You Say Remedial, I Say Coercive, Let's Call the Whole Thing Off: Why the Remedial/Coercive Distinction Is Not Critical in *Younger* Abstention [*Brown v. Day*, 555 F.3d 882 (10th Cir. 2009)]

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> *"[F]or if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun."*[1]

I. INTRODUCTION

A harmonious relationship between state and federal governments holds a highly important place in our country's history.[2] This principle, often called comity or "Our Federalism," dictates that federal courts should avoid unnecessary conflict with legitimate state activities.[3] In a 1971 decision, *Younger v. Harris*,[4] the United States Supreme Court emphasized comity when it reaffirmed the long-standing policy against federal interference with state court proceedings by overturning a federal injunction against a state prosecution.[5] Cases after *Younger* established that comity holds the key to whether a federal court abstains.[6] Particularly, a federal court should avoid interference out of respect for a state's ability to interpret its own laws.[7]

In 2009, the United States Court of Appeals for the Tenth Circuit disregarded comity when it sanctioned improper federal interference before the Kansas court system resolved a Medicaid-eligibility dispute.[8] The Tenth Circuit held that its courts may issue an injunction when the

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1. Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 130 (1941) (quoting Attorney General Edmund Randolph in a speech to the House of Representatives on December 31, 1790, that recommended changes to the Judiciary Act of 1789).

2. *See* 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4251, at 14 (3d ed. 2007).

3. *See* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 122.05[2][c], at 122-73 (3d ed. 2009).

4. 401 U.S. 37 (1971).

5. *Id.* at 41.

6. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (citing Supreme Court precedent).

7. *See* Moore v. Sims, 442 U.S. 415, 429-30 (1979).

8. *See* Brown v. Day, 555 F.3d 882, 906 (10th Cir. 2009) (Tymkovich, J., dissenting).

state proceeding at issue is "remedial."[9] The court focused its decision not to mandate abstention on a semantic analysis of whether to label the state agency's hearing "remedial" or "coercive," which it called the "critical distinction."[10] The court took four words, "coercive rather than remedial," from a Supreme Court footnote out of context from the broader rationale of *Younger* abstention.[11] This persuaded the court that the label was more important than the historic notion of comity.[12] Ultimately, the Tenth Circuit's misapplication of precedent allowed a federal court to substitute its judgment for state court review and undermine the ability of Kansas courts to assess the state's Medicaid law.[13]

This Comment examines the *Brown v. Day*[14] decision and concludes that the Tenth Circuit ignored the rationale behind *Younger* abstention by incorrectly basing its decision on the distinction between a remedial and a coercive proceeding. Part II of this Comment provides the relevant facts and procedural posture of the case. Part III provides a background of *Younger* abstention and the cases that defined its broad scope. Part IV examines the court's decision and its disagreement with the dissenting judge and the district court. Part V examines the remedial-coercive distinction in context to show that: (1) the difference is one of degree in measuring the state's interest; (2) the Tenth Circuit failed to follow its own precedent; and (3) the Supreme Court rationale emphasizes that comity matters more than whether a proceeding is labeled remedial or coercive. Part VI concludes that the supposedly "critical distinction" between remedial and coercive proceedings is not critical at all, that comity and federalism still should determine when a court must abstain, and that the Tenth Circuit should not have disrespected the Kansas legislative and judicial systems by opening the door to federal review of state agency decisions.[15]

II. CASE DESCRIPTION

Dena K. Brown was a developmentally disabled 46-year-old who received Medicaid payments.[16] Brown's mother died in 2003, leaving assets for her in a trust controlled by her brother.[17] Based on its inter-

9. *Id.* at 893.
10. *Id.* at 890 (adopting the "critical distinction" language from the Third Circuit).
11. *Id.* (quoting Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 n.2 (1986)).
12. *See id.* at 893-94.
13. *See infra* Part V-B.
14. 555 F.3d 882 (10th Cir. 2009).
15. *See infra* Part VI; *see also* Bernard v. Kan. Health Policy Auth., No. 09-cv-01247-JTM-KMH (D. Kan. filed Aug. 7, 2009) (involving aid recipient filing a federal § 1983 suit instead of appealing Medicaid eligibility decision through state court system).
16. *Brown*, 555 F.3d at 885. Medicaid paid for her residential care facility. *Id.*
17. *Id.* at 886. Dena Brown was the beneficiary of a residuary trust that included $15,000 in cash, $23,000 in two annuities, and 160 acres of land valued at $30,000 in Kingman County. *Id.*

pretation of a new statute, the Kansas Division of Health Policy and Finance (HPF) declared that Brown no longer was eligible for Medicaid because of the inherited resources.[18] The state agency notified Brown that her benefits would end August 31, 2005.[19]

Brown requested a hearing in front of the state agency.[20] On January 15, 2006, Brown asserted that the amended law did not apply retroactively to her pre-existing trust, and the hearing officer restored her benefits.[21] Nevertheless, on April 26, 2006, HPF director Robert M. Day reinstated the original decision to terminate benefits and advised Brown that she had thirty-three days to file a petition for state judicial review.[22] Instead, on May 25, 2006, Brown filed suit against Day in the United States District Court for the District of Kansas under 42 U.S.C. § 1983.[23]

In her federal suit, Brown sought a declaratory judgment and an injunction barring the state from terminating her Medicaid coverage, and the federal court issued the injunction June 8, 2006.[24] On July 3, 2006, Day filed a motion to dismiss arguing that, because of the abstention doctrine established in *Younger*, the court should not have acted.[25] On

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18. *Id.* The state terminated Brown's benefits because her brother, Donald Brown, had the discretion to use trust income or principal for his sister's benefit, making the trust an available resource worth approximately $68,000, which is more than the $2,000 resource limit. Brown v. Kan. Dir. of Health Policy and Fin. Final Order, Appeal No. 06 M 0080 MA (April 26, 2006). In 2004, the Kansas Legislature changed a statute in a way that the trust was considered an available resource. *Brown*, 555 F.3d at 886. The new law considered trust resources to be available "to the extent, using the full extent of discretion, the trustee may make any of the income or principal available to the applicant or recipient of medical assistance." KAN. STAT. ANN. § 39-709(e)(3) (2009).

19. *Brown*, 555 F.3d at 886.

20. *Id.* On August 25, 2005, Brown mailed a formal written notice of appeal and requested the hearing, claiming the trust was a supplemental-needs trust and not a discretionary-support trust and should not be considered a countable resource. Letter from Janet Huck Ward, Attorney, Morris Laing Evans Brock & Kennedy, Chtd., to James D. Smith, Social and Rehabilitation Services, and Office of Administrative Hearings and Appeals (Aug. 25, 2005) (on file with author).

21. *Brown*, 555 F.3d at 886.

22. *Id.* Day reversed the hearing officer's finding as "clearly contrary to Kansas law and public policy." Brown v. Kan. Dir. of Health Policy and Fin. Final Order at 7, Appeal No. 06 M 0080 MA (April 26, 2006). Kansas's appellate scheme is governed by the Kansas Judicial Review Act. KAN. STAT. ANN. § 77-601 to 77-631 (2009). A petition for judicial review must be filed within thirty days of the final order. *Id.* § 77-613. The act "establishes the exclusive means of judicial review of agency action." *Id.* § 77-606. The Final Order noted that Kansas law allowed for three additional days to file for judicial review because it was mailed. Brown v. Kan. Dir. of Health Policy and Fin. Final Order at 9.

23. *Brown*, 555 F.3d at 886-87. Title 42 section 1983 of the United States Code provides for a civil action for deprivation of rights. 42 U.S.C. § 1983 (2003). Brown's suit was not statutorily barred by 28 U.S.C. § 2283 (Anti-Injunction Act) because she brought her federal suit pursuant to § 1983, an act of Congress that authorizes a suit in equity in cases alleging deprivation of rights. *See* 42 U.S.C. § 1983. Brown claimed the state deprived her of her rights because the Kansas statute conflicted with federal Medicaid law. *Brown*, 555 F.3d at 887.

24. *Brown*, 555 F.3d at 887. Brown sought a declaratory judgment that the interpretation of state law counting the trust as an available resource is unlawful because it violates federal law. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 1, Brown v. Day, 477 F. Supp. 2d 1110 (D. Kan. 2007) (No. 06-2212-KHV).

25. Brown v. Day, No. 06-2212-KHV, 2006 WL 3087111, at *1 (D. Kan. Oct. 27, 2006). Day also argued that the abstention doctrine established by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) also should have applied, but this argument never was addressed at any stage of the federal litigation. *Id.*; *see* Memorandum in Support of Motion to Dismiss

October 27, 2006, the federal court held that *Younger* required dismissal because (a) Brown initiated a federal action instead of exhausting her state appeals, (b) the state court provided an adequate forum for Brown's appeal, and (c) Kansas had an important interest in "[p]rotecting the fiscal integrity of public assistance programs."[26] In a motion to alter the judgment, Brown made a new argument that abstention was not required because the hearing was remedial and abstention is mandatory for coercive but not for remedial proceedings.[27] On February 28, 2007, the court rejected this argument and reaffirmed its decision to abstain because the hearing was coercive, as part of the state's overall enforcement scheme, and required abstention.[28]

III. BACKGROUND

Federalism and comity, the proper respect for state functions, are the heart of *Younger* abstention, which requires a federal court to abstain from interfering with pending state proceedings.[29] After *Younger*, the Supreme Court has required abstention whenever a state judicial proceeding is ongoing, involves an important state interest, and provides the parties with a forum to consider federal issues.[30] The Court has required abstention from pending state criminal, civil, and administrative proceedings, each time finding that the type of proceeding takes a back-

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at 5-6, Brown v. Day, 477 F. Supp. 2d 1110 (D. Kan. 2007) (No. 06-2212-KHV). *Colorado River* abstention applies when a federal court deciding state law issues would interfere with important state interests better suited to be decided by a state court. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 196-97 (2d ed. 1988). Other abstention doctrines are *Pullman* abstention, used when "difficult and unsettled questions of state law must be resolved" before a federal court can decide a constitutional question; *Burford* abstention, used when federal review of a state question would disrupt state efforts to establish policy; and *Thibodaux* abstention, used when settling questions of state law are more important than settling the federal suit. *See id.*

26. *Brown*, 2006 WL 3087111, at *2-3. The federal court focused its analysis on Brown's argument that no state proceeding was pending because Day's Final Order brought an end to the proceeding. *Id.* at *2. The court did not discuss the remedial-coercive distinction in its original decision. Appellant's Brief at 28, Brown v. Day, 555 F.3d 882 (10th Cir. 2009) (No. 06-3387).

27. Brown v. Day, 477 F. Supp. 2d 1110, 1115 (D. Kan. 2007).

28. *Id.* at 1117. The district court added a discussion of the distinction between coercive and remedial state administrative proceedings and determined the hearing was coercive for the purpose of *Younger* abstention. *Id.* at 1115-17. After an appeal to and remand by the United States Court of Appeals for the Tenth Circuit, the Kansas Health Policy Authority reached a settlement with Brown and agreed to waive any claim to recover alleged overpayment of benefits to Brown since 2005. Agreed Order of Dismissal, Brown v. Day, No. 06-2212-KHV (D. Kan. Mar. 5, 2009). In exchange, Brown dismissed her federal complaint and released the state agency from all claims pled. *Id.* The state paid Brown $50,000 for attorney fees and litigation expenses as part of the agreement. *Id.* The Kansas Division of Health Policy and Finance was reorganized as the Kansas Health Policy Authority in 2006. *See* KAN. STAT. ANN. § 75-7413(f) (2008); *Brown*, 555 F.3d at 884 n.1.

29. *See infra* Part III-B. *Younger* abstention is named for *Younger v. Harris,* which involved a criminal defendant asking a federal court to enjoin his state prosecution because the state statute was unconstitutional. 401 U.S. 37, 38-39 (1971). Federal interference with state activities is doubly offensive because it hinders efforts to maintain a smoothly running state judicial system and denies the principle of comity between the federal and state courts because there is no constitutional basis for preferring federal courts over state courts when it comes to judging federal constitutional claims. *See* TRIBE, *supra* note 25, at 197.

30. *See infra* Part III-C; Pennzoil, Co. v. Texaco, Inc., 481 U.S. 1, 13-14 (1987) (basing abstention on consideration of three questions).

seat to comity as a determining factor in whether a federal court should abstain.[31]

A. The Roots of Younger *Abstention*

The idea that federal courts should not interfere with legitimate state activities derives from the principle of equitable restraint and a 1793 federal statute that prohibited federal injunctions against any state court.[32] It is a well-settled maxim of equity that a court of equity will not interfere when a "plain, adequate, and complete remedy at law" exists.[33] Historically, cases challenging the validity of state law relied on equity and comity to reject federal court action.[34] Long before 1971, the Supreme Court recognized the "principle of universal jurisprudence" that prevented switching forums once a proceeding was under way.[35]

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31. *See infra* Part III-C. Comity is defined as "courtesy and considerate behavior toward others." THE NEW OXFORD AMERICAN DICTIONARY 343 (Elizabeth J. Jewell & Frank Abate eds., 2001).

