggests that at least in the mid-1970s *Pullman* abstention was invoked far more frequently, *supra* note 207, so aggregating the various types of abstention requests almost certainly would substantially skew the results.

²¹⁵ This is more excusable, given that Mason was writing in 1988. Mason, *supra* note 208, at 858.

²¹⁶ This roughly corresponds to the results described herein, which found a 51.6 percent success rate in 368 reported circuit and district court opinions. *Infra*, Section III.C (Tables A and B).

²¹⁷ Birdsong, *supra* note 62, at 411–18. This is not to suggest that Birdsong should be faulted for the omission. It was not his focus.

²¹⁸ See Vairo, *supra* note 32, at 189 n.122.

²¹⁹ *Id.*

²²⁰ *Abstention Doctrine*, *supra* note 123, at 108–09.

²²¹ I contacted Professor Vairo to inquire as to whether she had access to this data. Her response was very generous and gracious, but unfortunately she could not locate the results.

reported decisions (235 trial and 133 appellate) from 1995 to 2006 identified by this Article's methodology in which there was a definitive abstention ruling, parties seeking *Younger* abstention prevailed 51.6 percent of the time and lost 48.4 percent of the time.²²² And when a court declined to abstain, it was because: (1) the first *Middlesex* factor was not met 56.2 percent of the time (27.1 percent of all *Younger* cases); (2) the second *Middlesex* factor was not met 12.4 percent of the time (6.0 percent of all *Younger* cases); (3) the third *Middlesex* factor was not met 32.0 percent of the time (15.5 percent of all *Younger* cases); and (4) an exception applied 16.9 percent of the time (8.2 percent of all *Younger* cases).²²³

It is tedious but not particularly difficult to gather this primitive data. But it surely must be informative and helpful for practitioners and abstention commentators alike—yet except for the partial exceptions discussed above, no one seems to have ever attempted to compile it. Why not? The absence of any numerical sense of how often *Younger* abstention is granted and why it is most frequently declined only heightens the importance and influence of conventional wisdom. And this wisdom, after all, may not be correct.²²⁴

And this says nothing of perhaps the most interesting question implicated by *Younger* abstention: If the doctrine is premised on the assumption that state forums can systematically provide an adequate and unbiased opportunity to resolve federal claims, what actually happens in the relevant state proceedings after abstention? And how does that compare with what happens in federal court after an anti-abstention ruling? This Article attempts to fill in the gap in the literature and answer those queries. It presents below the results of a survey comparing the disposition of federal claims asserted in state tribunals and federal courts after *Younger* litigation from 1995 to 2006.

B. Purpose, Methodology, Typology, and Problems

1. Purpose of the Survey

My primary intent in undertaking this survey was to conduct an observational or descriptive study only, with all of the limitations that this type of survey implies.²²⁵ The goal was to try to answer the straightforward questions posed immediately above. I was (and am) not trying to examine what specific factors or variables affect the resolution of federal claims in the abstention context, and I especially am not arguing that the post-abstention forum has any sort

²²² The specific breakdown of success rates in federal district and appellate courts were 47.7 percent and 58.6 percent, respectively. *Infra*, at Section III.C.

²²³ Anti-abstention decisions frequently cite multiple *Younger* requirements as not being met or exceptions as applying, which is why the summed percentages are greater than 100 percent.

²²⁴ See, e.g., Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 122 (2009).

²²⁵ In such studies, variation among variables is observed but not manipulated. Thus, there is always a significant risk that an observed correlation should be attributed to a third unmeasured variable. See ROGER BAKEMAN, UNDERSTANDING SOCIAL SCIENCE STATISTICS: A SPREADSHEET APPROACH 57–58 (1992). Observational or descriptive studies therefore are best used to formulate hypotheses that can then be tested through more rigorous quantitative analysis. *Id.*

of predictive value with respect to this resolution. Nor do I contend that the survey results are evidence for either side in the parity debate—to the contrary, as explained below, I substantially doubt that this is the case.²²⁶

It is also important to note that my search parameters were intended to capture the majority of reported *Younger* abstention decisions in a given year, but they were not meant to be exhaustive. There are a number of additional West abstention headnotes that were not searched, and I did not conduct text searches in the cases themselves to identify unreported decisions. My goal was only to find a representative sample of reported *Younger* abstention decisions, not the entire universe of them. That task is worthwhile and an ultimate research goal, but it remains for another day.

Finally, I should caution that my data analysis is highly simplistic at this point. I did not perform the sort of sophisticated multivariate analysis that has become the hallmark of the “ELS” movement, but instead merely tested for statistical significance and correlation. Professors Solimine and Walker were criticized for their “rudimentary” statistical methods;²²⁷ that criticism certainly applies here.

2. Methodology

The survey encompasses a twelve year period from 1995 to 2006. This was arbitrary—I initially intended to look at the decade from 1996 to 2005 but added an additional year at each end to gather more data. I stopped then because it was becoming increasingly difficult to determine the outcome of state tribunal proceedings in the earlier years due to the unavailability of state court and administrative decisions, and for the later years, final state decisions were extending into 2010.²²⁸ I selected potential abstention decisions through Westlaw searches of three West abstention headnotes: “Nature and grounds in general” (170Bk41 k), “Constitutional and federal questions, abstention” (170Bk46 k), and “Particular Cases and Subjects, Abstention – In General” (170Bk47.1 k).²²⁹ I restricted the searches to headnotes to focus on decisions in

²²⁶ See *infra* Section IV.B.

²²⁷ See PINELLO, *supra* note 163, at 107.

²²⁸ State litigation process can take years to run its course after abstention. See, e.g., *JMM Corp. v. District of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004). The *JMM* case involved efforts by the Washington D.C. Office of Zoning to close an adult video store. *Id.* at 1119–20. The store filed a lawsuit in 2002 to halt the zoning proceedings, but *Younger* litigation delayed matters until 2004 and it was not actually closed until September 2007. *Id.*; see Moira E. McLaughlin, *Zoning Board Told to Close Video Store*, WASH. POST (Sept. 27, 2007), <http://www.washingtonpost.com/wp-yn/content/article/2007/09/26/AR2007092600770.html>.

²²⁹ These were three of the four most populated abstention headnotes. Using a search for [Younger & (1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006)] and looking at the raw number of hits (which include multiple repeated and overlapping entries), the first of these (170Bk41 k) has by far the most entries at 591—nearly twice as many as the second (170Bk46 k, with 316), which I also used. The third most populous abstention headnote was the “Particular Cases and Subjects, Abstention – Injunctions in General” (170Bk54 k) headnote, with 245 entries. I chose the fourth most populous headnote (170Bk47.1 k, with 191 entries) instead, due to concerns that the “Injunctions” headnote would skew in favor of pro-abstention decisions.

which *Younger* abstention featured prominently (thus warranting such a headnote).²³⁰

I typically went year-by-year, working backward. I searched for the terms “Younger” and the relevant year for all federal trial and appellate cases in all three headnote categories.²³¹ Based on an informal review of a few random years,²³² these search parameters seem to have located the vast majority of the reported decisions, though there are a sizeable number of unreported decisions not included in my analysis.

Once the sample of *Younger* decisions for the particular year being studied was selected, I reviewed them on a case-by-case basis. Twenty-eight decisions did not reach a definitive abstention result and were discarded. This included instances where the court decided not to rule for or against the abstention request,²³³ or where it mostly decided that another form of abstention applied (or did not) but observed in an aside that *Younger* abstention might be appropriate (or was not).²³⁴ Several variables determined how the remaining 368 decisions were classified.

First, I assigned each decision to the pro- or anti-abstention, and trial or appellate categories. Then, I sorted each decision based on whether the resolution of the federal claim after abstention proceedings was clear (*i.e.*, whether it was identifiably accepted, denied, or not decided). If I could identify what happened after the abstention decision, it was then classified based on whether the claim was actually decided. Finally, I classified “decided” decisions based on whether the federal claim was successful.

This last classification was the most difficult, or at least time-consuming. The ultimate disposition of a federal claim in federal court after an anti-absten-

²³⁰ This generally meant that my searches only identified published opinions included in the Federal Supplement (223 decisions), the Federal Rules Decisions (6 decisions), West’s Bankruptcy Reporter (7 decisions), and the Federal Reporter (116 decisions), and unpublished but reported opinions included in the Federal Appendix reporter (16 decisions), all of which are assigned headnotes by West Publishing. (No Supreme Court decisions were identified by my methodology.) It also appears that West began assigning headnotes to a few unpublished and unreported federal district court decisions from isolated districts starting around 2002, and seven such trial decisions were identified by my search methodology. In order to maintain some degree of uniformity in my sample, however, I chose from the outset to exclude this handful of unpublished and unreported trial decisions.

²³¹ For example, [Younger & 2000] for the year 2000. The first headnote search generally provided the vast majority of the unique decisions used in the survey. The other two headnotes overlapped substantially, but they usually identified an additional 10 percent or so each. To pick a few years at random, in 2001 the first headnote uncovered 38 of the decisions, the second headnote did not identify any additional ones, and the third headnote identified five. In 2000, the first headnote encompassed 22 of the decisions, the second headnote identified an additional three, and the third headnote again uncovered five.

²³² Specifically, I searched for [Younger w/3 abstention] from 1999 to 2001 in all reported circuit and district court decisions. I then skimmed the resulting cases to see if the court reached a definitive abstention holding. My three headnote searches appear to have picked up the lion’s share of the reported decisions that did so.

²³³ See, *e.g.*, *Sica v. Connecticut*, 331 F. Supp. 2d 82, 87 (D. Conn. 2004) (referring case back to the magistrate for an evidentiary hearing to determine if the bad faith exception applied).

²³⁴ See, *e.g.*, *Johnson v. Schnelz*, 385 F. Supp. 2d 613, 616 n.2 (E.D. Mich. 2005) (abstaining under *Rooker-Feldman* but noting that *Younger* might also apply).

tion decision, for the most part, was not difficult to figure out. That result frequently was identified in the decision itself, or in a subsequent summary judgment motion or an appeal. It was clear whether and how a federal claim was resolved for 79.2 percent of the anti-abstention decisions.²³⁵

State tribunals are another story entirely. It was much harder to determine what happened in these proceedings after a post-abstention decision. My goal was to employ a consistent and standardized research approach as much as possible. First, a handful of the decisions themselves reported the result of by-then-completed state judicial proceedings.²³⁶ For the rest I reviewed the Westlaw case history for subsequent appellate or related federal court proceedings. Appeals of district court abstention decisions sometimes disclosed how the state proceedings unfolded after the trial court effectively remanded the case to state court;²³⁷ subsequent related district court decisions occasionally did the same.²³⁸ If the federal case history was not helpful, I searched for state decisions in the applicable state case databases. This search typically included party names, case numbers (if known), and unique keywords from the federal opinion that might help locate a parallel state court decision.²³⁹ It identified the majority of state decisions included in the survey.

If those steps were unsuccessful, and the matter was an administrative proceeding, I would go to the applicable state agency website to see if it maintained a database of decisions.²⁴⁰ Finally, where none of these steps helped locate a state result, I used a commercial online search engine to look for party names and other relevant key words. This sometimes located news reports concerning the case. Most often it reported a settlement, but sometimes the account

²³⁵ I suspect that most of the remaining anti-abstention cases settled after the abstention litigation, but this hypothesis requires more research to confirm. There was an unexplainable (and statistically significant) discrepancy between trial and appellate decisions—I could determine what happened in 83.7 percent of the former, but only 69.1 percent of the latter.

²³⁶ See, e.g., *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 519–21 (5th Cir. 2004) (abstaining in favor of completed state proceedings challenging the contested subpoenas); *Bess v. Spitzer*, 459 F. Supp. 2d 191, 204 (E.D.N.Y. 2006). This was the case for nine of the 53 (17.0 percent) pro-abstention cases with an identifiable federal claim disposition. There were two additional cases in which the state proceedings concluded after briefing but prior to the abstention decision, and the federal court seems unaware of the result.

²³⁷ See, e.g., *Dorsett Felicelli, Inc. v. Cnty. of Clinton*, 349 F. Supp. 2d 355 (N.D.N.Y. 2004) (abstaining from deciding a § 1983 claim in favor of pending state proceedings); *Dorsett-Felicelli, Inc. v. Cnty. of Clinton*, 305 Fed. Appx. 685, 686–87 (2d Cir. 2008) (noting that the state proceedings were resolved solely on procedural grounds without deciding the federal claim).

²³⁸ See, e.g., *Levich v. Liberty Cent. Sch. Dist.*, 258 F. Supp. 2d 339, 342–44 (S.D.N.Y. 2003) (abstaining in favor of ongoing administrative proceedings); *Levich v. Liberty Cent. Sch. Dist.*, 361 F. Supp. 2d 151, 156–57 (S.D.N.Y. 2004) (noting that the administrative proceedings had rejected the plaintiff's First Amendment claims).

²³⁹ To the extent that multiple state decisions addressed the federal claim, I classified the claim based on the last, final judgment in the case. See, e.g., *Colonial First Prop., LLC v. Henrico Cnty., Va.*, 166 F. Supp. 2d 1070, 1091 (E.D. Va. 2001) (abstaining from hearing a constitutional challenge to an anti-nudity ordinance); *Boyd v. Cnty. of Henrico*, 581 S.E.2d 863, 870–71 (Va. App. 2003) (invalidating ordinance on constitutional grounds); *Boyd v. Cnty. of Henrico*, 592 S.E.2d 768, 772 (Va. Ct. App. 2004) (reversing decision *en banc*).

²⁴⁰ This was especially helpful with respect to state bar proceedings, which frequently are available online. See *Bendel*, Case No. 00-O-13391-RAH, at 14–17.

disclosed a state decision that was not otherwise included in any searchable legal database. If all of these search methods were unsuccessful, I classified the decision as “unclear.”

3. *Typology*

The classification of a number of decisions required a judgment call. First, the most controversial, and the one that caused the most hesitation: each federal abstention decision constitutes a unique data point in the overall results. This means, for example, that if a trial court granted abstention in a decision included by the search methodology, and that result was upheld in a reported appeal also included in the survey, those decisions were each included in the aggregate survey results. Thus, if the subsequent state proceedings resolved the federal claim, the post-abstention outcome was “double counted” in the final overall tally.

This classification may seem questionable, and I wavered over the issue, but I chose the approach for two reasons. The first is that this classification seems the most consistent with the purpose behind my survey—I was looking at what happened to federal claims after each *Younger* abstention decision. In other words, my intent was to see what happens whenever a federal court determines that parallel state proceedings are an adequate forum to adjudicate an asserted claim. This necessarily implies a decision-by-decision focus; the fact that two such decisions correspond to the same underlying post-abstention outcome does not change the answer to the ultimate question and (I argue) should not affect how each decision is evaluated on a stand-alone basis.

The second reason to use each federal decision as a unique data point in the final aggregate tally is more practical. Given the various permutations of trial and appellate court decisions in a given case, simply counting each decision as a separate and unique occurrence was the most straightforward way to classify the data.²⁴¹ And in any event, the number of double counted data points is small: there were four pro-abstention decisions appearing twice in the “federal claim rejected” category.²⁴² If counted as single events, they would increase the success rate for federal claimants in a state tribunal from 15.1 percent to 16.3 percent. Similarly, there were two double counted anti-absten-

²⁴¹ Consider, for example, an anti-abstention decision that is reversed on appeal. Under my methodology, the classification is simple—the trial court decision is a “no abstention” one, with the post-abstention resolution of the federal claim classified however it was decided prior to reversal (or “not decided” if it was not resolved prior to then). The appellate decision, if included, is a separate and distinct pro-abstention decision, with the disposition of the federal claim classified however it is resolved afterward at the state level. It is unclear how an approach that evaluates unique cases rather than decisions would treat this scenario.

²⁴² See, e.g., *Lui v. Comm’n on Adult Entm’t Establishment of Del.*, 369 F.3d 319 (3d Cir. 2004); *Lui v. Comm’n on Adult Entm’t Establishment of Del.*, 213 F.R.D. 166 (D. Del. 2003); *Colonial First Prop., LLC v. Henrico Cnty. Va.*, 236 F. Supp. 2d 588 (E.D. Va. 2002); *Colonial First Prop., LLC v. Henrico Cnty. Va.*, 166 F. Supp. 2d 1070 (E.D. Va. 2001); *Carroll v. City of Mt. Clemens*, 139 F.3d 1072 (6th Cir. 1998); *Carroll v. City of Mt. Clemens*, 945 F. Supp. 1071 (E.D. Mich. 1996); *Commc’ns Telesys. Intl. v. Cal. Pub. Util. Comm’n*, 14 F. Supp. 2d 1165 (N.D. Cal. 1998); *Commc’ns Telesys. Intl. v. Cal. Pub. Util. Comm’n*, 196 F.3d 1011 (9th Cir. 1999).

tion decisions in the “federal claim accepted” category.²⁴³ Counting each singularly would decrease the success rate for federal claimants in post-abstention federal proceedings from 43.6 percent to 42.1 percent. (There were no double-counted cases in any other “decided” categories.) Finally, to avoid any confusion, separate results for trial and appellate abstention decisions are presented with the aggregate results wherever possible.