32. *Younger*, 401 U.S. at 43. The Court has noted that the rule granting exclusive authority to the first court to hear a matter "is the fruit of experience and wisdom, and regulates the relations and maintains harmony among the various superior courts of law and of chancery in Great Britain." Taylor v. Carryl, 61 U.S. (20 How.) 583, 594 (1857). The principles of *Younger* abstention did not originate in *Younger*. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119 n.2 (1981) (Brennan, J., concurring) (stating that the principle of comity is encapsulation of policy with roots in the Constitution and "its manifestations can be clearly seen in the cases of this Court, and in the Acts of Congress, long before *Younger v. Harris*"). Some commentators have suggested the principles of *Younger* abstention are rooted in the Constitution. *See* TRIBE, *supra* note 25 at 206 ("*Younger* is firmly rooted in the law of judicial federalism underlying the Constitution."); Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 842 (1991) (asserting that the Constitution mandates the principles of equity, comity, and federalism in *Younger* abstention and that *Younger* composes "the hard outer shell of article III"); Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J.L. & PUB. POL'Y 175, 203 (1995) (showing Constitutional foundations of *Younger* abstention); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1336 (1982) (asserting *Younger* abstention is not a self-imposed limitation but a result of the Constitution's federalist first principles).

33. Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276, 281 (1909) ("It is so well settled and has so often been acted upon that no authority need be cited in its support."); *see also Younger*, 401 U.S. at 43-44 (recounting history that courts of equity shall refrain unless the moving party will suffer irreparable injury).

34. *See, e.g.*, Ark. Bldg. & Loan Ass'n v. Madden, 175 U.S. 269, 274 (1899) (denying federal injunction when validity of Texas tax law was challenged). Courts also have invoked comity principles to prevent federal injunctions or declaratory relief in other areas, including state tax collection. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 116 (1981) (holding that taxpayers are barred by principle of comity from challenging validity of state taxes in federal court).

35. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1872). *Taylor* embodied today's principles of *Younger* abstention ninety-nine years before *Younger*:

> Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is . . . exclusive in effect until it has wrought its function.

Id. These principles consistently reappeared in Supreme Court opinions leading up to *Younger*. *See, e.g.*, Atl. Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 296 (1970) ("[L]ower federal courts possess no power whatsoever to sit in direct review of state court decisions."); Cameron v. Johnson, 390 U.S. 611, 613-14 (1968) (affirming lower federal court dismissal "'in furtherance of the doctrine of abstention'"); Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (noting the relationship of "federal equitable power and State administration of its own law, has been an historic concern"); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (recognizing federal courts should refuse to

The Supreme Court, in its *Younger* jurisprudence, has recognized congressional desire since the founding of this country to allow state courts to operate free from federal court interference.[36] *Younger*-abstention rationale is embedded in former U.S. Attorney General Edmund Randolph's suggestion that "if the plaintiff and defendant rely upon the State courts, as far as the judgment, they ought to continue there as they have begun."[37] The *Younger* Court noted that the Anti-Injunction Act of 1793 provides: "'[N]or shall a writ of injunction be granted to stay proceedings in any court of a state.'"[38] The act expresses congressional desire that a federal court should keep its hands off state court litigation and avoid the friction that results from federal intrusion into the "orderly functioning of a state's judicial process."[39] To this day, Congress protects state courts from federal court intervention with the modern-day version of the Anti-Injunction Act.[40]

B. The Supreme Court's Rationale in Younger v. Harris

In *Younger*, John Harris Jr. was charged with violating the California Criminal Syndicalism Act and filed suit in federal court seeking an injunction to prevent his prosecution.[41] The Court ruled that a lower

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embarrass state proceedings); Watson v. Buck, 313 U.S. 387, 401-02 (1941) (recognizing it is highly desirable that state supreme court should have opportunity to interpret its state statutes); Beal v. Mo. Pac. R.R., 312 U.S. 45, 50 (1941) ("[S]crupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld . . . ."); Fenner v. Boykin, 271 U.S. 240, 244 (1926) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection."); Covell v. Heyman, 111 U.S. 176, 182 (1884) (asserting the importance of federal-state comity is a principle of right and necessity).

36. *Younger*, 401 U.S. at 43 (detailing history of congressional action to prohibit federal injunctions against state courts); *see also* Okla. Packing Co. v. Okla. Gas & Elec. Co., 309 U.S. 4, 8-9 (1940) (confirming that congressional policy "to prevent needless friction between state and federal courts" dates to the beginning of U.S. history).

37. Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 130 (1941).

38. *Younger*, 401 U.S. at 43 (alteration in original). The act did not provide for any exceptions. Anti-Injunction Act, ch. 22, § 5, 1 Stat. 335 (1793) (codified as amended at 28 U.S.C. § 2283 (2006)). Another version of the Anti-Injunction Act, Section 265 of the Judicial Act of 1911, provided for an exception authorizing an injunction for proceedings relating to bankruptcy. *Toucey*, 314 U.S. at 129-130. Other statutory exceptions have been made for removal of actions, limitation of shipowners' liability, interpleader, and the Frazier-Lemke Act. *Id.* at 133-34. *Ex parte Young*, 209 U.S. 123 (1908) created a judicial exception to allow a federal injunction if a defendant can show he will suffer great and immediate irreparable injury. *Younger*, 401 U.S. at 43.

39. *Toucey*, 314 U.S. at 132, 135. The Court first used the Anti-Injunction Act to overturn a federal injunction in *Diggs & Keith v. Wolcott*, a civil case concerning promissory notes. 8 U.S. (4 Cranch) 179, 180 (1807). The decision prevented "any control by the federal over the state courts," except for appellate jurisdiction. *Toucey*, 314 U.S. at 135 n.5.

40. *See* 28 U.S.C. § 2283 (2006) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). A suit alleging deprivation of rights under 42 U.S.C. § 1983 is an expressly authorized exception to the Anti-Injunction Act, but principles of equity, comity, and federalism may justify abstention in § 1983 cases. Mitchum v. Foster, 407 U.S. 225, 243 (1972) (detailing history of § 1983 cause of action before holding that congressional desires do not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding").

41. *Younger*, 401 U.S. at 38-39. Harris sought the injunction to prevent Los Angeles County

court injunction violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings."[42] The Court called the injunction inappropriate because Harris had the opportunity in state court to raise his claim that the law was unconstitutional.[43]

The Court referred to both equity and comity concerns in its rationale but decided that comity was an "even more vital consideration" for exercising judicial restraint than the principle that courts of equity do not intervene when there is an adequate remedy at law.[44] Justice Black explained that the underlying reasons for federal restraint are the notions of comity—which he described as "a proper respect for state functions;" and "Our Federalism"—described as "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."[45] The Court emphasized comity and federalism and declared: "[I]t has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending

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District Attorney Evelle Younger from prosecuting him. *Id.* Harris wanted the law declared unconstitutional for violating his rights of free speech. *Id.* Harris's federal suit came shortly after the Supreme Court declared the Ohio Criminal Syndicalism Act unconstitutional, overruling an earlier holding that the California Criminal Syndicalism Act was constitutional. *Id.* at 40-41. Harris was indicted for distributing two leaflets advocating revolution and physical violence in response to police action in south central Los Angeles. *See* Appendix to Appellee's Supplemental Brief on Reargument at 11, Younger v. Harris, 401 U.S. 37 (1971). The California Criminal Syndicalism Act prohibited advocating unlawful violence to affect political change. *Younger*, 401 U.S. at 38 n.1.

42. *Younger*, 401 U.S. at 41, 43-44. The Court found that Harris did not show an unusual circumstance that would justify violating principles of common law equity. *Id.* at 54. The Court stated federal intervention could be justified by a showing of bad faith or harassment by the government. *Id.*; *see, e.g.,* Dombrowski v. Pfister, 380 U.S. 479, 490 (1965) (finding federal injunction against enforcement of state criminal statute proper in case of government harassment of black citizens). The Court added it was conceivable that a federal court could intervene if a state statute was blatantly unconstitutional in every clause, sentence, and paragraph. *Younger*, 401 U.S. at 53-54. This exception never has been used. Beth Shankle Anderson, *"Our Federalism" and* Younger *Abstention Doctrine and Its Companions*, FLA. BAR J., Nov. 2007, at 12.

43. *Younger*, 401 U.S. at 49 (noting that the potential injury that Harris faces is present in every criminal proceeding and it is settled doctrine that federal equitable relief is not available even if the statute is unconstitutional).

44. *Id.* at 44; *see* Timothy Kin Lee Hui, *The Ultimate Expansion of the* Younger *Doctrine:* Pennzoil Co. v. Texaco, Inc., 41 SW. L.J. 1055, 1066 (1987) (citing *Younger* for the proposition that comity is an even more vital consideration underlying why equitable restraint is inappropriate).

45. *Younger*, 401 U.S. at 44. Justice Black's oft-repeated reference to comity and "Our Federalism" is explained more fully in context:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

proceedings in state courts is not to issue such injunctions."[46]

C. Supreme Court Application of Younger *Abstention*

The Court issued seven major decisions that refined the scope of *Younger* abstention in the sixteen years following *Younger*.[47] The Court's analysis has focused on answering three questions to determine whether to abstain: (1) if there is an ongoing state judicial proceeding; (2) if the proceeding implicates important state interests; and (3) if the state proceeding gives an adequate opportunity to raise constitutional challenges.[48] This analysis was harmonized into a test established in *Middlesex County Ethics Committee v. Garden State Bar Association*,[49] which mandated that if the answer to all three questions is yes, then the federal court must abstain.[50]

1. Ongoing State Judicial Proceeding

A state proceeding, once started, is ongoing until all state appeals are completed.[51] A state proceeding is judicial if it is within appellate

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46. *Id.* at 45. The pattern of abstention described by Justice Black demonstrates the federal government's historical policy of not unduly interfering with the legitimate activities of the states. *Id.* at 44. *Younger* reaffirmed what had been a basic doctrine of judicial restraint. O'Shea v. Littleton, 414 U.S. 488, 499 (1974). *Younger* was one of six abstention cases announced on February 23, 1971. Huffman v. Pursue, Ltd., 420 U.S. 592, 599 n.13 (1975); *see also* Byrne v. Karalexis, 401 U.S. 216, 220 (1971) (vacating injunction against district attorney when theater owner was charged with possession of obscene film); Dyson v. Stein, 401 U.S. 200, 203 (1971) (vacating injunction against police chief when newspaper publisher was charged with possession of obscenity); Perez v. Ledesma, 401 U.S. 82, 85 (1971) (reversing federal court order to suppress evidence in case of newsstand charged with obscenity); Boyle v. Landry, 401 U.S. 77, 81 (1971) (reversing declaratory judgment and injunction against enforcing a statute prohibiting mob action and intimidation); Samuels v. Mackell, 401 U.S. 66, 73 (1971) (holding that federal declaratory relief is inappropriate in a suit challenging constitutionality of state anarchy law while prosecution is pending).

47. *See* WRIGHT ET AL., *supra* note 2, § 4254, at 72-73.

48. *See* Pennzoil, Co. v. Texaco, Inc., 481 U.S. 1, 13-17 (1987) (assessing importance of state interest, presence of ongoing proceeding, and adequacy of state forum to settle federal claims in decision to abstain). The Court viewed state courts equally able to judge federal constitutional claims as federal courts. *See* Moore v. Sims, 442 U.S. 415, 430 (1979); *Huffman*, 420 U.S. at 611. A state court proceeding must be pending when the federal action begins to mandate abstention. *See* WRIGHT ET AL., *supra* note 2, § 4253, at 44.

49. 457 U.S. 423 (1982).

50. *Id.* at 432 (asking "*first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges") (emphasis in original).