The rest of the classification rules are more straightforward. In a few cases involving multiple federal claims, some prevailed and some did not. For these, I tried to determine whether the relief fundamentally sought by the federal claim, or opposed with a federal defense, was substantially granted.²⁴⁴ For example, if a judge or lawyer opposed disbarment or removal from the bench on multiple federal grounds and was partially successful, the decision’s classification depended on whether he or she was ultimately disbarred or removed as a result of an unsuccessful federal defense.²⁴⁵

Trying to determine whether a federal claim was actually raised and adjudicated also required a judgment call at times. Some of the more arguable ones are as follows: A federal claim was classified as “decided” if it was affirmatively raised in the post-abstention proceedings but was rejected without elaboration.²⁴⁶ A federal claim was classified as “not decided” if the post-abstention court or tribunal ruled against the claimant on purely procedural grounds or other substantive grounds,²⁴⁷ even if the claim was clearly raised.²⁴⁸ A federal

²⁴³ See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *Hartford Courant Co. v. Pellegrino*, 290 F. Supp. 2d 265 (D. Conn. 2003); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202 (10th Cir. 2003); *Winnebago Tribe of Neb. v. Stovall*, 205 F. Supp. 2d 1217 (D. Kan. 2002).

²⁴⁴ See *Cooper v. Parrish*, 20 F. Supp. 2d 1204, 1211 (W.D. Tenn. 1998) (raising “litany” of constitutional complaints related to Tennessee nude dancing ordinance); *State ex rel. Gibbons v. Jackson*, 16 S.W.3d 797, 804 (Tenn. Ct. App. 1999) (rejecting some constitutional claims but ultimately refusing to enforce statute solely on First Amendment grounds); *Carroll*, 945 F. Supp. at 1075 (abstaining from adjudicating damages claim under Takings Clause and Fair Housing Act in connection with town zoning action); *Carroll*, 139 F.3d at 1075 (same as to FHA claim); *City of Mt. Clemens v. Carroll*, No. 219085, 2001 WL 738484, at *4 (Mich. Ct. App. Jun 29, 2001) (rejecting all federal damages claims but upholding prior state court injunction of enforcement of zoning code on rational basis grounds). I included *Cooper* in the “federal claim accepted” category, and the *Carroll* decisions in the “federal claim rejected” category.

²⁴⁵ See, e.g., *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 351 F.3d 65, 85 (2d Cir. 2003) (abstaining in favor of pending judicial misconduct proceedings); *In re Thomas J. Spargo, N.Y. State Comm’n on Judicial Conduct* (March 29, 2006), available at <http://www.scjc.state.ny.us/Determinations/S/spargo.htm> (ruling against judge on some but not all ethics charges and removing him); *Spargo v. N.Y. State Comm’n on Judicial Conduct*, 803 N.Y.S.2d 742, 744 (App. Div. 2005) (rejecting First Amendment ethics defenses).

²⁴⁶ See *Jou v. Chang*, 350 F. Supp. 2d 862, 871 (D. Haw. 2004); *Jou v. Chang*, 155 P.3d 690 (Haw. Ct. App. 2006) (rejecting plaintiff’s constitutional challenges as meritless without discussion).

²⁴⁷ See, e.g., *Yamaha Motor Corp. v. Stroud*, 179 F.3d 598, 600 (8th Cir. 1999) (abstaining from considering § 1983 claims); *Yamaha Motor Corp. v. Richard’s Honda Yamaha*, 38 S.W.3d 356, 363 (Ark. 2001) (deciding case solely on state grounds); see also *Wis. Mfrs. & Commerce v. Wis. Elections Bd.*, 978 F. Supp. 1200, 1203 (W.D. Wis. 1997) (abstaining from First Amendment claim concerning Wisconsin political advertising regulatory proceedings); *Elections Bd. of Wis. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 731–35 (Wis. 1999) (declining to rule on First Amendment claim and instead invalidating the challenged

claim was classified as “unclear” even where there were identifiable post-abstention proceedings if it was not clear whether it was affirmatively raised, or if the decision resolving the post-abstention proceedings was ambiguous as to whether it was addressing the claim.²⁴⁹ If a case settled or an abstention decision was overturned²⁵⁰ after an initial decision or interlocutory appeal (temporarily) resolved the claim, the abstention decision was classified based on that resolution. If the case settled or the abstention decision was reversed prior to such a resolution, the claim was classified as “not decided.”²⁵¹

4. Methodological Problems

The foregoing methodology should implicate several concerns. First, the survey only considers reported decisions, and it excludes a sizeable number of unreported decisions involving *Younger* abstention. To the extent that ignoring these unreported decisions causes my data to skew towards or against the party requesting abstention—and there certainly is a plausible argument that a pro-abstention decision will be more likely to be published than an anti-abstention one²⁵²—then that bias will be reflected. The flip side is that this reflected bias

proceedings as impermissible retroactive rulemaking). I initially classified the *WMC* decision as “accepted,” but on closer inspection I determined that the Wisconsin Supreme Court was not endorsing the First Amendment claim asserted in the federal lawsuit. To the contrary, it expressly declined to reach that result because the regulation at issue constituted impermissible retroactive rulemaking. *Id.* at 736.

²⁴⁸ See, e.g., *Weitzel v. Div. of Occupational & Prof'l Licensing*, Dep't of Commerce of Utah, 240 F.3d 871, 876 (10th Cir. 2001) (abstaining from hearing federal claim); *Weitzel v. Utah Dep't of Commerce*, No. 20000516-CA, 2001 WL 312394, at *1 (Utah Ct. App. Feb. 1, 2001) (refusing to address licensee's constitutional claims for procedural reasons). I also wavered on *Weitzel* because the plaintiff was so insistent on raising his federal claims. I ultimately classified the decision as “not decided” because the Utah courts were equally steadfast in refusing to consider them.

²⁴⁹ See, e.g., *Majors v. Engelbrecht*, 149 F.3d 709 (7th Cir. 1998) (unclear whether federal claims were raised in administrative proceedings and whether state lawsuit raising claims was ever resolved).

²⁵⁰ Most post-abstention proceedings did not reach final decision before the abstention ruling was reversed. Only two decisions seem to fall in this category. See *Harper v. Pub. Serv. Comm'n of W. Va.*, 291 F. Supp. 2d 443, 462 (S.D. W. Va. 2003), *rev'd* at 396 F.3d 348 (abstaining from a Commerce Clause claim in favor of administrative proceedings that ultimately rejected that claim); *O'Neill v. Coughlan*, 436 F. Supp. 2d 905, 909 (N.D. Ohio 2006), *rev'd* at 511 F.3d 638 (declining to abstain from resolving a successful First Amendment claim).

²⁵¹ See, e.g., *Esso Standard Oil Co. v. López-Freytes*, 522 F.3d 136, 140–41 (1st Cir. 2008) (reversing abstention decision due to bias); *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 213 (1st Cir. 2004) (abstaining); *Esso Standard Oil Co. v. Cotto*, 327 F. Supp. 2d 110, 129 (D.P.R. 2004) (abstaining).

²⁵² My intuition is that federal judges generally view pro-abstention decisions as more significant than anti-abstention decisions. Thus, when selecting decisions for publication, courts could err on the side of publishing the former and not the latter. Indeed, there is a substantial political science literature addressing decisions by judges to publish (or not) a particular opinion. See generally Karen Swenson, *Federal District Judges and the Decision to Publish*, 25 JUST. SYS. J. 121 (2004); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001). It suggests that opinions involving novel or complex legal issues tend to be published, and since a successful *Younger* movant must satisfy a complicated multipart test, pro-abstention decisions should be more likely to be published than anti-abstention ones. Yet this is incon-

would only affect the abstention/no abstention ratio, and not the underlying success rate of federal claims. In any event, my plan for the future is to conduct a more exhaustive study including these unreported decisions.