51. *See Huffman*, 420 U.S. at 608, 611 ("The District Court should not have entertained this action, seeking pre-appeal interference with a state judicial proceeding."). The Court said comity and federalism considerations apply to civil actions much like federal habeas corpus first requires a criminal defendant to complete the state appeals process. *Id.* at 606-07 ("The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state-court dispositions of federal questions."). The Court rejected the idea that the state action was no longer pending because a judgment was issued and no appeal was made. *Id.* at 608. The Court held that federal intervention before completion of the appeals process was "highly duplicative . . . a direct aspersion on the capabilities and good faith of state appellate courts." *Id.* ("Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial."). The state's

jurisdiction of the state supreme court.[52] The Court has found that a state administrative proceeding is judicial if judicial review is available.[53]

A federal plaintiff does not first have to initiate available state administrative remedies before filing a § 1983 suit in federal court.[54] In *Patsy v. Board of Regents of the State of Florida*,[55] the Court held that a university teacher alleging discrimination was allowed to have her choice of a federal forum, even though a state forum was available, because she did not sidetrack an ongoing state proceeding when she filed her federal claim.[56]

2. Important State Interests

The Supreme Court consistently has invoked federalism and comity when it has refused to intervene in state proceedings involving a variety of important state interests.[57] *Pennzoil v. Texaco*,[58] which found an important state interest in enforcing judgments of the state's courts in a private civil suit in which the state was not a party, demonstrates the broad scope of *Younger* abstention.[59] Under the *Pennzoil* standard, the

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interest is continual from beginning to end. Hui, *supra* note 44, at 1071. It can arise in administrative proceedings before reaching a state court, during a trial, after a trial, and before or after a court enters judgment. *Id.* at 1072 ("One cannot hide from the broad expansion of the *Younger* doctrine.").

52. S*ee Huffman*, 420 U.S. at 608 (holding that a natural break between trial and appellate stages of a proceeding does not destroy its ongoing nature); *Middlesex*, 457 U.S. at 433-34. *Middlesex* featured an attorney seeking a federal injunction to stop a pending disciplinary proceeding. *Id.* at 429. The New Jersey Supreme Court considered the attorney discipline proceeding judicial in nature from the beginning because it considered the ethics committee an arm of the court. *Id.* at 433.

53. MOORE ET AL., *supra* note 3, § 122.05[2][d], at 122-80. The appellate scheme makes some administrative proceedings "judicial in nature" from the outset. *Middlesex*, 457 U.S. at 433-34. Abstention applies only to proceedings that are judicial, but not legislative, in nature. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans (*NOPSI*), 491 U.S. 350, 372-73 (1989) (holding that *Younger* abstention does not apply when the proceeding is legislative in nature, specifically in a city council proceeding that sets electrical rates).

54. MOORE ET AL., *supra* note 3, § 122.05[2][d], at 122-81; *see* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 523 (1990) (affirming *Patsy's* holding that availability of state administrative procedures does not ordinarily prevent § 1983 claim in federal court); Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (holding that claims under § 1983 do not require the exhaustion of state administrative remedies). *Patsy* did not discuss *Younger* abstention but was later brought into the *Younger* discussion by *Dayton*. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 n.2 (1986).

55. 457 U.S. 496 (1982).

56. *Patsy*, 457 U.S. at 518 (White, J., concurring) ("The result today is also fully consistent with our decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court."); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 238-39 (1984) ("*Younger* is not a bar to federal court action when state judicial proceedings have not themselves commenced . . . ."); Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

57. *See* TRIBE, *supra* note 25, at 203 n.9 (listing cases).

58. 481 U.S. 1 (1987).

59. *See* WRIGHT ET AL., *supra* note 2, § 4254, at 85, 89-91 (noting that sufficiently important state interest may exist even when the state proceeding is between two private parties). In *Pennzoil*, Texaco claimed a state law violated constitutional due process because it required Texaco to post more than $13 billion to appeal an $11 billion judgment in a private civil suit. *Pennzoil*, 481 U.S. at 5-6 nn.5-6. Texaco sought a federal injunction against enforcing the judgment. *Id.* at 6. The Court ruled that the lower court should have abstained out of respect for Texas's ability to adjudicate its own state law. *Id.* at 10.

second prong of the test is met "if the State's interests in the proceedings are so important that exercise of the federal judicial power would disregard the comity [extended] between the States and the National Government."[60]

The Court has found three ways to show a state interest sufficiently important to warrant abstention: (a) proceedings resembling criminal prosecutions; *or* (b) proceedings enforcing the state's judicial process; *or* (c) proceedings vindicating important state policies.[61]

a. Proceedings Resembling Criminal Prosecutions

Abstention is not limited to criminal cases because comity was an even more vital consideration than the traditional restraints on the use of equity courts, which applied only to criminal cases.[62] The equity-based rationale included in the *Younger* opinion—that courts of equity should not intervene when there is an adequate remedy at law—disappeared in *Huffman v. Pursue, Ltd.*,[63] in which the Court mandated abstention from a civil enforcement proceeding.[64] *Huffman* decided

60. *Pennzoil*, 481 U.S. at 11. The Court cited its precedent to emphasize the importance of the state's interest in enforcing orders and judgments of its courts. *Id.* at 13-14. The Court did not require abstention whenever any state civil proceeding is pending, leaving the lower courts to work out the limits of *Younger*'s reach. WRIGHT ET AL., *supra* note 2, § 4254, at 88. Justice Blackmun noted that *Pennzoil's* holding effectively allows *Younger* abstention to apply when there is an ongoing state proceeding, "no matter how attenuated the State's interests are" and "no matter what abuses the federal plaintiff might be sustaining." *Pennzoil*, 481 U.S. at 27-28 (Blackmun, J., concurring); *see also* TRIBE, *supra* note 25, at 207 ("[T]here now appears to be no principled way to prevent the application of the *Younger* doctrine to preclude federal litigation of any threatened federal interest where the litigant is involved in a pending state judicial proceeding that is adequate to ventilate the federal claim.").

61. Moore v. Sims, 442 U.S. 415, 423 (1979); *see also* 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, 540-41 (1994) (noting that Justice Rehnquist shifted the focus from the federal plaintiff's posture to the state's interests, indicating perhaps any interest warrants abstention). Rehnquist said state courts should decide state law because federal court disruption prevents the informed evolution of state policy by state courts. *Moore*, 442 U.S. at 430.

62. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01 (1975). *Huffman*, in a civil arena, was so significant that some commentators refer to "Younger-Huffman abstention." *See* Baird, *supra* note 61, at 503-04 (noting that four Supreme Court opinions referred to *Younger-Huffman* abstention); *see also* Hui, *supra* note 44, at 1062 (referring to the Court's use of "principles that *Huffman* and *Younger* had developed"); George Sheram King, Comment, *Federal Injunctive Relief Against Pending State Civil Proceedings:* Younger *Days Are Here Again*, 44 LA. L. REV. 967, 973 (1982) (discussing the "*Younger-Huffman* doctrine"). The Court also used the *Younger-Huffman* terminology. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 628 (1986) (discussing "*Younger-Huffman* principles"); *Moore*, 442 U.S. at 423 (same); Juidice v. Vail, 430 U.S. 327, 339 n.16 (1977) (same).

63. 420 U.S. 592 (1975).

64. *See* Baird, *supra* note 61, at 532-33 (noting *Huffman*'s reliance on federalism divorced equity from *Younger* abstention requirements, freeing federalism analysis to take on a life of its own); *Huffman*, 420 U.S. at 604 (emphasizing offense to state's interest as Court's rationale because equity is not available to mandate abstention in civil cases). The state court ordered a theater closed for a year for showing obscene films in violation of a public nuisance statute, but the theater's new operator filed a federal suit rather than appealing within the state court system. *Id.* at 598. Subsequent *Younger* abstention cases turned on valuing the "harmonious operation of separate federal and state court systems, with a special regard for the State's interest" because common law equity was not available in civil cases. Steffel v. Thompson, 415 U.S. 452, 482 (1974).

that federal interference with civil nuisance litigation is every bit as offensive to the state's interest as it would be in a criminal proceeding.[65]

b. Proceedings Enforcing the State's Judicial Process

The Court, in *Juidice v. Vail*,[66] stated that a state's interest in vindicating its judicial system is important enough to require abstention even though it may not be as important as criminal prosecutions or a civil enforcement proceeding.[67] The Court repeated that comity is the more vital consideration than whether a criminal proceeding is involved because federal interference would offend the state's interest and unduly interfere with the legitimate activities of the state.[68]

c. Proceedings Vindicating Important State Policies

Courts also can find an important state interest in proceedings "necessary for the vindication of important state policies."[69] Comity and federalism principles require abstention from civil proceedings necessary "to vindicate important state policies," which include safeguarding the fiscal integrity of its public-assistance programs and preventing child abuse.[70]

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65. *Huffman*, 420 U.S. at 604 ("[T]he proceeding is both in aid of and closely related to criminal statutes . . . ."). *See* Baird, *supra* note 61, at 526 (calling *Huffman* important because "it introduced the 'state's interest' analysis which has become a central test" in applying abstention).

66. 430 U.S. 327 (1977).

67. *Id.* at 335; *see* Baird, *supra* note 61, at 537-38 (noting that *Younger* was under a more lenient standard and no longer required the state's interest to "rise to the level of its interest in criminal prosecution"). An important state interest in enforcing judgments of its courts may exist even if the state is not a party. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 13-14 (1987). *Younger* abstention is not limited to proceedings resembling criminal prosecutions or civil actions based on criminal statutes. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In *Middlesex*, the Court stated:

> The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman* . . . . Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation.

Id. In *Juidice*, the Court formally abandoned the limitation of *Younger* abstention to criminal or quasi-criminal proceedings. Powell, *supra* note 32, at 1340. Vail filed a federal suit rather than appealing a state contempt proceeding brought about after Vail failed to appear at a civil judgment hearing. *Juidice*, 430 U.S. at 330.

68. *Juidice*, 430 U.S. at 336.

69. *Middlesex*, 457 U.S. at 432.

70. Trainor v. Hernandez, 431 U.S. 434, 444 (1977). *Trainor* involved a state civil enforcement action to recover public assistance funds paid to ineligible recipients. *Id.* The Court found recovering fraudulently obtained benefits to be an important state interest in a proceeding that was a step removed from a criminal (*Younger*) or quasi-criminal (*Huffman*) proceeding. *Id.*; *see* Baird, *supra* note 61, at 539 (noting *Trainor*'s reliance on comity stands for a policy of broad non-interference toward state courts regardless of a criminal/non-criminal distinction). The Court noted that 28 U.S.C. § 2283, the Anti-Injunction Act from which the *Younger* abstention derived, applied to "proceedings in a State court" and did not distinguish between criminal and civil proceedings. *Trainor*, 431 U.S. at 444 n.8. The statute also does not distinguish between enforcement and non-enforcement proceedings. 28 U.S.C. § 2283 (2006). *Moore v. Sims* involved an action to remove child abuse victims from their parents. 442 U.S. 415, 419-20 (1979).

3. Adequate Opportunity to Present Federal Issues

The availability of judicial review is an adequate forum for hearing constitutional claims even if the administrative proceeding does not in practice consider the constitutionality of a statute.[71] The Court, in *Ohio Civil Rights Commission v. Dayton Christian Schools*,[72] held it is sufficient that state judicial review of constitutional claims is available.[73]

D. The Remedial/Coercive Distinction in the Supreme Court

The Court used the words "remedial" and "coercive" once in the *Younger* line of cases, in a footnote that has been read by some lower courts to create another limitation.[74] The Court, in *Dayton*, placed the footnote after a paragraph that detailed the evolution of *Younger* application to civil judicial proceedings.[75] In *Dayton*, a state agency mandated a school's participation in a coercive proceeding, and in *Patsy*, a teacher alleged discrimination and initiated a remedial court proceeding.[76] Attempting to distinguish *Dayton*'s holding that the school first must exhaust its state remedies from *Patsy*'s holding that exhaustion is not required, footnote 2 reads:

> The lower courts have been virtually uniform in holding that the *Younger* principle applies to pending state administrative proceedings in which an important state interest is involved. . . .
>
> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy*, which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.[77]

The Court made no further explanation of the significance of whether a state proceeding is "coercive" or "remedial" and has not used those words again in its *Younger* line of cases.[78]

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71. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 629 (1986). Dayton was a private school being investigated for sex discrimination after firing a pregnant teacher because she failed to follow the school's "[b]iblical chain of command" in challenging the school's belief that women should remain at home to raise young children. *Id.* at 622-24. The private school sought a federal injunction against a state agency's investigation because the school claimed its freedom-of-religion rights were violated. *Id.* at 624-25.

72. 477 U.S. 619 (1986).

73. *Id.* at 629. Dayton claimed the administrative proceeding did not allow it to raise its freedom-of-religion argument that the potential punishment was unconstitutional. *Id.*

74. *See infra* Part III-E; *see, e.g.*, Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 260 (1st Cir. 1987).

75. *Dayton*, 477 U.S. at 627.

76. *See Kercado-Melendez*, 829 F.2d at 260.

77. *Dayton*, 477 U.S. at 627 n.2 (citations omitted).

78. *Id.* at 627.

E. Other Jurisdictions

Every circuit uses a version of the *Middlesex* three-part test today.[79] To decide whether to abstain, some courts evaluate whether the federal plaintiff is involved in a "coercive" state proceeding, in other words a state-initiated enforcement action in which the plaintiff does not have a choice to participate, or a "remedial" proceeding in which the plaintiff initiated an option to seek a remedy for the state's wrongful action.[80] Circuits are split about whether a court can hear a case if the state action is remedial.[81] Circuits disagree about whether the coercive-remedial distinction matters, and if so, how to tell the difference.[82]

The United States Court of Appeals for the First Circuit, in a case involving the firing of a school superintendent, was the first circuit court to discuss the remedial-coercive distinction.[83] Because it was the superintendent's option to initiate an administrative appeal, the First Circuit held that the available state proceeding was "remedial rather than coercive."[84] The court said this was the "crucial distinction" between *Patsy*, which did not require abstention because exhaustion of state remedies was not mandatory, and *Dayton*, which required abstention because state remedies were not exhausted.[85] Subsequent First Circuit cases have held that a court must abstain only when state proceedings are coercive, which the First Circuit defines as a state-initiated enforcement proceeding.[86]

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79. *See* Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 518 (1st Cir. 2009); Brown v. Day, 555 F.3d 882, 887 (10th Cir. 2009); Barzilay v. Barzilay, 536 F.3d 844, 850 (8th Cir. 2008); San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008); Am. Family Prepaid Legal Corp. v. Columbus Bar Ass'n, 498 F.3d 328, 332 (6th Cir. 2007); Stroman Realty, Inc. v. Martinez, 505 F.3d 658, 662 (7th Cir. 2007); Nivens v. Gilchrist, 444 F.3d 237, 241 (4th Cir. 2006); Addiction Specialists, Inc. v. Twp. of Hampton, 411 F.3d 399, 408 (3d Cir. 2005); Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 75 (2d Cir. 2003); 31 Foster Children v. Bush, 329 F.3d 1255, 1274 (11th Cir. 2003); Wightman v. Tex. Supreme Court, 84 F.3d 188, 189 (5th Cir. 1996); Bridges v. Kelly, 84 F.3d 470, 476 (D.C. Cir. 1996).

80. MOORE ET AL., *supra* note 3, § 122.05[2][d], at 122-83.

81. *Brown*, 555 F.3d at 896 (Tymkovich, J., dissenting).

82. *See id.* *Compare* Alleghany Corp. v. Haase, 896 F.2d 1046, 1053 (7th Cir. 1990) (finding distinction matters in decision to hear federal suit), *with* Alleghany Corp. v. McCartney, 896 F.2d 1138, 1145 (8th Cir. 1990) (finding distinction does not matter in decision to abstain). Courts that have discussed the distinction have considered:

> (1) whether the federal plaintiff's participation in the state administrative proceeding was mandatory (coercive) or an option available to the federal plaintiff to redress a wrong inflicted by the state (remedial); (2) whether the state proceeding is itself the wrong the federal plaintiff seeks to correct; and (3) whether the state administrative proceeding was initiated to punish the federal plaintiff for an alleged bad act (coercive).

MOORE ET AL., *supra* note 3, § 122.05[2][d], at 122-84.

83. *See* Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 261 (1st Cir. 1987). The United States Court of Appeals for the Eighth Circuit was the first to cite the *Dayton* footnote but did not make it determinative, only noting that the proceedings at issue were similar to the coercive proceeding in *Dayton*. *See* Ronwin v. Dunham, 818 F.2d 675, 677-78 n.7 (8th Cir. 1987).

84. *Kercado-Melendez*, 829 F.2d at 260.

85. *Id.* However, the holding of *Kercado-Melendez* was controlled by *Patsy* because the superintendent was not challenging a pending state proceeding because she chose to file suit in federal court rather than pursue an available state administrative remedy. *Id.* at 262.

86. *See, e.g.*, Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 522 (1st Cir. 2009) (restat-

The United States Court of Appeals for the Third Circuit declared in a footnote that the coercive-remedial difference was the "critical distinction" between *Dayton* and *Patsy* because it focused on the plaintiff's positions.[87] Some jurisdictions have addressed the remedial-coercive distinction raised in these cases from the First and Third Circuits and concluded that exhaustion of state administrative remedies is required only in coercive proceedings.[88] The First and Ninth Circuits expressly require a state-initiated action to show the existence of a coercive proceeding as part of their abstention tests.[89]

By contrast, the United States Court of Appeals for the Eighth Circuit in *Alleghany Corp. v. McCartney*[90] mandated abstention from a proceeding that was not coercive.[91] The plaintiffs argued that *Younger* abstention requires a coercive proceeding and applies "only where there is a pending state enforcement proceeding."[92] The court dismissed the argument in two sentences by citing the holding in *Pennzoil*, which re-

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ing *Kercado*'s holding that federal plaintiff-initiated remedial proceedings are not subject to *Younger* abstention); Maymo-Melendez v. Alvarez-Ramirez, 364 F.3d 27, 31 (1st Cir. 2004) (requiring a coercive proceeding).

87. O'Neill v. City of Phila., 32 F.3d 785, 791 n.13 (3d Cir. 1994).

> The critical distinction between *Dayton Christian Schools* and *Patsy* is that *Patsy* involved a *remedial* action brought by the plaintiff to vindicate a wrong which had been inflicted by the State. In contrast, *Dayton Christian Schools* involved an administrative proceedings [sic] initiated by the State, before a state forum, to enforce a violation of state law. That is, in *Dayton Christian Schools*, the action taken by the Ohio Civil Rights Commission was *coercive* rather than remedial.

Id. District courts in the Third Circuit since *O'Neill* have focused their analysis of *Younger* abstention on whether the proceeding was coercive or remedial to determine that a federal court is not required to abstain from a state proceeding that is remedial. *See, e.g.*, Gordon v. E. Goshen Twp., 592 F. Supp. 2d 828, 842 (E.D. Pa. 2009) (declining to apply *Younger* abstention on the ground that plaintiffs' state case was a remedial action in case involving residents seeking injunction to stop ordinance from allowing deer hunting with a bow in township).

88. Brown v. Day, 555 F.3d 882, 890 (10th Cir. 2009) ("Seizing on this language, the lower courts have required that federal plaintiffs 'perfect' their § 1983 claims by exhausting state administrative remedies only where the state administrative proceedings are coercive."). The Fourth Circuit, in a case involving a street preacher cited for violating a city noise ordinance, held that in a coercive state administrative-proceeding a defendant must exhaust his state remedies before filing in federal court. *See* Moore v. City of Asheville, 396 F.3d 385, 388 (4th Cir. 2005) ("[W]e hold that a defendant to a coercive state administrative proceeding must exhaust his state administrative and judicial remedies and may not bypass them in favor of a federal court proceeding in which he seeks effectively 'to annul the results' of a state administrative body."). The United States Court of Appeals for the Seventh Circuit, in a case involving a nurse contesting the loss of his license, equated "judicial in nature" with a coercive proceeding. *See* Majors v. Engelbrecht, 149 F.3d 709, 712 (7th Cir. 1998) ("For purposes of *Younger* abstention, administrative proceedings are 'judicial in nature' when they are coercive– i.e., state enforcement proceedings, as opposed to remedial, or legislative.") (citations omitted).

89. *See Guillemard-Ginorio*, 585 F.3d at 522; San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 546 F.3d 1087, 1092 (9th Cir. 2008).

90. 896 F.2d 1138 (8th Cir. 1990).

91. *Id.* at 1145. The proceeding involved a company challenging the constitutionality of a Nebraska law that prevented it from buying shares of stock in another insurance company. *Id.* at 1140. The Eighth Circuit focused its analysis on the *Middlesex* three-part test to determine that the federal court must abstain. *Id.* at 1143-44. Because the Nebraska Director of Insurance decision was appealable to a state court, the court found the availability of judicial review made it an ongoing judicial proceeding. *Id.* at 1143. Furthermore, the proceeding involved important state interests in encouraging competition in the state's insurance market. *Id.* at 1144. Finally, the court determined that an adequate opportunity existed to raise constitutional claims in state court. *Id.*

92. *Id.* at 1145.

quired abstention from a state proceeding between two private parties because of the important state interest in the proceeding.[93] The Eighth Circuit read *Pennzoil* as applying *Younger* equally to non-coercive proceedings because it broadened the "applicability of *Younger* abstention beyond state enforcement proceedings."[94]

Before *Brown*, the Tenth Circuit determined whether a court must abstain by using its version of the *Middlesex* test.[95] The Tenth Circuit defined important state interests as "matters which traditionally look to state law for their resolution or implicate separately articulated state policies."[96] As will be shown, the Tenth Circuit placed a barrier in front of its established test with its sole attention on the remedial-coercive distinction in *Brown*.[97]

IV. COURT'S DECISION

The Tenth Circuit declared *Brown v. Day* a case of first impression for the issue of whether a hearing to challenge a state agency's decision to terminate Medicaid benefits mandates a federal court to abstain.[98] The court focused its discussion on whether the state proceeding was remedial or coercive and held that the federal district court should have heard the case.[99]

A. Court's Majority Opinion

Brown argued that her suit should have been heard in federal court.[100] Brown wanted the state hearing to be termed remedial because of her argument that a federal court could hear cases involving a

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93. *Id.*

94. *Id.* Alleghany filed a nearly identical action in the Seventh Circuit, which reached the opposite result that abstention was not required because Alleghany's proceeding was not coercive. *See* Alleghany Corp. v. Haase, 896 F.2d 1046, 1053 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991).

95. Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F.3d 1160, 1163 (10th Cir. 1999). The Tenth Circuit test states:

> (1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings "involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies."

Id.; s*ee also* Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997) (articulating three-part test for *Younger* abstention in case involving a land dispute between private parties); Phelps v. Hamilton, 122 F.3d 885, 889, 891 (10th Cir. 1997) (abstaining because no showing of bad faith in case involving protestors facing battery charges); Seneca-Cayuga Tribe of Okla. v. State of Okla. *ex rel.* Thompson, 874 F.2d 709, 711, 714 (10th Cir. 1989) (holding abstention not required because federal interest in tribal land was predominant over the state's interest).

96. *Amanatullah*, 187 F.3d at 1163. This definition was restated from *Taylor v. Jaquez*, which found an important state interest in a state court being able to vindicate its process of recording title to private land. 126 F.3d at 1297. The federal plaintiff, an estate executor, was not subject to a state-initiated enforcement action. *See id.* at 1295.

97. *See infra* Part IV.

98. Brown v. Day, 555 F.3d 882, 888 (10th Cir. 2009).

99. *Id.* at 893. Judge Ebel authored the 2-1 majority opinion. *Id.* at 883.

100. Appellant's Brief at 41, Brown v. Day, 555 F.3d 882 (10th Cir. 2009) (No. 06-3387).

remedial proceeding but not a coercive proceeding.[101] The state agency argued that the coercive-remedial distinction does not matter and that the district court correctly abstained.[102]

The court decided to use the coercive-remedial distinction as the "touchstone" for deciding if the state proceeding was the type that mandated abstention.[103] Adopting the First Circuit test to determine if a proceeding is remedial or coercive, the Tenth Circuit determined that a state proceeding is remedial if the federal plaintiff initiated the proceeding voluntarily to seek a remedy for the state's wrongful act.[104] A proceeding is coercive if participation is mandatory because of a state-initiated enforcement action.[105] The court determined that the proceeding was remedial, and not the type that mandated abstention, because Brown initiated the hearing to seek a remedy for the state's alleged unlawful termination of her benefits.[106]

In doing so, the Tenth Circuit disagreed with the district court's finding that the state proceeding was coercive.[107] The Tenth Circuit

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101. *Id.* at 32-33.

102. Appellee's Brief at 6-7, Brown v. Day, 555 F.3d 882 (10th Cir. 2009) (No. 06-3387) (citing *Juidice* to say "the critical factor [is] the federal court's interference with the state's interest" and not labels given to the proceeding).

103. *Brown*, 555 F.3d at 888 n.5. The court declared that the first part of the Tenth Circuit's three-part test has two sub-parts. *Id.* at 888. The court made the coercive-remedial distinction the first sub-part to determine if the proceeding is the type that requires abstention. *Id.* at 888-89. In addition to determining if there was "an ongoing state criminal, civil, or administrative proceeding," the court read NOPSI v. Council of New Orleans, 491 U.S. 350 (1989)) as requiring it to decide if the proceeding was the *type* of state proceeding subject to *Younger* and read *Dayton* as limiting abstention to coercive proceedings. *Id.* at 887-88. The court focused on what it saw as the critical distinction between *Dayton* and *Patsy*. *Id.* at 890. Brown asserted that the district court abstained "based on a clear misapprehension of the law" because it termed the state proceeding coercive. Appellant's Brief, *supra* note 100, at 41.

104. *Brown*, 555 F.3d at 889. The court borrowed from United States Court of Appeals for the First Circuit opinions, which look to who initiated the state proceeding and what relief the federal plaintiff seeks. *Id.* at 891.