Second, my methodology failed to identify the resolution of the federal claim after abstention in 40.0 percent of the pro-abstention decisions. This pool of “hidden” federal claim outcomes is troubling because insofar as they skew one way or another, they will have a substantial impact on the survey results.²⁵³ They are analogous to classical nonresponders in social science surveys, and as that literature notes, sample bias is a significant concern whenever nonresponse rates exceed fifteen percent or so.²⁵⁴

There are a few steps that can minimize this risk, however. The first, which I have done, is to scrutinize the nonresponder population to evaluate its potential to skew the data.²⁵⁵ Of the “unclear” pro-abstention decisions, 17 of 76 (22.4 percent) identified by my survey involved a situation where there was an identifiable post-abstention proceeding, but it was ambiguous whether the federal claim was raised or resolved. The claimant lost in all of these, albeit for those ambiguous reasons, so the decisions should not skew in favor of such claims. Ten of the remaining “unclear” pro-abstention decisions (13.1 percent) involved cases in which any post-abstention proceedings could not be identified, but the ultimate outcome was inconsistent with a successful federal claim, usually because whatever action the claimant was challenging eventually occurred.²⁵⁶ That leaves 49 “unclear” decisions—64.5 percent, or 25.8 percent

sistent with the limited results observed in my survey. In the sixteen unpublished decisions reported in the Federal Appendix reporter identified by my methodology, the court elected to abstain eleven times (68.8 percent). This is somewhat more than the 57.2 percent (67 of 117) abstention rate observed in published appellate decisions, though the small sample size means that the difference is not statistically significant.

²⁵³ My concern is that because state trial court decisions are rarely available, I am missing a wide swath of state decisions ruling in favor of federal claimants. Criminal cases come to mind. These trial court decisions would be unlikely to be appealed if they ruled in favor of a defendant asserting a federal defense, so they would not be reported in any sources used in this study. However, only a handful of the “unclear” decisions involve parallel state criminal proceedings, and of course the state criminal defendants generally will not prevail on federal defenses, so the number of cases that could skew the data is small.

²⁵⁴ See, e.g., NORMAN BLAIKIE, *ANALYZING QUANTITATIVE DATA: FROM DESCRIPTION TO EXPLANATION* 167–68 (2003).

²⁵⁵ *Id.* at 167. Alternatively, one could also use supplemental data collection methods to attempt to reduce the number of nonresponders altogether. The most logical tool to do so would be to contact attorneys in the “unclear” decisions to inquire as to how their cases were resolved. This would introduce another potential source of error—inaccurate information conveyed by counsel—that would need to be accounted for, probably by contacting lawyers for parties in “clear” decisions and comparing the reported results to the independent research findings. This type of broad questionnaire survey is beyond the scope of my survey, though I plan to undertake that sort of project in the future.

²⁵⁶ For example, a claimant might contest license suspension or revocation proceedings, and although I cannot find a record of those proceedings, the license was actually suspended or revoked. See, e.g., *Amanatullah v. Colo. Bd. of Med. Exam’rs*, 187 F.3d 1160, 1162 (10th Cir. 1999); *Healthcare Professions Profile for Faisal Amanatullah*, COLO. DEP’T REG. AGENCIES, https://www.dora.state.co.us/pls/cproweb/HPPS_Search_GUI.Search_Form (choose “All License Types” on drop-down and hit “Continue”; type the license number “25585” into the form and hit submit; click on the hyperlink “Amanatullah, Faisal F”) (last visited Dec. 11, 2011) (license revoked on May 21, 1999). It is theoretically possible, how-

of the total pro-abstention decisions—where there is simply no indication as to how the federal claim was resolved. That is higher than one would like, but it is sufficiently low that any bias should be tolerably small.²⁵⁷

Third, unlike other comparative studies that focus on particular types of claims, this survey focuses on *Younger* decisions generally. The federal claims at issue therefore run the gamut from facial constitutional challenges, to as-applied challenges, to due process challenges, to preemption claims, to federal statutory claims. Professor Chemerinsky faulted Professors Solimine and Walker's 1983 study for aggregating First and Fourth Amendment and Equal Protection claims, thus potentially obscuring disparities that might be observed for particular types of claims, and that criticism certainly applies here.²⁵⁸ But this objection is largely inapplicable given my purpose. My goal was to observe what happens to federal claims from an empirical perspective after *Younger* decisions—it should not matter whether the examined abstention decisions all involve the same sorts of claims.²⁵⁹

Fourth, Chemerinsky cited several additional purported flaws in Solimine and Walker's study.²⁶⁰ As discussed below, a few of the criticisms are inapplicable to a review of post-abstention decisions showing a sizable discrepancy between the resolution of federal claims in state or federal forums—but only a few. Insofar as I do not discuss whether Chemerinsky's objections are implicated by my survey, they are fully applicable.

Fifth, and finally, any study requiring the use of judgment when classifying or sorting data is susceptible to bias. Basically, this theory cautions that the person conducting the study will be tempted to resolve close calls in a way that supports his or her hypothesis.²⁶¹ Further compounding that here is the fact that many of the state decisions required extensive research to locate, meaning that there is an opportunity to "look harder" for those outcomes that seem likely to

ever, that the asserted federal claims in this scenario might be successful but still insufficient to avoid the sought discipline. That is exceedingly uncommon, however—of the 52 abstention decisions in which the federal claim prevailed, the *Bendel* case is the only one in which a successful federal claimant lost on other grounds.

²⁵⁷ For example, if the remaining 49 "unclear" decisions were resolved at a rate similar to that at which federal claims are resolved in federal court after an anti-abstention decisions, that would increase the federal claim success rate to roughly 25 percent—and, of course, the 27 "unclear" pro-abstention decisions that could not have been resolved in favor of the federal claimant invariably include a substantial number of unsuccessful claims, which would lower the success rate to near or below 20 percent. The important point is that even under unrealistic assumptions about federal claim success rates in the "unclear" pro-abstention decisions, state tribunals will still appear significantly more hostile to federal claims after abstention proceedings than federal courts.

²⁵⁸ See Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 266–67. This criticism is misplaced with respect to Solimine and Walker's study, which specifically provides the results for a number of different types of claims.

²⁵⁹ This also applies to the presumed criticism that it is inappropriate to compare federal trial court and appellate court abstention decisions. See generally David W. Romero & Francine Sanders Romero, *Precedent, Parity, and Racial Discrimination: A Federal/State Comparison of the Impact of Brown v. Board of Education*, 37 LAW & SOC'Y REV. 809 (2003) (arguing that one should compare federal appellate courts to state appellate courts, and federal district courts to state trial courts).

²⁶⁰ *Supra* Section II.C.

²⁶¹ See Gerry, *supra* note 177, at 278.

support preconceived notions. As Gerry noted in his study, one safeguard against these biases is to devise clear and objective criteria governing search parameters and data classification,²⁶² and to fully disclose what those criteria are. I hope that I did this sufficiently well in the preceding section.

C. Results

The above methodology identified 396 unique reported decisions from 1995 to 2006 that had the terms “Younger” and the applicable year in the three applicable West headnotes; 368 of those involved a case that reached a concrete *Younger* abstention decision. The court abstained in 51.6 percent (190 of 368) of those, and it declined to abstain in 48.4 percent (178 of 368) of them.

This population of identified *Younger* abstention decisions includes 235 district court and 133 court of appeals decisions. There was a modest disparity in how these trial and appellate courts resolved *Younger* abstention requests. The former decided to abstain 47.7 percent (112 of 235) of the time, whereas the latter issued a pro-*Younger* decision a more generous 58.6 percent (78 of 133) of the time. That difference is statistically insignificant to a 95 percent confidence interval, though just barely so.²⁶³

In any event, I could determine what happened in the post-abstention proceedings for 60.0 percent of the pro-abstention decisions and for 79.2 percent of the anti-abstention ones, for an aggregate total of 69.3 percent of all decisions. Of this, 32.1 percent of the pro-abstention decisions involve a situation in which the federal claim was identifiably not decided; similarly, 22.5 percent of the anti-abstention decisions involve post-abstention proceedings that could be located but did not affirmatively resolve the claim. That leaves 27.9 percent of the pro-abstention decisions and 56.7 percent of the anti-abstention decisions in which the federal claim was identifiably resolved by a state tribunal or federal court.²⁶⁴

With respect to this last group of abstention decisions, the bottom line is that federal claimants prevailed 33.8 percent (52 of 154) of the time after abstention proceedings. This aggregate figure encompasses a federal claim success rate of 34.0 percent (33 of 97) after abstention proceedings in federal trial court, and 33.3 percent (19 of 57) after such proceedings in federal appellate court.

²⁶² *Id.*

²⁶³ The two-tail p-value for the difference in abstention request success rates in trial and appellate courts is 0.0506. For this and all other p-value calculations, I used a Fisher exact probability test.