105. *Id.* at 889. The court also considered standards used by the United States Courts of Appeals for the Third, Fourth, and Seventh Circuits and observed that each case involved the state proactively enforcing its laws. *Id.* at 891-92.

106. *Id.* at 889. The court reasoned that the Supreme Court found abstention proper in *Dayton* because the school was the subject of a state-initiated enforcement proceeding (coercive), while improper in *Patsy* because the teacher was pursuing a remedy for a state wrong (remedial). *Id.*

107. *Id.* at 893. The district court had reasoned that the state proceeding was coercive in the same way that someone initiates a proceeding to challenge parking tickets, because it was part of the state's law enforcement scheme. Brown v. Day, 477 F. Supp. 2d 1110, 1117 (D. Kan. 2007). The district court pointed to the coercive nature of the state agency's order, which declared Brown ineligible to receive Medicaid payments. *Id.* In this case, the district court reasoned, it was the state-initiated enforcement action that triggered Brown's right to request an administrative hearing. *Id.* The Tenth Circuit acknowledged that the state agency prepared a "Petition for Civil Enforcement" to recover all benefits paid to Brown since July 1, 2004, when the new law took effect. *Brown*, 555 F.3d at 893. However, the court called the document, prepared after Brown won the federal injunction, a transparent attempt to bolster its case for abstention and gave it no weight because there was no record that it was filed. *Id.* Day did file the petition to enforce his Final Order on July 11, 2006, in state court. Petition for Civil Enforcement, Kansas Health Policy Authority v. Brown, No. 06C995 (Shawnee County District Court Div. 7 July 11, 2006) (naming Brown as a defendant). A state court granted Brown's motion to dismiss for failure to state a claim after a hearing on April 27, 2007. Order to Dismiss, Kansas Health Policy Authority v. Brown, No. 06C995 (Shawnee County District Court Div. 7 May 31, 2007). The Tenth Circuit did not consider the enforcement proceeding for the purposes of *Younger* analysis because it was initiated by the state after Brown secured the federal

based its determination on the fact that Brown initiated the state hearing and her participation was not mandatory.[108] The court declared that the federal courts' "virtually unflagging" duty to grant jurisdiction in § 1983 cases outweighed the need to respect state proceedings.[109] Ultimately, the Tenth Circuit held that abstaining in this case "would extend the *Younger* doctrine to remedial cases" against congressional intent in enacting § 1983 and against Supreme Court precedent.[110]

B. Dissent

Judge Tymkovich dissented on two grounds: first, because the majority found the state proceeding was remedial; and second, because the majority failed to determine that the proceeding was ongoing.[111] He wrote that Brown circumvented an ongoing coercive proceeding, abandoned the state administrative process altogether, and detoured into federal court.[112]

The dissent first questioned whether the remedial-coercive distinction even applied.[113] Assuming it did, the dissent disagreed with the majority's use of the First Circuit standard and concluded that focusing on the initiator fails to recognize that remedial and coercive can be "opposite sides of the same coin."[114] Therefore, the dissent said the better question is whether administrative proceedings are "state enforcement efforts–regardless of who initiates them."[115]

The dissent reasoned that Kansas terminated Brown's benefits in the "proactive enforcement of its laws," the words the majority used to describe coercive proceedings.[116] It cited a state statute that makes failing to report changes in eligibility a crime.[117] The dissent gave more

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injunction and, therefore, was not pending when the federal court issued its injunction. *See Brown*, 555 F.3d at 893.

108. *Brown*, 555 F.3d at 893. Furthermore, Brown sought relief from the state's wrongful application of its new law that she argued violated federal Medicaid law. *Id.* The court declined to decide if the state administrative proceeding was ongoing but concluded that even if it was, its remedial nature did not require abstention. *Id.* at 894.

109. *Brown*, 555 F.3d at 894; *see* Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("Abstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation'" to exercise their jurisdiction.).

110. *Brown*, 555 F.3d at 884. The court concluded that all proceedings not involving state enforcement are remedial, in which case a federal court can hear a § 1983 claim before the plaintiff exhausts state remedies. *Id.* at 890. The court said its decision was consistent with the holding in *Patsy*, which did not require exhaustion. *Id.*

111. *Id.* at 894 (Tymkovich, J., dissenting).

112. *Id.*

113. *Id.* at 895 ("The *Dayton* Court did not specifically say that *Younger* could apply only to coercive administrative proceedings . . . .").

114. *Id.* at 896.

115. *Id.* at 897. The dissent agreed with the district court's focus on the "underlying substance and nature" of the proceeding and not who initiated it. *Id.*; *see* Brown v. Day, 477 F. Supp. 2d 1110, 1116 (D. Kan. 2007).

116. *Brown*, 555 F.3d at 897. The dissent called it bad public policy to require states to use the most coercive measures to enforce law "just so they can preserve abstention arguments." *Id.* at 898.

117. *Id.* at 897 ("And if failure to report amounts to fraud, the recipient 'shall be guilty of the

weight to the state's interest in recovering unlawfully received benefits and concluded that the district court properly abstained because the state proceeding was coercive and ongoing.[118]

V. COMMENTARY

The Tenth Circuit missed the point of *Younger* abstention by basing its entire decision on the distinction between a remedial and a coercive proceeding.[119] The court opened, without citing authority, by stating that cases "where the federal plaintiff has sought a state remedy are not the type of cases subject to *Younger* abstention."[120] The court assumed this was true based on the extraordinary weight it gave to the words "coercive rather than remedial," but it lost sight of the context in which that phrase was written and the context of the broader scope of *Younger* abstention.[121] The dispositive issue in *Brown* should have been whether the state proceeding was "ongoing," because that was the actual critical distinction between *Patsy* and *Dayton*.[122] Basing the entire

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crime of theft . . . .'") (citing KAN. STAT. ANN. § 39-720 (2003)). The dissent disagreed with the majority's view that Brown did not commit a "bad act" that would have led to a coercive proceeding. *Brown*, 555 F.3d at 898 (Tymkovich, J., dissenting).

118. *Brown*, 555 F.3d at 906 (Tymkovich, J. dissenting). The dissent determined that the proceeding was ongoing because Brown had the option to appeal to a state court. *Id.* at 902. The dissent relied on *Huffman* and other circuit court decisions to conclude that "state court judicial review of administrative proceedings represents an integral part of the state administrative process–which *Younger* says cannot be cut off at a mid-point in favor of federal court litigation." *Id.*; *see also* Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 166 (4th Cir. 2008) (relying on *Huffman* to explain that a federal plaintiff "must exhaust his state administrative and judicial remedies and may not bypass them in favor of [a] federal court proceeding in which he seeks effectively to 'annul the results' of a state administrative body"); Maymo-Melendez v. Alvarez-Ramirez, 364 F.3d 27, 35 (1st Cir. 2004). In *Maymo-Melendez*, the court noted that after *Huffman*, "*Younger* now has to be read as treating the state process . . . as a continuum from start to finish . . . . [T]here cannot at any point on the continuum be an automatic right to detour into federal court because [a party is] unhappy with an initial answer." *Id.* (alterations added); Majors v. Engelbrecht, 149 F.3d 709, 713 n.3 (7th Cir. 1998); O'Neill v. City of Phila., 32 F.3d 785, 791 (3d Cir. 1994); Alleghany Corp. v. McCartney, 896 F.2d 1138, 1143 (8th Cir. 1990). *But see* Thomas v. Tex. State Bd. of Med. Exam'rs, 807 F.2d 453, 456 (5th Cir. 1987) ("The mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings.").

119. *Brown*, 555 F.3d at 884 ("The dispositive issue in this case is whether a federal plaintiff's challenge to a state administrative agency's decision to terminate her Medicaid benefits is the type of proceeding entitled to *Younger* deference.").

120. *Id.* The Supreme Court has not declared that federal interference is allowed in remedial proceedings. Professor Tribe, writing post-*Dayton*, lists one of the basic rules of *Younger* abstention as:

> If, at the time the litigant initiates federal proceedings, he is a party in a state *civil proceeding initiated by state officials*, *or* some other state civil proceeding *involving important state interests*, (or, potentially, *any* state civil proceeding), and if he is not barred from raising the constitutional issue in that proceeding, he will again ordinarily be denied federal declaratory or injunctive relief.

TRIBE, *supra* note 25, at 203.

121. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 n.2 (1986) (mentioning the words "coercive rather than remedial" for the only time in the Court's *Younger* line of cases).

122. *See* NOPSI v. Council of New Orleans, 491 U.S. 350, 369 n.4 (1989) (noting that the Court never has squarely faced whether a challenge in federal court can be made after an administrative action has become final, though suggesting that it cannot); *see also* Sanders *ex rel.* Rayl v. Kan. Dep't of Soc. & Rehab. Servs., 317 F. Supp. 2d 1233, 1238, 1240 (D. Kan. 2004) (finding no ongoing state

decision on descriptive labels trivialized the greater contextual principles of comity and federalism that form the core of *Younger* abstention.[123] The most relevant question posed in *Brown* went unanswered: "Does the distinction even apply?"[124]

A. The "Critical Distinction" Is Not Critical at All

The Tenth Circuit premised its opinion on the assumption that whether Brown's state hearing was remedial or coercive was the critical distinction and used this inquiry as the touchstone for its decision.[125] The Tenth Circuit borrowed from the "coercive" versus "remedial" discussion in the Third Circuit, which deemed the coercive-or-remedial issue the critical distinction between the private school's position in *Dayton* and the university teacher's position in *Patsy*.[126] Actually, the critical distinction between *Dayton* and *Patsy* was that the proceeding in *Dayton* "began before any substantial advancement in the federal action took place."[127] In *Patsy*, there was no state proceeding under way, and, therefore, the notion of a federal court respecting an ongoing state proceeding was not an issue.[128]

A better analysis of the critical distinction requires examining the *Dayton* footnote in context.[129] The first paragraph of the footnote states

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proceeding exists under similar facts because federal plaintiff chose federal court rather than to seek state judicial review after four denials of Medicaid coverage).

123. Alleghany Corp. v. Haase, 708 F. Supp. 1507, 1535 (W.D. Wis. 1989), *rev'd*, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991) (rejecting argument that *Younger* does not apply to proceedings with remedial characteristics).

124. *Brown*, 555 F.3d at 895 (Tymkovich, J., dissenting).

125. *Id.* at 888-89 n.5 (majority opinion) ("[W]e will use the dichotomy between remedial and coercive administrative proceedings set forth in [*Dayton*] as the touchstone for determining whether the administrative proceeding is the type of proceeding that merits *Younger* abstention.") (citation omitted). *But see* Hart v. Valdez, 186 F.3d 1280, 1294 (10th Cir. 1999) ("[I]nterference is the touchstone of *Younger*.").

126. *See* O'Neill v. City of Phila., 32 F.3d 785, 791 n.13 (3d Cir. 1994) ("The critical distinction between *Dayton Christian Schools* and *Patsy* is that *Patsy* involved a *remedial* action brought by the plaintiff to vindicate a wrong which had been inflicted by the State."). The *O'Neill* court addressed the distinction for the limited purpose of establishing that the city's action to enforce parking tickets was coercive. *Id.* Otherwise, *O'Neill* followed the *Middlesex* test to determine that abstention was appropriate. *Id.* at 793. The court's decision hinged on whether the proceeding was pending after the plaintiffs filed a federal suit instead of seeking judicial review. *Id.* at 790.

127. Ohio Civil Rights Comm'n v. Dayton Christian Schs., 477 U.S. 619, 627 n.2 (1986). One commentator has discounted the assertion that the coercive/remedial distinction was the critical distinction between *Dayton* and *Patsy*. *See* Harry Edwards, *The Changing Notion of "Our Federalism*," 33 WAYNE L. REV. 1015, 1029 n.42 (1987) ("I find the Court's distinction between 'coercive' and 'remedial' administrative proceedings to be unpersuasive.").

128. Patsy v. Bd. of Regents, 457 U.S. 496, 518 (1982) (White, J., concurring) ("The result today is also fully consistent with our decisions that a defendant in a civil or administrative enforcement proceeding may not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court.").

129. *See Dayton*, 477 U.S. at 627. Justice Rehnquist placed the footnote after a sentence that discussed whether it was vital for *Younger* purposes that an administrative proceeding had progressed to state-court judicial review. *Id.* ("Because we found that the administrative proceedings in *Middlesex* were 'judicial in nature' from the outset, it was not essential to the decision that they had progressed to state-court review by the time we heard the federal injunction case.") (citation omitted).

that lower courts have agreed that *Younger* principles apply to pending state administrative proceedings, and the second paragraph explains that mandating abstention is consistent with *Patsy*, which did not require state remedies be exhausted.[130] The footnote then points out how *Dayton* is different: "Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest."[131]

The Tenth Circuit added emphasis to "coercive rather than remedial," but the key word is "and" because all three clauses work together: *Dayton* was different, and required abstention, because the school had no choice of forum *and* a state proceeding had begun *and* there was an important state interest.[132] Attempts to make each clause of the *Dayton* footnote determinative of "either-or" distinctions are unpersuasive because the third part of the sentence—"and involve an important state interest"[133]—shows no difference between *Dayton* and *Patsy*.[134]

1. The Remedial/Coercive Distinction Measures State Interest

The difference between *Dayton* and *Patsy* is the *level* of state interest involved.[135] In *Dayton*, in which the proceeding was deemed coercive, the level of state interest was high because the state agency was a party to a proceeding that vindicated the state's policy of prohibiting sex discrimination.[136] On a sliding scale, *Patsy* represents the lowest state interest—insufficient to require abstention—at one end because there was not an existing state proceeding under way.[137] *Younger* represents

130. *Id.* at 627 n.2 ("The lower courts have been virtually uniform in holding that the *Younger* principle applies to *pending* state administrative proceedings in which an important state interest is involved.") (emphasis added). Applying *Patsy*'s holding must be considered in the context of other *Younger* decisions. *Pennzoil*, a later § 1983 case, limited the effect of *Patsy* by reaffirming the *Huffman* position that required the exhaustion of state remedies once the state proceeding was ongoing. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 16 n.16 (1987).

131. *Dayton*, 477 U.S. at 627 n.2. The *Dayton* opinion also declared that the state hearing was an ongoing judicial proceeding to which *Younger* applies. *Id.* at 627. The Court concluded, with no further mention of the coercive and remedial distinction, by applying the other parts of the *Middlesex* test and determining that eliminating sex discrimination was an important state interest and that Dayton had an adequate opportunity to raise its First Amendment claims through state-court judicial review. *Id.* at 628-29. The important state interest in *Dayton*—the "elimination of prohibited sex discrimination"—was the same as in *Patsy*, in which a university instructor claimed sex and race discrimination. *Id.* at 628.

132. Brown v. Day, 555 F.3d 882, 890 (10th Cir. 2009).

133. *Dayton*, 477 U.S. at 627 n.2.

134. *See* Independence Pub. Media of Phila., Inc. v. Pa. Pub. Television Network Comm'n, 813 F. Supp. 335, 342 n.6 (E.D. Pa. 1993) ("The Court's mention . . . that an additional distinction between *Dayton* and *Patsy* is that an 'important state interest' was involved in *Dayton* surely cannot be taken literally. Both *Dayton* and *Patsy* involved the same important state interest—the elimination of prohibited sex discrimination.").

135. *Id.* ("That interest was, perhaps, not as fully implicated in *Patsy* because the plaintiff there had not engaged the state administrative process designed to vindicate that interest."). *See infra* notes 136-141 and accompanying text.

136. *See Dayton*, 477 U.S. at 628.

137. *See Independence*, 813 F. Supp. at 342 n.6 (recognizing the non-existence of a state pro-

the highest state interest at the other end because no state interest is as great as the prosecution of its criminal laws.[138] *Dayton*, which involved a coercive administrative proceeding, was lower than *Younger* on the state-interest scale but still high enough to warrant abstention.[139]

Whether a proceeding is remedial or coercive should not be an all-or-nothing, either-or question but rather one of degree relevant for measuring the state's interest.[140] Therefore, the "critical distinction" between remedial and coercive proceedings is not critical at all.[141]

Holding that remedial proceedings do not require abstention directly contradicts *Middlesex*, which addressed the same concepts without using the remedial-coercive code words:

> The importance of the state interest *may be* demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman*. . . . Proceedings necessary for the vindication of important state policies . . . *also* evidence the state's substantial interest in the litigation.[142]

In other words, *Middlesex* expressly mandates abstention from certain proceedings *in addition to* "coercive" proceedings resembling criminal prosecutions.[143] Proceedings necessary for the vindication of important state policies encompass remedial proceedings in which the state defends its policies against allegations of wrongdoing.[144] The critical ques-

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ceeding).

138. *See* Nat'l Parks Conservation Ass'n v. Lower Providence Twp., Pa., 608 F. Supp. 2d 637, 654 n.20 (E.D. Pa. 2009) ("States have a strong interest in preserving their ability to control coercive proceedings to enforce a state law or regulation, particularly because they initiated the litigation. A state's interest is generally given less weight in a case that is privately initiated, unless the state's interest is abundantly clear.").

139. *See Dayton*, 477 U.S. at 628.

140. *See Nat'l Parks Conservation Ass'n*, 608 F. Supp. 2d at 654 n.20 ("[W]hen relevant to the state's interest in the litigation, the coercive/remedial distinction may be a factor in the second prong of a *Younger* analysis."). One commentator said it would not be helpful to draw a dividing line through a list of all possible civil actions "arranged left-to-right from those that are least like those that are most like criminal actions. Those that fall on the right side should not be interfered with by federal courts, while those that fall on the left side are properly more susceptible to federal court interference." 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, 46 (1976).

141. *See supra* notes 125-139 and accompanying text.

142. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (emphasis added) (explaining *Younger* policies are fully applicable when important state interests are involved in noncriminal judicial proceedings). *Middlesex* cited *Trainor*, which involved eligibility for welfare benefits, as its example of a proceeding necessary for the vindication of important state policies. *Id.*

143. *See id.*

144. *See* Alleghany Corp. v. Haase, 708 F. Supp. 1507, 1535 n.32 (W.D. Wis. 1989), *rev'd*, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991) ("It is difficult to credit as serious the suggestion that an important state interest can never be implicated in the absence of a showing of a 'violation' of law."). This is especially so when the "necessary" proceeding is required by due process regardless of who initiates it. *See* Hui, *supra* note 44, at 1071 ("Whenever a state official or a state agency is involved, the case implicates state interest regardless of the role that the official plays."). A synonym for "vindication" is "defense." ROGET'S II: THE NEW THESAURUS 1108 (3d ed. 1995). Therefore, a proceeding necessary for the defense of important state policies indicates a state agency may find itself in position of defending its policies against a party who initiated the proceeding. These remedial proceedings also implicate important state interests sufficient to require abstention.

tion in *Brown*, then, is whether a federal court interferes with legitimate state activities and not how the proceeding is labeled.[145]

In *Brown*, the Tenth Circuit overvalued and misused the remedial-coercive distinction to create an exception when one was not necessary.[146] The court declared that it must determine if the proceeding is the *type* that mandates abstention.[147] The court took a sentence out of context and creatively interpreted Supreme Court precedent to make the coercive-remedial distinction in the *Dayton* footnote an either-or barrier to getting to the test.[148] Precedent did not require evaluating the nature of the state hearing beyond recognizing that it was judicial.[149]

2. The Misapplication of the Remedial/Coercive Distinction

Ultimately, that the labels "remedial" and "coercive" can be "opposite sides of the same coin" is strong evidence that the distinction should not be determinative.[150] Another court already has cited *Brown* to show that it is relatively easy to label a proceeding both remedial and coercive and that the line between them is often blurry.[151] That court discounted the test stated in *Brown* as undermining "the clear directive of the Supreme Court by introducing a theory of definitive resolution—

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145. *See Middlesex*, 457 U.S. at 432, 433 n.12 ("[W]hether the proceeding 'is labeled civil, quasi-criminal, or criminal in nature,' the salient fact is whether federal-court interference would unduly interfere with the legitimate activities of the state.").

146. *See Alleghany Corp.*, 708 F. Supp. at 1535. The court stated that:

> Alleghany argues that Younger does not apply (1) because the state did not initiate the administrative proceeding, (2) it was not a state enforcement proceeding, and (3) Alleghany has not violated the state law. . . . It will be observed at the outset that the three-fold *Middlesex County* test contains no reference to any of the points.

Id.; *see also* Nat'l Parks Conservation Ass'n v. Lower Providence Twp., Pa., 608 F. Supp. 2d 637, 654 n.20 (E.D. Pa. 2009) (noting that the coercive-remedial distinction may be a factor relevant to the state's interest in the litigation).

147. Brown v. Day, 555 F.3d 882, 888 (10th Cir. 2009). The Tenth Circuit, without citing legal authority, declared that the first part of the three-part test has two sub-parts. *Id.*

148. *See* NOPSI v. Council of New Orleans, 491 U.S. 350, 369 (1989) ("Respondents' case for abstention still requires, however, that the *Council proceeding* be the sort of proceeding entitled to *Younger* treatment."). *NOPSI*, decided three years after *Dayton*, specifically clarified what types of proceedings are judicial in nature and held that abstention is not required from legislative proceedings. *Id.* at 370-71. Instead of limiting the type-of-proceeding question to whether it was judicial or legislative, the court used a sentence out of context from *NOPSI* and a footnote out of context from *Dayton* to leap into a coercive versus remedial discussion, a test not required by Supreme Court or Tenth Circuit precedent. *Brown*, 555 F.3d at 888 n.5 ("[W]e will use the dichotomy between remedial and coercive administrative proceedings set forth in [*Dayton*] as the touchstone for determining whether the administrative proceeding is the type of proceeding that merits *Younger* abstention.") (citation omitted).

149. *See* Brown v. Day, 2006 WL 30871111, at *2 n.2 (D. Kan. 2006) (citing *NOPSI*, "[a] judicial proceeding is one which 'investigates, declares and enforces liabilities as they stand on present or past facts . . . .'")

150. *Brown*, 555 F.3d at 896 (Tymkovich, J., dissenting).

151. *See* Nat'l Parks Conservation Ass'n v. Lower Providence Twp., Pa., 608 F. Supp. 2d 637, 654-55 (E.D. Pa. 2009) (noting that two Tenth Circuit judges finding Brown's administrative challenge remedial and one judge finding it coercive shows the unreliability of the distinction); *see also* O'Neill v. City of Phila., 32 F.3d 785, 802 (3d Cir. 1994) (Lewis, J., dissenting) (disagreeing that proceeding was coercive because only the plaintiff's initiative could have triggered the hearing, making it remedial).

a 'remedial/coercive' analysis of the state court action."[152] The test has resulted in inconsistent decisions within the same circuit.[153] Focusing on who initiates the proceeding also is not effective.[154] Another effect of making *Younger* abstention hinge on a remedial-coercive label will be to encourage the argument that every required due process hearing is remedial whenever someone wants to substitute a federal court for the statutorily-created state appeals process.[155] *Younger* abstention exists to prevent this exercise of forum-switching.[156]

Some lower courts have borrowed blindly from each other to perpetuate the misapplication of the *Dayton* footnote into a rule requiring the state proceeding to be coercive.[157] In contrast, *Dayton* clearly followed the *Middlesex* factors and did not include a new test to determine whether a proceeding is coercive or remedial.[158] The Court did not limit

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152. *Nat'l Parks Conservation Ass'n*, 608 F. Supp. 2d at 652 ("To do so prevents a court from conducting an analysis of the three *Younger* abstention factors articulated by the Supreme Court."). *But see* Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 522 (1st Cir. 2009) (citing *Brown* to support the rule that a remedial state case does not require abstention).

153. *See Nat'l Parks Conservation Ass'n*, 608 F. Supp. 2d at 654 ("This has led to inconsistent decisions because of the malleability of the remedial/coercive distinction."). *Compare* ReMed Recovery Care Ctrs. v. Twp. of Worcester, No. 98-1799, 1998 WL 437272, at *3 (E.D. Pa. July 30, 1998) (finding abstention not required because challenging a cease order was remedial), *with* Gentlemen's Retreat, Inc. v. City of Phila., 109 F. Supp. 2d 374, 379 n.5 (E.D. Pa. 2000) (finding abstention required because cease order was coercive to enforce a violation).

154. *See Brown*, 555 F.3d at 897 (Tymkovich, J., dissenting) ("That Brown was the one to initiate an administrative hearing to challenge termination of her benefits does not matter. . . . [B]y terminating Brown's benefits, the state effectively triggered the resultant administrative hearing, which it was required to provide."); *see also* Meacham v. Betit, 97 F.3d 1465, 1996 WL 532230, at *1 (10th Cir. Sept. 19, 1996) (declining to distinguish remedial and coercive proceedings based on who initiated them because a party sought a hearing only in response to an action taken by the state). Judge Breyer, now a Supreme Court justice, called the *Kercado* majority view contrary to relevant Supreme Court precedent in his dissent that focused on the superintendent being in the midst of a proceeding and not who initiated it. Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 267-68 (1st Cir. 1987) (Breyer, J., dissenting).