²⁶⁴ Breaking out the statistics for the trial and appellate decisions, there was an unclear ultimate resolution of the federal claim at issue in 43.8 percent of the pro-abstention trial decisions, 34.6 percent of the pro-abstention appellate decisions, 16.3 percent of the anti-abstention trial decisions, and 30.9 percent of the anti-abstention appellate decisions. The federal claim was identifiably not decided in 33.0 percent of the pro-abstention trial decisions, 30.8 percent of the pro-abstention appellate decisions, 26.0 percent of the anti-abstention trial decisions, and 14.5 percent of the anti-abstention appellate decisions. The federal claims therefore were identifiably resolved for 23.2 percent of the pro-abstention trial decisions, 34.6 percent of the pro-abstention appellate decisions, 57.7 percent of the anti-abstention trial decisions, and 54.5 percent of the anti-abstention appellate decisions.

There was a significant disparity in how the federal claims were resolved at the state and federal levels after abstention proceedings. Federal claims adjudicated in a state forum after a successful *Younger* abstention request prevailed only 15.1 percent (8 of 53) of the time; conversely, federal claims succeeded in federal court after a declined *Younger* request 43.6 percent (44 of 101) of the time.²⁶⁵ Looking at only these decisions, then, federal claimants were about 2.89 times (or 189 percent) as likely to prevail in federal court as in a state forum after *Younger* proceedings.²⁶⁶ This disparity is reflected at both the trial and appellate levels. With respect to the former, federal claims were successful in state tribunals after pro-abstention federal trial court decisions 11.5 percent (3 of 26) of the time, and they were successful in federal court after anti-abstention trial court decisions 42.3 percent (30 of 71) of the time. With respect to the latter, federal claims were successful at the state level after pro-abstention federal appellate decisions 18.5 percent (5 of 27) of the time, and they were successful 46.7 percent (14 of 30) of the time in federal court after an anti-abstention federal appellate decision.²⁶⁷

It may be helpful to see a year-by-year breakdown of the *Younger* decisions. Tables presenting this data are included below. The first displays outcomes of pro-abstention decisions and records the number of anti-abstention decisions:

²⁶⁵ This is ironic. As noted above, John Harris was ultimately successful at the state level, thus making the initial *Younger* decision itself an outlier. See *In re Harris*, 97 Cal. Rptr. 844, 846 (1971).

²⁶⁶ If the “not decided” cases are included, the corresponding federal claim success rates are 7.0 percent (8 of 114) for state tribunals and 31.2 percent (44 of 141) for federal courts. For these decisions, federal claimants were 4.46 times (346 percent) as likely to prevail in a federal forum.

²⁶⁷ The differences in the ultimate federal claim success rates after pro- or anti-abstention proceedings between federal trial and appellate courts are not statistically significant to any reasonable confidence interval. The two-tail p-values for the difference in trial and appellate outcomes for the pro- and anti-abstention decisions were 0.704 and 0.841, respectively.

TABLE A—RESOLUTION OF ABSTENTION DECISIONS

Year	AA	AR	AN	AU	NA	Total
1995	1	1	3	12	17	34
1996	2	5	3	6	11	27
1997	1	3	5	6	11	26
1998	1	4	1	5	11	22
1999	0	3	1	9	12	25
2000	0	2	4	5	19	30
2001	0	5	8	9	21	43
2002	0	2	6	6	16	30
2003	2	5	7	2	13	29
2004	0	8	7	6	20	41
2005	1	4	10	3	19	37
2006	0	3	6	7	8	24
Total	8	45	61	76	178	368

Legend: AA—pro-abstention decisions involving ultimately successful federal claim; AR—pro-abstention decisions involving ultimately unsuccessful claim; AN—pro-abstention decisions involving not decided federal claim; AU—pro-abstention decisions involving unclear federal claim; NA—anti-abstention decisions.

The next table does the reverse. It displays the outcomes of the anti-abstention decisions and records the number of pro-abstention decisions:

TABLE B—RESOLUTION OF NON-ABSTENTION DECISIONS

Year	NA	NR	NN	NU	AB	Total
1995	6	7	3	1	17	34
1996	1	2	4	4	16	27
1997	3	3	4	1	15	26
1998	1	4	6	0	11	22
1999	5	2	3	2	13	25
2000	6	4	4	5	11	30
2001	5	7	0	9	22	43
2002	3	5	4	4	14	30
2003	2	4	5	2	16	29
2004	6	10	2	2	21	41
2005	4	7	3	5	18	37
2006	2	2	2	2	16	24
Total	44	57	40	37	190	368

Legend: NA—anti-abstention decisions involving ultimately successful federal claim; NR—anti-abstention involving ultimately unsuccessful federal claim; NN—anti-abstention decisions involving not decided federal claim; NU—anti-abstention decisions involving unclear federal claim; AB—pro-abstention decisions.

Finally, I used a 2 x 2 contingency table to perform some of the more basic federal claim accepted/rejected calculations. It is set forth below:

*TABLE C—2 x 2 CONTINGENCY TABLE DISPLAYING ABSTENTION/
NON-ABSTENTION AND FEDERAL CLAIM ACCEPTED/
REJECTED VARIABLES*

	Federal Claim Ultimately ACCEPTED	Federal Claim Ultimately REJECTED	TOTAL
Pro-Abstention Decisions with Federal Claim Resolved by a STATE TRIBUNAL	8 (5.2%)	45 (29.2%)	53 (34.4%)
Anti-Abstention Decisions with Federal Claim Resolved by a FEDERAL COURT	44 (28.6%)	57 (37.0%)	101 (65.6%)
TOTAL	52 (33.8%)	102 (66.2%)	154 (100%)

Assuming a null hypothesis that federal and state forums will resolve post-abstention federal claims at the same proportion, the z-score (or standard score) for the difference in aggregate federal and state outcomes is 4.09, which suggests an observed difference that is more than four standard deviations greater than expected.²⁶⁸ The two-tail p-value for the two samples is 0.000565, suggesting a 0.057 percent chance that the null hypothesis is true. All of this means that the discrepancy between federal claim success rates in state and federal forums after abstention litigation is statistically significant to a 99 percent confidence interval.²⁶⁹

This conclusion holds for both federal trial and appellate decisions, though perhaps to a slightly lesser degree. The z-score for the difference in ultimate federal claim success rates for the pro- and anti-abstention trial court decisions therefore is 3.59;²⁷⁰ the two-tail p-value is 0.00689. This implies a statistically significant difference to a 99 percent confidence level. The z-score for the difference in federal claim success rates following abstention proceedings at the federal appellate level is 2.39;²⁷¹ the two-tail p-value is 0.0475. This is statistically significant to a 95 percent (but not 99 percent) confidence interval, though the less definitive conclusion is likely more a function of the small sample size than any differences in the actual observed results.

²⁶⁸ The standard deviation for this difference is 6.97 percent, and the difference in federal claim success rates is 28.5 percent. The standard deviation for the entire population of abstention decisions involving an ultimately decided federal claim is 3.81 percent.

²⁶⁹ For a discussion of null hypotheses, calculating standard deviation, z-scores (or standard scores) and p-values for the difference of two proportion subsamples, see DAVID A. KENNY, *STATISTICS FOR THE SOCIAL AND BEHAVIORAL SCIENCES* 77–78, 131–37 (1987).

²⁷⁰ The standard deviation for the difference is 8.57 percent; the difference in success rates is 30.8 percent.

²⁷¹ The standard deviation for the difference is 11.78 percent; the difference in success rates is 28.2 percent.

The question of whether these statistically significant differences are particularly important is a different matter. The correlation for the two groups of federal abstention decisions (calculated by determining the *phi*-coefficient) is 0.286. That value falls in the “weak” correlation category, though at the very high end of it. It implies a modest degree of correlation between the forum and the resolution of the federal claim. This aggregate result is consistent with what is observed at federal trial and appellate levels.²⁷²

So what does this mean? First, regardless of whether one is looking at federal trial or appellate abstention decisions or an aggregate, the observed difference in federal claim success rates resolved after *Younger* proceedings in federal courts versus state tribunals is highly significant and almost certainly must be attributed to something other than statistical noise. There is something going on, in other words, to make a federal claimant seem substantially less likely to prevail in a state forum rather than federal court after *Younger* litigation. The correlation between the two variables is weak-to-moderate, however, meaning that the relationship between the post-abstention forum and federal claim success is not strong.

That makes good sense. Federal claimants are unlikely to prevail in state tribunals after a pro-abstention decision, but they are also unlikely to prevail in federal court after an anti-abstention decision. The fact is, whether or not a litigant is asserting or opposing a federal claim has a more significant impact on his or her odds of success than the forum in which the claim is proceeding. It generally is preferable to be a federal claimant in federal court after an unsuccessful abstention request than to be a federal claimant in a state forum after abstention; but even better is to be the party opposing the federal claim, no matter in which court. That says the most about who is likely to prevail.