155. *See* Stefanelli v. Minard, 342 U.S. 117, 123 (1951) (warning that "[e]very question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum" if federal injunctions are allowed against pending state proceedings). Tracing the history of procedural due process rationale hinders the argument that such proceedings are remedial. *Goldberg v. Kelly*, which mandated notice and a hearing before terminating public-assistance benefits such as Brown's, based its rationale on ancient principles that require the government to disclose evidence so that the individual has the opportunity to show it is not true. 397 U.S. 254, 261, 270 (1970). The Court compared a welfare recipient to a criminal defendant who has the right to confront and cross-examine witnesses. *Id.* at 270 ("'This Court . . . has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.'") (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)). The Court recognized that state interests in correctly administrating public assistance payments are promoted by having a pre-termination evidentiary hearing. *Id.* at 264-65; *see also* Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (declaring that "a State has a valid interest in preserving the fiscal integrity of its programs").

156. *See* Younger v. Harris, 401 U.S. 37, 45 (1971) ("The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute.").

157. *See, e.g.*, Green v. City of Tucson, 255 F.3d 1086, 1102 n.16 (9th Cir. 2001) (claiming incorrectly, based on other court readings, that "the Supreme Court has explained" abstention is not required from remedial proceedings); Executive Art Studio, Inc. v. City of Grand Rapids, 179 F. Supp. 2d 755, 761 (W.D. Mich. 2001) (relying on lower court interpretations to deny abstention in case of adult bookstore applying for a zoning variance).

158. Ohio Civil Rights Comm'n v. Dayton Christian Schs., 477 U.S. 619, 627-28 (1986). The remedial-coercive analysis is irrelevant in cases in which the importance of the state interest is clear.

Younger abstention to only coercive proceedings, nor did it hold that remedial proceedings allowed federal involvement.[159] The characterization has not been mentioned again, nor added to the three-part test, in subsequent Supreme Court analysis.[160]

If the Court intended to exclude remedial proceedings from *Younger* abstention, it had the opportunity to do so in *Patsy*.[161] However, the issue in *Patsy* was whether a federal plaintiff must first initiate available state administrative proceedings before filing a federal § 1983 case.[162] The purely remedial nature of Georgia Patsy's complaint effectively gave her the choice of forums, though *Younger* abstention would have prevented her from changing forums to federal court in midstream had she started a proceeding in state court.[163]

See Nat'l Parks Conservation Ass'n, 608 F. Supp. 2d at 654 ("[T]he coercive/remedial distinction is irrelevant to a *Younger* abstention analysis when a non-§ 1983 action has been filed in state court and the state's interest in the litigation is clear."). The *National Parks* court, and other courts in the Third Circuit, cite *Patsy* and the *Dayton* footnote to say that the coercive/remedial distinction is relevant in § 1983 cases. *Id.* at 653. This conflicts with *Huffman*, which required its § 1983 federal plaintiff involved in a state proceeding to exhaust state appellate remedies before filing federal suit. Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975). *Patsy* did not overrule *Huffman*, it only denied abstention in a § 1983 case that did not involve an ongoing state proceeding. *See* Robert H. Thomas, *Gaining Access to a Federal Forum: The Preclusive Effect of Unreviewed Administrative Determinations in Section 1983 Actions,* 9 U. HAW. L. REV. 643, 666 (1987) ("*Patsy* is also consistent with the policies of federal-state comity delineated in *Huffman*, which encourage plaintiffs to seek redress at the state level before proceeding in federal court.").

159. *See Brown*, 555 F.3d at 895 (Tymkovich, J., dissenting) ("The *Dayton* Court did not specifically say that *Younger* could apply only to coercive administrative proceedings . . . ."). The "coercive rather than remedial" distinction was not essential to the Court's holding. *See Dayton*, 477 U.S. at 628-29 (holding abstention applies because of sufficiently important state interest and the availability of an adequate forum to hear constitutional claims).

160. Alleghany Corp. v. Haase, 708 F. Supp. 1507, 1512 (W.D. Wis. 1989), *rev'd*, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991). The lower court rejected the argument that state proceedings must be coercive to mandate abstention and stated:

> Plaintiff expands this test to include as additional determinative factors the existence of a state-initiated enforcement proceeding and the violation of state law. These may be common characteristics of many *Younger* and related cases. However, plaintiff does not cite to, and I am not aware of, any Supreme Court case that explicitly elevates these characteristics to be *Younger* requirements. Moreover, neither of these characteristics was present when the Court held *Younger* abstention appropriate in *Pennzoil*.

Id. The test contains no requirement that the proceeding be coercive, that is state-initiated, an enforcement proceeding, or pertaining to the violation of state law. *Id.* Like *Brown*, the *Alleghany Corp.* district court decision was reversed at the circuit level on the same rationale the Tenth Circuit used. *Alleghany Corp.*, 896 F.2d at 1053 (relying on outdated precedent to confine *Younger* to cases involving state enforcement action). The Supreme Court vacated the Seventh Circuit decision. *Dillon*, 499 U.S. at 933.

161. *Patsy* was decided June 21, 1982, the same day that *Middlesex* was decided, and arguments for the two cases were presented twenty-nine days apart that March. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Patsy v. Bd. of Regents, 457 U.S. 496 (1982). Logically, it follows that if the Court intended for *Patsy* to stand for the proposition that remedial proceedings are to be excluded from *Younger* abstention it would have done so that day either in *Patsy* or in establishing the three-part test in *Middlesex*.

162. *See Patsy*, 457 U.S. at 498. The word "remedial" does not appear in *Patsy*, nor is there any discussion of its remedial nature. There was no existing state proceeding. *See id.*

163. *See* Thomas, *supra* note 158, at 666 ("*Patsy* is a strong reaffirmation of the basic policy underlying section 1983: the choice of a federal or state forum for plaintiffs.").

B. Brown v. Day *Departs from Tenth Circuit Precedent*

The Tenth Circuit already had rejected the remedial-coercive distinction when it abstained from a remedial proceeding in *Joseph A. v. Ingram*,[164] seven years before *Brown*.[165] Then, the Tenth Circuit specifically rejected the argument that a federal court should hear a case if the plaintiffs are not trying to avoid state court enforcement efforts.[166] Without using the labels, the Tenth Circuit evaluated the remedial-coercive argument in *Joseph A.* despite its declaration that *Brown* was a case of first impression for the issue.[167]

Morrow v. Winslow,[168] in which the Tenth Circuit cited *Pennzoil* to abstain in a clearly remedial case initiated to object to an adoption, would have provided a better template than the First and Third Circuit cases relied upon in *Brown*.[169] The court determined that the state's interest in family relations was sufficiently important to warrant absten-

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164. 275 F.3d 1253 (10th Cir. 2002).

165. *See id.* at 1269-70. Children alleging insufficient access to adoption services sought federal relief while state proceedings were pending. *Id.* at 1257. By the *Brown* test, the state proceeding was remedial because the children initiated it and their presence was not mandatory in an enforcement proceeding. *Id.* at 1269-70.

166. *See id.* at 1269 ("The other cases cited by Appellants do not establish the limits of *Younger* abstention."). The court expressly rejected the rationale of a Sixth Circuit case that held that a federal court was not required to abstain because inmates alleging poor conditions were plaintiffs in state court and plaintiffs in federal court. Crawley v. Hamilton County Comm'rs, 744 F.2d 28, 30 (6th Cir. 1984) (finding no basis for abstention because federal plaintiffs also were state plaintiffs and were not trying to use federal court to shield themselves from state court enforcement proceedings). That state proceeding fits the *Brown* definition of remedial because the inmates initiated the proceeding and were not subject to an enforcement proceeding. *See Brown*, 555 F.3d at 891.

167. *See Joseph A.*, 275 F.3d at 1270. The Tenth Circuit has abstained from cases that were not enforcement proceedings. *See* Hart v. Valdez, 186 F.3d 1280, 1283 (10th Cir. 1999) (abstaining from interfering with non-coercive state proceedings involving developmentally disabled children); Goodpaster v. Superior Court of Colo., No. 91-1286, 1992 WL 7449, at *3 (10th Cir. Jan. 16, 1992) (abstaining despite attorney not being subject to state disciplinary proceeding because "the state's interest in regulating the practice of law encompasses the entire procedure"). In *Brown*, Judge Ebel criticized the Eighth Circuit decision in *Alleghany* because it failed to address the coercive/remedial distinction. *Brown*, 555 F.3d at 892 n.8. Similarly, Judge Ebel did not expressly address the remedial/coercive distinction in *Joseph A.* *See* 275 F.3d at 1270.

168. 94 F.3d 1386 (10th Cir. 1996). The court raised the *Younger* abstention issue *sua sponte* though both parties agreed to stay state proceedings until the federal proceeding was resolved. *Id.* at 1391.

169. *See* Yancey v. Bonner, 323 Fed. App'x. 674, 676 (10th Cir. 2009). *Yancey*, decided by a different three-judge panel three months after *Brown*, held *Younger* abstention appropriate even though Yancey initiated a state appeal and was not the subject of an enforcement action under facts similar to *Morrow*. *See id.* at 675-76. In *Morrow*, a biological father sought a federal injunction to stay an ongoing state adoption proceeding. 94 F.3d at 1389. The father's participation in the state hearing was not mandatory nor was he there because of a bad act on his part. *Id.* at 1388. Morrow, the father, appeared at the hearing to object to the termination of his parental rights, filed a counterclaim for custody of the child, and filed a motion to dismiss the adoption petition because the proceeding failed to comply with minimum standards of conflicting federal law. *Id.* In *Yancey*, the Tenth Circuit applied the *Middlesex* three-part test without discussing the remedial/coercive distinction that was dispositive three months earlier in *Brown*. *Yancey*, 323 Fed. App'x. at 675. Nor did the court disturb the district court's rejection of the argument that abstention is required only when a proceeding resembles a criminal proceeding ("coercive"). *See* Yancey v. Bonner, No. 08-539-C, 2008 WL 4279760, at *2 n.6 (W.D. Okla. Sept. 12, 2008). *Morrow* was cited once in *Brown*, only for the purpose of providing additional support to restate that exceptions to *Younger* exist if there is a showing of bad faith, harassment, or a flagrantly unconstitutional law at the state level. *Brown*, 555 F.3d at 888 n.4.

tion even if the state was not a party.[170] Just as *Morrow* looked to *Moore v. Sims*[171] to establish the state's interest in child custody, *Brown* could have looked to *Trainor* to establish an important state interest in safeguarding the fiscal integrity of its public-assistance programs.[172] The state's interest in the *Morrow* adoption hearing was sufficiently important even though it was not coercive, as was the hearing in *Moore*, which involved removing children from their parents.[173] In the same way, Kansas's interest in maintaining the fiscal integrity of its Medicaid program is sufficiently important though Brown's hearing was not as coercive as the enforcement proceeding to recover welfare benefits in *Trainor*.[174] Properly respecting the state's interest is more vital than who initiated the proceeding or whether it was labeled remedial or coercive.[175]

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170. *Morrow*, 94 F.3d at 1397 (quoting the *Moore v. Sims*, 442 U.S. 415, 435 (1979) declaration that "'[f]amily relations are a traditional area of state concern'"). The court found it mandatory that federal courts must abstain from "noncriminal judicial proceedings when important state interests are involved." *Id.* (quoting *Middlesex*, 457 U.S. at 432). The court also recognized that the state adoption proceeding was ongoing and provided an adequate opportunity to address Morrow's federal claim. *Id.* at 1398.

171. 442 U.S. 415 (1979).

172. *See* Trainor v. Hernandez, 431 U.S. 434, 444 (1977).

173. *See Morrow*, 94 F.3d at 1397. ("[W]e reject the contention that the absence of the state as a formal party justifies disregarding the abstention doctrine where the recognized state interest in the state's adoption proceeding is apparent.").

174. *See Trainor*, 431 U.S. at 444 (noting that the state's interest in a civil enforcement action may not be quite as important as the state's interest in a criminal enforcement action but comity principles are broad enough to apply because the state was a party in the proceeding). The less-coercive nature of Brown's proceeding may have placed it lower on the important state interest scale, but it was sufficiently important nonetheless to require abstention. *See Brown*, 555 F.3d at 896 (Tymkovich, J., dissenting) ("recognizing the interrelationship between the enforcement nature of state proceedings and the importance of such proceedings by the state") (citing Patrick J. Smith, Note, *The Preemption Dimension of Abstention*, 89 COLUM. L. REV. 310, 326-27 (1989)). The Tenth Circuit may have had a better rationale for abstention on state-interest grounds based on its observation that a comprehensive analysis would be required to weigh "obvious *federal* interest" against state interest in Medicaid. *Id.* at 894 n.10.