To put some numbers on it, if one were betting on how a federal claim after a *Younger* dispute was resolved, knowing only that a particular party would be litigating in his or her preferred forum (but not whether he or she was the federal claimant) would increase the chances of predicting success from a coin flip to 57.8 percent.²⁷³ Knowing whether the party was the federal claimant, but not whether he or she would be litigating in a preferred forum, would increase the accuracy of the prediction to 66.2 percent.²⁷⁴ Thus, knowledge of who is asserting the federal claim is roughly twice as valuable as knowledge of the outcome of abstention proceedings. And indeed, when looking only at the variables of whether a litigant is asserting or opposing a federal claim and whether the litigant was successful, the correlation coefficient increases to 0.325, which falls in the “medium” correlation category. This confirms the foregoing intuition: the difficulty of prevailing as a federal claimant is at least modestly more important to the outcome of post-abstention proceedings than whether the claim is decided in a federal or state forum.

²⁷² The *phi*-coefficient for the trial and appellate court abstention decisions are 0.287 and 0.298, respectively.

²⁷³ This is because the party that was successful in the abstention litigation was successful on the merits 89 out of 154 times. See *supra* Table C.

²⁷⁴ The party resisting the federal claim was successful 102 out of 154 times. *Id.*

IV. IMPLICATIONS OF THE SURVEY RESULTS

A. *Comparisons to Other Empirical Parity Studies*

Any comparison of these results to other state-federal empirical comparative studies must begin with Professors Solimine and Walker's 1983 article. It should be noted from the outset, however, that comparing my results to theirs has an apples-to-oranges quality. The authors only looked at First Amendment, Fourth Amendment, and Equal Protection claims, whereas I looked at all federal claims implicated by *Younger* abstention proceedings.

In any event, the first thing that stands out is the similarity in the success rates of federal claimants in federal court. This Article concluded above that such litigants are successful 43.6 percent of the time.²⁷⁵ The Solimine and Walker study found a remarkably similar success rate of 41.7 percent.²⁷⁶ The 35.8 percent success rate for all federal claims observed by Solimine and Walker is also reasonably close to the 33.8 percent rate found by this Article.²⁷⁷

The similarities stop with respect to federal claims decided by state tribunals, however. Whereas Solimine and Walker found that the federal claimant prevailed in these cases 31.4 percent of the time,²⁷⁸ this Article observed a 15.1 percent success rate²⁷⁹—less than half as much. While the Solimine and Walker study suggests that federal courts are 32.8 percent more likely to rule in favor of a federal claim than are state courts, I found that a federal court after declining abstention is 189 percent more likely to side with the federal claimant than is a state tribunal after abstention. Obviously, this is a significant discrepancy.²⁸⁰ This Article's finding is not much more of an outlier than Solimine and Walker's conclusion, however—they calculated a z-score of 3.62,²⁸¹ indicating a difference between the success rates in state and federal court a little more than three-and-a-half standard deviations greater than expected. This is only slightly less than my z-score of 4.09.²⁸²

My survey results were also somewhat different with respect to the relationship between the particular forum in which a federal claim is being adjudicated and the likelihood of success of that claim. As noted above, my study observed a (rounded) correlation of 0.29 between the forum and federal claim-

²⁷⁵ *Supra* Section III.C.

²⁷⁶ See Solimine & Walker, *Constitutional Litigation*, *supra* note 26, at 240. The authors of that study rounded their results to the nearest percentile in their article; my analysis uses results rounded to the nearest tenth of a percent, which Professor Solimine has used in other forums. See Solimine, *Future of Parity*, *supra* note 147, at 1465. In any event, the p-value for the difference between their federal court results and my federal court results is 0.823, which is not statistically significant.

²⁷⁷ *Id.* at 239. The p-value for this difference in overall federal claim success rates is 0.699, which is not statistically significant.

²⁷⁸ See *id.* at 240.

²⁷⁹ *Supra* Section III.C.

²⁸⁰ The z-score (or standard score) for this difference in our state forum results is 3.09, indicating that it falls a little more than three standard deviations from the mean. The two-tail p-value is 0.0182. This means that the difference is statistically significant to a 95 percent (but not 99 percent) confidence interval.

²⁸¹ Solimine & Walker, *Constitutional Litigation*, *supra* note 26, at 241 n.124.

²⁸² The seeming inconsistency is almost certainly explained by their much larger sample size.

ant success, which fell at the very high end of the “weak” category.²⁸³ Solimine and Walker did not address the issue of correlation in their article, but in a subsequent 1999 book update they calculated a *phi*-coefficient of 0.11 between the forum where a federal claim is brought and its success rate.²⁸⁴ Although this also falls into the “weak” correlation category, it does so just barely, and it is less than half as strong as the correlation observed in the abstention context.²⁸⁵ Thus, Solimine and Walker’s findings differed substantially from my results because: (a) they found federal claimants to be much more successful in state court on an absolute basis; (b) they found federal claimants in state court to be much more successful relative to claimants in federal court; and (c) they observed much less correlation between the forum and the disposition of the claim.

The other studies comparing state and federal court performance are similarly inapposite. Solimine examined the outcome of section 1983 claims in state and federal court in his 1991 article and found no difference in how the two forums were resolving these claims.²⁸⁶ Gerry reached a similar conclusion in his 1999 article comparing how state and federal courts were interpreting and applying *Nollan*.²⁸⁷ These results obviously are inconsistent with my finding that federal and state forums appear fundamentally different in their disposition of federal claims asserted in post-abstention proceedings.

With respect to Solimine’s study, it should be noted from the outset that he actually found a state court success rate that is roughly similar to my results—18.5 percent to 15.1 percent—though, of course, the specific type of claim that was his focus makes direct comparison impossible.²⁸⁸ The main discrepancy lies with his miniscule observed chance of success (10.5 percent) in federal court.²⁸⁹ This likely is due to statistical noise. Solimine only examined nineteen cases to understand how federal courts were resolving section 1983 claims.²⁹⁰ Yet with that small sample size, the difference between his observed results and any success rate between 0 percent and approximately 25 percent would be statistically insignificant. There simply were not enough federal cases studied to be able to draw meaningful conclusions about how courts were treating section 1983 claims, except in the roughest or broadest sense.

A different phenomenon likely explains Gerry’s findings. As Professor Pinello argues, observations derived from takings lawsuits should not be gener-

²⁸³ *Supra* Section III.C.

²⁸⁴ See SOLIMINE & WALKER, *RESPECTING STATE COURTS*, *supra* note 156, at 48.

²⁸⁵ A general rule is that a correlation coefficient under 0.1 implies no correlation; a correlation between 0.1 and 0.3 implies a “weak” correlation; a correlation between 0.3 and 0.5 implies a “medium” correlation; and a correlation coefficient greater than 0.5 implies a “strong” correlation. See KENNY, *supra* note 269, at 133.

²⁸⁶ See Solimine, *Exclusive Federal Jurisdiction*, *supra* note 198, at 418.

²⁸⁷ See Gerry, *supra* note 177, at 293.

²⁸⁸ See Solimine, *Exclusive Federal Jurisdiction*, *supra* note 198, at 416 (Table One).

²⁸⁹ *Id.* at 418 (Table Two).

²⁹⁰ *Id.* One should not fault Solimine too much. He mainly was interested in how state courts were resolving the § 1983 claims, and just included federal cases as a benchmark. And my own sample of pro-abstention cases with an identifiably decided federal claim is relatively small, so this observation smacks of pot-kettle criticism.

alized to other sorts of federal constitutional claims.²⁹¹ Gerry himself acknowledged that the takings claims at issue in *Nollan* and the subsequent state and federal cases that he examined involved an individual right that is qualitatively different from typical constitutional claims (e.g., First or Fourteenth Amendment claims).²⁹² Unlike those prototypical constitutional challenges, a takings lawsuit generally does not involve an individual asserting an unpopular or counter-majoritarian claim against a state or local government; to the contrary, it often involves local interests challenging unpopular federal or state actions.²⁹³ This might explain why he observed an equally receptive treatment of federal claims in state and federal forums.

B. Possible Explanations

So if federal claimants experience a success rate in post-abstention proceedings in federal court that is nearly three times as high as their counterparts litigating before state tribunals, what could explain the difference? The first and most obvious hypothesis is that this much higher success rate is evidence of a strong disparity between federal and state courts, at least in the *Younger* context. There may be an argument that a 15.1 percent chance of success is still evidence of weak parity, but it is not very persuasive. At the very least, this invokes the observation that the mere existence of some degree of parity is insufficient to justify the federal doctrines that rely on an assumption of state court adequacy; in that case, one also must determine precisely how strong or weak that parity is.²⁹⁴ The substantial discrepancy observed in this survey surely must fall on the “not strong enough” side of the line.

This parity-based conclusion could take one of two forms. The first—the broad form—is that these results show that state tribunals generally cannot be trusted to adjudicate federal claims at the same level of competency as federal courts. This should be rejected out of hand. My survey is a relatively small study commingling heterogeneous types of claims in front of all levels of state and federal courts and administrative tribunals. There certainly is no reason that this study should trump the much more comprehensive and uniform studies done by Professors Solimine and Walker and similarly-minded empiricists.

The alternative narrow parity-based conclusion is more plausible. This theory interprets the survey results as constituting reasonable evidence that there is insufficient parity specifically—and solely—in the context of post-*Younger* proceedings. In other words, regardless of whether state forums provide an adequate and unbiased opportunity to litigate federal claims generally, they do not give federal claimants a sufficient chance of success in cases where the claims get channeled to them following *Younger* abstention. This theory certainly is consistent with my results, and although I ultimately think that it is too strong to be justified, it certainly warrants discussion.

²⁹¹ See PINELLO, *supra* note 163, at 108.

²⁹² See Gerry, *supra* note 177, at 286–87.

²⁹³ *Id.* at 287. Gerry suggests that the conventional wisdom is that judges who are more sympathetic to takings claims are less sympathetic to other types of constitutional claims.

²⁹⁴ See Herman, *supra* note 147, at 651–52.

As an initial observation, this theory avoids or negates many of the empirical parity criticisms asserted by Professor Chemerinsky and others. Much of their criticism ultimately amounts to the observation that the Solimine and Walker study compared state decisions that skewed in favor of federal constitutional claims relative to all such claims that were or could be brought,²⁹⁵ and vice versa with respect to federal decisions.²⁹⁶ However, an empirical finding that federal claimants are disproportionately unlikely to succeed during post-abstention proceedings in a state forum would only be underscored when adjusted for these criticisms.

Furthermore, it would be straightforward to evaluate this theory with additional research by being as exhaustive as possible. The remaining West headnotes could be searched, text searches could be run in the decisions themselves to include unreported *Younger* decisions that currently are excluded, and significant resources could be devoted to researching the outcome of post-abstention proceedings in state tribunals—all from 1971 to the present. The goal would not be to find a representative sample of reported *Younger* decisions (as mine was); it would be to come close to finding all such *Younger* cases. Then, at the end of the day, one probably could draw firm conclusions about the broad universe of all or nearly all *Younger* decisions, which in turn might provide a powerful argument about the justification of the fundamental assumption of state court adequacy in the context of the doctrine.

The main problem with the narrow disparity hypothesis is that it is not easy to imagine a mechanism explaining why post-abstention state tribunals treat federal claims so differently than when they are brought outside the abstention context. One possibility echoes the observations of Professors Althouse and Friedman: cases that qualify for *Younger* abstention (by satisfying the *Middlesex* test) are especially unsuited to support the assumption of state forum adequacy because they necessarily involve an important state interest.²⁹⁷ My results could reflect that basic tension. Under this view, federal claimants prevail less frequently in state forums after abstention proceedings than they do outside of that context because their claims often infringe upon an important state interest. One flaw in this theory, however, is that it is undercut by the expansion of the second *Younger* requirement to encompass virtually any type of state enforcement or similar proceeding.²⁹⁸ It seems counterintuitive to contend that state tribunals are especially reluctant to rule for federal claimants when doing so might adversely affect an important state interest, but then at the same time conclude that virtually any state enforcement or similar proceeding involves such an important interest.

²⁹⁵ *Supra* Section II.C. To summarize, Chemerinsky argued that Solimine and Walker likely observed a misleadingly small discrepancy because (1) only the strongest constitutional claims would be filed and proceed to judgment and appeal, (2) state appellate courts studied would be more solicitous than trial courts to federal claimants, and (3) state statutes were more likely to be egregiously unconstitutional than their federal counterparts. *Id.*

²⁹⁶ See, e.g., Chemerinsky, *Parity Reconsidered*, *supra* note 47, at 262.

²⁹⁷ Althouse, *Misguided Search*, *supra* note 47, at 1083–84; Friedman, *Revisionist Theory*, *supra* note 32, at 542–43.

²⁹⁸ *Supra* Section I.B.2.

The second flaw in the Althouse/Friedman explanation for the narrow disparity hypothesis is alluded to in *NOPSI*. Although the generic *type* of proceeding that is the basis for abstention must implicate an important state interest, the actual litigation need not.²⁹⁹ And indeed, a cursory review of the *Younger* decisions included in my analysis shows that many are mundane licensing or zoning disputes that hardly involve a direct important state interest on their face. Take the shuttle service example from the note above, for example. While broadly regulating intrastate transportation is an important state interest, it seems highly unlikely that a state tribunal would be reluctant to rule against the state in a garden-variety limousine licensing dispute simply because this generic type of proceeding, in the aggregate, ultimately implicates an important state concern (*i.e.*, the regulation of commercial motor carriers).³⁰⁰

Another theory that might explain the post-abstention disparity is that the state or one of its agencies typically is a party in the proceedings, and under those circumstances, a state forum might be especially likely to favor its sister governmental branch.³⁰¹ But the sorts of constitutional claims examined by Solimine and Walker also invariably involved a large number of state defendants, and they did not observe an exaggerated sense of favoritism. Indeed, their results for criminal cases, which necessarily involve the state, do not suggest any statistically significant difference in federal and state court behavior.³⁰² Nor did Gerry find a significant difference,³⁰³ and he was looking at takings claims in which a state or local government typically has a vested financial interest. If a state court ever has an incentive to disproportionately favor state litigants, it should be in that context, where state funds are at stake.

And there is a more fundamental reason to avoid drawing a parity-based conclusion. I believe that another hypothesis, unrelated to any notion that federal courts are more or less sympathetic to federal claims, is more likely to explain why federal claimants seem disproportionately unlikely to succeed after abstention decisions. Most empirical parity studies start with the assumption that the forum is the important variable in the analysis; indeed, these studies are usually intended to investigate if the forum is what is driving a potential difference in federal claim success rates. That certainly was my focus when beginning this project.

But what if this is the wrong way of looking at it, at least with respect to abstention decisions? What if the important variable is not whether post-abstention proceedings are conducted in federal court or a state tribunal, but instead, something else closely correlated with it?³⁰⁴ This led me to question whether

²⁹⁹ See *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 365 (1989).

³⁰⁰ See *supra* note 80.

³⁰¹ See Redish, *Judicial Parity*, *supra* note 148, at 333–35 (arguing that state courts are biased in favor of state litigants).

³⁰² See Solimine & Walker, *Constitutional Litigation*, *supra* note 26, at 242 (Table III).

³⁰³ See Gerry, *supra* note 177, at 285.

³⁰⁴ This invokes the classic observation that ice cream sales are correlated with the crime rate. These sales do not cause crime—they merely are correlated with a variable (hot weather) that does. See, e.g., Jason J. Kilborn, *Comparative Cause and Effect: Consumer Insolvency and the Eroding Social Safety Net*, 14 COLUM. J. EUR. L. 563, 564 (2006) (describing phenomenon); see also BAKEMAN, *supra* note 225, at 58 (noting that a major

the post-abstention forum might be a close proxy for another variable that could have a more significant and explainable impact on observed federal claim success rates after abstention proceedings. The answer, of course, should be clear: whether a *Younger* dispute keeps a federal claimant in federal court or funnels him or her to a state forum corresponds *nearly exactly* with whether the federal claimant wins the abstention dispute in the first place. Perhaps who wins the abstention dispute, not where that party gets sent, is the most influential variable in the post-abstention context. In other words, although one certainly would like to be litigating in his or her preferred forum, it is not as important as winning the legal battle required to get there.

Three possible mechanisms could explain this. The first is the most obvious. Perhaps the federal judge, in deciding whether to abstain under *Younger*, is signaling what he or she thinks about the merits of the claim.³⁰⁵ In other words, a judge who thinks that a federal claim seems promising might subconsciously be inclined to keep the case, especially if abstention is a close call—and vice versa if the claim feels untenable. This “cherry picking” use of abstention would amount to an implicit version of the “patently unconstitutional” or “facially conclusive” *Younger* exceptions that courts now use to decline abstention when all *Middlesex* requirements are met.³⁰⁶

The second explanation for the possible correlation between abstention success and prevailing in the ultimate dispute is also straightforward. Perhaps victory in an abstention dispute is a reasonable proxy for the quality of litigants and their counsel. Abstention disputes are complex, technical, and hotly contested. Attorneys believe that the forum can provide a significant advantage,³⁰⁷ and they will fight for it like dogs. Given the significant attention devoted to abstention litigation, prevailing in those proceedings might indicate that the winner and his or her lawyers are more skilled than their opponents on average. This should carry over to the merits of the case.³⁰⁸

drawback in observational or descriptive studies is the possibility that one is observing correlation with an unknown variable).

³⁰⁵ It is no secret that judges can use preliminary rulings to signal to the losing party that “his or her resources might be put to better use than pursuing the litigation.” Jack M. Beer-mann, *Federal Court Self-Preservation and Terri Schiavo*, 54 *BUFF. L. REV.* 553, 566–67 (2006).

³⁰⁶ See, e.g., *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 78 (1st Cir. 2004) (applying “facially conclusive” exception); *Woodfeathers, Inc. v. Wash. Cnty., Or.*, 180 F.3d 1017, 1021–22 (9th Cir.1999) (preemption of county ordinance not so “readily apparent” as to defeat *Younger* abstention). *But see Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) (declining to rule on whether the exception exists).

³⁰⁷ See, e.g., Marvell, *supra* note 193, at 1371–72 (discussing attorneys’ views on federal and state forums in student litigation context).

³⁰⁸ As noted above, the effect of this knowledge is measurable. Disregarding the “not decided” decisions, my results indicate that the winner of an abstention dispute prevails in post-abstention proceedings 57.8 percent (89 of 154) of the time. This overall success rate obscures the stark difference between winning and losing, though. If the federal claimant successfully opposes abstention, his or her chances of success increase 28.5 percentage points from 15.1 percent (8 of 53) to 43.6 percent (44 of 101). Parties seeking abstention experience an identical increase if they win during abstention proceedings.

The final possibility for why success or failure during *Younger* proceedings could affect the resolution of the federal claim independent of the ultimate forum is more behavioral. Perhaps parties or their counsel, having viewed abstention litigation as crucial to success on the merits, are inclined to give up on their lawsuit if they lose the forum dispute. In this self-perpetuating cycle, litigants opposing abstention, for example, might spend so much time and resources trying to avoid relegation to a perceived hostile state forum that when it happens they are convinced that their claim will not receive a fair hearing and thus pursue it only halfheartedly. At the very least, private litigants usually have more limited resources than their state opponents, so they might be more likely to abandon their federal claims if forced to pursue them elsewhere after a lengthy and costly abstention dispute.³⁰⁹

These hypotheses implicate an extensive field of empirical legal studies that has developed outside of the abstention and parity contexts. Several scholars have examined what litigation factors have the largest impact on case outcomes.³¹⁰ These academics observe that perhaps the biggest predictor of ultimate success in complicated litigation is winning or losing important pre-trial motions.³¹¹ Their work on the relationship between removal efforts and litigation success seems particularly relevant to the question addressed by this Article, given that abstention also involves the impact of a forum dispute on case outcomes. In *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, Professors Kevin Clermont and Eisenberg conclude that a plaintiff's odds of success in diversity jurisdiction cases start at 71 percent if the lawsuit is brought directly but drop to 34 percent if the case reaches federal court through removal.³¹² They attribute the decrease in part to forum effects, in part to weakness of removed cases, and in part to inferior counsel as demonstrated by the failure to avoid removal, though they generally minimize the role that the last of these could play.³¹³ They controlled for known variables and concluded that removal decreased a plaintiff's odds from an even 50 percent to 35 percent, with eleven percentage points of the drop attributed to the forum and the remainder attributed to case weakness and quality of counsel.³¹⁴ Perhaps my results reflect this same dynamic.

³⁰⁹ I am grateful to Professor Solimine for suggesting this theory.

³¹⁰ See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 140 (2002) (describing current research); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1919 (2009) [hereinafter Clermont, *Litigation Realities Redux*] (same); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 599 (1998) [hereinafter Clermont & Eisenberg, *Case Outcomes*].

³¹¹ See, e.g., James A. Henderson, Jr., & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 532–33 (1990) (“[D]efendants’ success rate at the pretrial motion stage is by far the biggest factor in describing the decline in plaintiffs’ overall success rate.”).

³¹² Clermont & Eisenberg, *Case Outcomes*, *supra* note 310, at 593.

³¹³ *Id.* at 603–05. Eisenberg and Clermont note that counsel quality likely has a limited effect because removal often cannot be avoided. The same applies here, though to a lesser degree.

³¹⁴ *Id.* at 606–07. This result—that removal to a presumably unfavorable federal forum decreases a plaintiff's odds of success by 11 percent—obviously is a significant one, and it suggests that litigants are quite good at judging where they will have the most success.

One possible hitch in the first two of these theories is that if prevailing during *Younger* proceedings signaled a likelihood of success on the merits, one would expect to see a depressed federal claim success rate in post-abstention state proceedings, and vice versa in federal court after a failed abstention request.³¹⁵ The former certainly is consistent with my results, but the latter is not. As discussed above,³¹⁶ I observed a federal claim success rate that is consistent with what Solimine and Walker found in their study (43.6 percent to 41.7 percent). This tentatively suggests that there is no mechanism at play funneling more meritorious claims to federal court. I have a few theories that might explain this phenomenon;³¹⁷ however, I looked at a different universe of claims than those authors, and as such, it would be pointless and premature to speculate as to why my observed federal claim success rate in post-abstention proceedings in federal court does not appear disproportionately high.

V. CONCLUSION

Litigators should not care why federal claims seem to get a disproportionately hostile treatment in state forums after *Younger* proceedings than they do in federal court, or than they do outside of the abstention context. Why would trial lawyers care if the explanation for this discrepancy is that state tribunals cannot adequately adjudicate these sorts of cases, or if it is because an abstention victory signals that a party has an advantage in the post-abstention proceedings? Attorneys litigating this issue should have the same goal no matter what: win the abstention dispute or their client will probably lose the case. But how is this different than it always has been? Lawyers fight over *Younger* abstention as if the case is on the line for good reason—it usually is. My survey results should only confirm that conventional wisdom.

The question is more important and interesting from an academic perspective. The *Younger* doctrine is premised on a fundamental assumption that state tribunals can adequately resolve federal claims. If it turns out that this is not true—because state forums are hostile to federal claimants in the abstention context—then the theoretical underpinnings of the doctrine are baseless, and it should be restructured. It is unlikely that the Supreme Court would ever reverse the prior expansion of the *Younger* doctrine, even in the face of overwhelming

Notably, Clermont and Eisenberg also have examined the effects of venue transfer, observing a similar phenomenon. They conclude that plaintiffs prevail in 58 percent of all non-transferred and 29 percent of all transferred cases. Controlling for known variables, losing a transfer dispute seems to decrease a plaintiff's odds in a case from 50 percent to 40 percent. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–12 (1995); see also Clermont, *Litigation Realities Redux*, *supra* note 310, at 1927–28.

³¹⁵ It is possible that private litigants, with their limited resources, might be more likely to give up after an adverse abstention decision than are their state opponents, and as such, the third hypothesis is reconcilable with the observation that federal claim success rates appear depressed in state forums but not elevated in federal ones.

³¹⁶ See *supra* Section III.C.

³¹⁷ For example, the influx of Reagan and Bush I and II appointees may have made the federal judiciary less receptive to federal claims over the past few decades. Under this theory, my 43.6 percent federal court success rate actually is elevated—it is just that the baseline success rate is lower now than when Solimine and Walker conducted their study.

evidence that it was unwarranted.³¹⁸ But if the Court ever decided to take up the topic again, it could do so knowing whether the fundamental assumptions upon which the doctrine is based are suspect. If, on the other hand, outside factors only make it look like federal claimants are being unfairly treated at the state level, then this is a different matter. Perhaps nothing needs to be done—but we need to be aware of the phenomenon.

This Article is intended to start the conversation about what actually happens when courts abstain (or not) in favor of parallel state proceedings. My survey was not exhaustive, but I plan to do more comprehensive study in the future. And while there will probably always be post-abstention proceedings hidden from public view, someone with substantial resources likely could determine the disposition of the vast majority of federal claims. We will begin to have a full picture about what happens after *Younger* abstention at that point, and the debate will be less about how the federal claims are ultimately resolved, and more about whether any discrepancy between success rates in state and federal court is attributed to a lack of parity, or to the litigation advantage that the winners of pretrial matters oftentimes have, or to some other factor. This last inquiry, in my view, is the most interesting one. Hopefully this Article will provide the impetus for someone to try to answer it.

³¹⁸ See Herman, *supra* note 147, at 655 n.17.