Courts generally have considered a state's interest in its Medicaid program as sufficiently important to warrant abstention. *See, e.g.*, Columbus Rehab. & Subacute Inst. v. Franklin County Dep't of Job & Family Servs., No. 2:08-cv-103, 2008 WL 5273924, at *4 (S.D. Ohio Dec. 17, 2008) (concluding that state has significant interest in Medicaid eligibility decisions); Hays v. Concannon, No. 87-1362-MA, 1989 WL 222435, at *4 (D. Or. Mar. 20, 1989) (citing *Trainor* to declare there is no doubt important state interest in Medicaid program was implicated); Maple Shade Nursing & Convalescent Ctr., Inc. v. Heckler, No. 85-3016, 1986 WL 68498, at *3 (D. N.J. July 23, 1986) (concluding state interest is sufficiently important because the state is responsible for design, implementation, and administration of the Medicaid system). *But see* McCartney v. Cansler, 608 F. Supp. 2d 694, 703-04 (E.D.N.C. 2009) (finding federal interest outweighs state interest in Medicaid because states must comply with federal standards).

175. *See* Baird, *supra* note 61, at 528 (stating that abstention is determined by a state's interest in the proceeding). Brown elected to take advantage of the hearing to present evidence in her defense much as Morrow elected to take advantage of a hearing to contest the termination of his parental rights. *See* Brown v. Day, 477 F. Supp. 2d 1110, 1117 (D. Kan. 2007). The availability of an appeal to a state court provided an adequate opportunity to address the alleged conflict between state and federal Medicaid law. *See* White v. Kan. Health Policy Auth., 198 P.3d 172, 175 (Kan. Ct. App. 2008) (finding discretionary trust for disabled man funded by inheritance from father to be exempt resource for Medicaid eligibility in a case under similar facts as *Brown*, indicating Brown's likelihood of success had she applied in state court).

C. Comity Matters

The Tenth Circuit concluded that abstaining in *Brown v. Day* would extend *Younger* abstention to remedial cases against congressional intent in enacting § 1983 and against Supreme Court precedent.[176] That conclusion denies superseding Supreme Court precedent that dictates that *Younger* abstention turns on whether comity between federal and state courts would be disregarded by federal interference.[177] Abstaining from *Brown* also would not contradict congressional intent of § 1983 because the post-Civil War statute's purpose was to create an alternative federal forum in cases in which the integrity of the state court was in question.[178] Brown did not question the integrity of state judicial review or allege the state agency was acting in bad faith; she only asserted that she was not required to exhaust her state remedies because her proceedings were remedial.[179] When a state proceeding is ongoing at the time a federal suit is filed, the Court has held that comity trumps § 1983 in the absence of bad faith or harassment.[180]

1. Rationale, Not Facts, Determines Abstention

The question posed in *Brown*—whether *Younger* abstention applies only to coercive proceedings—was directly answered "no" in

176. *Brown*, 555 F.3d at 884. The court recited the *Dayton* footnote, which mentioned the remedial/coercive distinction, as its sole Supreme Court precedent to support the declaration that remedial proceedings are not the type that mandate abstention. *Id.* at 890. This view of the balance between § 1983 suits and comity is counter to the opinions of Justice Rehnquist, who wrote the *Dayton* opinion relied upon by the Tenth Circuit. *See* Baird, *supra* note 61, at 553 (concluding that Rehnquist applied federalism and comity principles of *Younger* to prevent access to federal courts in § 1983 suits); *infra* notes 184-186 and accompanying text.

177. *See* Pennzoil, Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987). Reading *Patsy* so narrowly as to deny abstention in all § 1983 cases involving a remedial state proceeding necessarily involves the same remedial/coercive analysis rejected as blurry, inconsistent, and irrelevant by *National Parks*. *See* Nat'l Parks Conservation Ass'n v. Lower Providence Twp., Pa., 608 F. Supp. 2d 637, 654 (E.D. Pa. 2009). The issue is muddier in a case like *Brown*, which Brown labeled a § 1983 case although its underlying claim that a state law conflicted with federal law is more similar to the preemption grounds raised in *National Parks*. *See Brown*, 555 F.3d at 884. Comity and important state interests suggest that the remedial/coercive analysis should be no more determinative in § 1983 cases than in other civil cases. Federal disruption before state court review of an agency's decision is the same in § 1983 and non-§ 1983 cases. Relying on *Patsy* alone ignores the effect of later *Younger* cases that emphasized comity and important state-interests analysis to require exhaustion of state remedies in § 1983 cases. *See* Charles R. Fraser, *Selected Procedural Issues in Section 1983 Litigation, in* 336 SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES 1987: CURRENT DEVELOPMENTS 563, 576 (1987) ("Expansion of *Younger* abstention has considerable impact on the rule of *Patsy*.") (citation omitted).

178. *See* Patsy v. Bd. of Regents, 457 U.S. 496, 506 (1982) (noting mistrust of fact-finding processes of state institutions was of primary importance to the exhaustion question in legislative history of § 1983); MOORE ET AL., *supra* note 3, § 122.05[1][c], at 122-59 (noting *Younger* abstention assumes that "state courts can be trusted to uphold civil rights"); Baird, *supra* note 61, at 508 (noting the driving force behind congressional action for § 1983 was to cure Southern state court deficiencies in protecting the rights of minorities).

179. *See* Appellant's Brief, *supra* note 100, at 34 (declaring that Brown's federal action does not "question the validity of the state administrative appeals process").

180. *See* Baird, *supra* note 61, at 528 (declaring federalism has trumped federal statutes).

Juidice, seven years before the *Dayton* footnote.[181] The *Juidice* Court emphasized that just because the facts in *Younger* and *Huffman* involved state-initiated criminal and civil enforcement actions does not mean the rationale behind *Younger* limits abstention to those situations.[182] Though facts vary, this comity-centered rationale is the common thread that runs from *Younger* to *Pennzoil*.[183]

Justice Rehnquist especially championed comity in *Huffman*, *Juidice*, *Moore*, and *Dayton*, each confirming the scope of *Younger* abstention beyond its original application.[184] To read Rehnquist's footnote in *Dayton* as requiring abstention from coercive proceedings and not from remedial proceedings would be a stark departure from Rehnquist's federalist philosophy.[185]

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181. *See* Juidice v. Vail, 430 U.S. 327, 334 (1977). The Court declared: "We now hold, however, that the principles of *Younger* and *Huffman* are not confined solely to the types of state actions which were sought to be enjoined in those cases." *Id.* Justice Rehnquist stopped short of making a general announcement that *Younger* applies to all civil litigation. *Id.* at 336 n.13. Justice Brennan noted in his dissent that Rehnquist's disclaimer that "we save for another day" whether *Younger* applies to all civil litigation is but a tongue-in-cheek signal that a formal announcement that it does is imminent. *Id.* at 345 n.* (Brennan, J., dissenting). To one commentator, the signal was clear: *Juidice* left no principled reason for failing to abstain from all state court proceedings. Powell, *supra* note 32, at 1340. To Justice Blackmun, the formal announcement that *Younger* abstention applies to all civil proceedings was made in *Pennzoil*. *Pennzoil*, 481 U.S. at 27-28 (Blackmun, J., concurring).

182. *See Juidice*, 430 U.S. at 334. The *Younger* line of cases has made clear that comity and federalism are more important than whether the proceeding is a coercive state-initiated enforcement proceeding. *Id.* (stating comity is the more vital consideration behind the Court's rationale, not because the state criminal process was involved). After *Juidice*, the question of abstention is resolved in favor of allowing the states and their institutions the freedom "to perform their separate functions in their separate ways." Powell, *supra* note 32, at 1340.

183. *See* TRIBE, *supra* note 25, at 206-07 ("Although *Younger* happened to involve deference to pending state criminal proceedings, the *Younger* doctrine has been extended to the civil realm on each occasion presented to the Court . . . ."); *see also* George D. Brown, *When Federalism and Separation of Powers Collide–Rethinking* Younger *Abstention*, 59 GEO. WASH. L. REV. 114, 119 (1990) (*Younger* abstention gets its extraordinarily broad scope because of Justice Black's choice to "move beyond equity and invoke principles of 'comity' to elevate the pendency of state proceedings to the dispositive reason for the federal court to abstain from hearing the case."). The underlying rationale repeated in *Younger* abstention cases forecasts application beyond cases involving coercive proceedings. *See* Pernsley v. Harris, 474 U.S. 965, 966 (1985) (Burger, J., dissenting). The closest the Court has come to reversing expressly the Third Circuit requirement that the ongoing proceeding be a state-initiated enforcement (coercive) action to require abstention came in Chief Justice Burger's dissent in the denial of certiorari of a remedial case involving state prisoners that filed a federal § 1983 action alleging unconstitutional prison conditions. *See id.* (Justices Rehnquist and O'Connor also voted to grant certiorari.). The Third Circuit held that abstention was not warranted because the state's interest in a privately initiated ongoing proceeding was not strong enough. Harris v. Pernsley, 755 F.2d 338, 344 (3d Cir. 1985). Chief Justice Burger wrote that he would reverse the Third Circuit, emphasizing that *Middlesex* specifically recognized that "policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Pernsley*, 474 U.S. at 966 (Burger, J., dissenting) (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)).

184. *See* Hui, *supra* note 44, at 1070 n.167 (noting Rehnquist wrote the majority opinion in *Huffman*, *Juidice*, *Moore* and *Dayton* and voted with the majority in *Trainor*, *Middlesex*, and *Pennzoil*). Justice Rehnquist was the most influential voice in broadening the scope of *Younger* abstention. *See* Baird, *supra* note 61, at 529 ("With Rehnquist leading the way, the Court embarked quickly to expand abstention in civil rights cases.").

185. *See* Powell, *supra* note 32, at 1338. Rehnquist's federalist doctrine is that federal interference with state activities is clearly unacceptable. *Id.* One commentator suggests Rehnquist's role in carrying a majority of the Court with him in "his crusade to universalize *Younger*" has created his own doctrine of "His Federalism." *Id.* at 1335-36. Powell suggests Rehnquist's federalist doctrine "would create an almost impenetrable sphere of state autonomy" if taken to its logical extreme. *Id.*

Huffman, Rehnquist's first *Younger* opinion, established two guidelines for abstention: (1) the more the state civil proceeding resembles a criminal proceeding, the more deference should be given; and (2) the greater the state's involvement, the greater the need for deference to the state proceeding.[186] The six abstention cases that followed *Younger* all involved proceedings in which the state had a stake in the outcome.[187] The existence of a coercive proceeding is one of three ways to show sufficient state interest to warrant abstention.[188] The state's interest also exists in "[p]roceedings necessary for the vindication of important state policies or for the functioning of the state judicial system."[189]

Younger does not require the Kansas agency to initiate an enforcement proceeding against Brown for abstention to apply if a more lenient pre-termination hearing is available.[190] The characteristics of the Kansas administrative hearing and available judicial review in *Brown* fit squarely within the rationale of *Juidice*, *Moore*, and *Trainor* as a judicial process involving the state safeguarding its interest in the fiscal integrity

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at 1343. Rehnquist has been criticized for using *Younger* abstention to prevent access to federal courts, especially in § 1983 cases. *See, e.g.*, Baird, *supra* note 61, at 553. The criticism led to the unsuccessful Civil Rights Improvement Act of 1981, which was introduced to overturn several *Younger* abstention decisions and statutorily confine abstention to state criminal proceedings. *See* Baird, *supra* note 61, at 517; *see also* WRIGHT ET AL., *supra* note 2, § 4251, at 15 n.42 (listing unsuccessful congressional efforts to limit *Younger* application). A better view is to examine the *Dayton* footnote in context with Rehnquist's other opinions. Justice Rehnquist wrote, in dicta, that federalism has its "greatest weight" in pending criminal prosecution cases but also applies to prevent federal injunctions against the head of an executive branch of a state or local agency in a case of a federal plaintiff seeking remedial action against a police department. *See* Rizzo v. Goode, 423 U.S. 362, 380 (1976). *Rizzo* was decided on lack of standing, yet Rehnquist's further discussion of *Younger* abstention is insightful into his rationale. *See* TRIBE, *supra* note 25, at 207-08. Rehnquist used his *Younger* rationale by analogy to hold that comity barred a federal suit seeking to enjoin allegedly unconstitutional state tax collection. *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 111-13 (1981).

186. Hui, *supra* note 44, at 1061-62. Comity was so prominent in the Court's rationale that it was foreseeable that *Younger* abstention was not limited to the facts of *Huffman*. *See The Supreme Court, 1974 Term: Federal Jurisdiction and Procedure*, 89 HARV. L. REV. 151, 154-55 (1975) (predicting future cases may illustrate the irrelevance of whether a state proceeding is related to state-initiated enforcement proceeding because it is not clear that those limitations "are strongly grounded in the Court's reasoning").

187. Hui, *supra* note 44, at 1066. The state's interest must be important, and the its interest is most important when the state is involved. *Id.* In *Trainor*, the Court mandated abstention because the state "was a party to the suit in its role of administering its public-assistance programs" and not because it initiated the action or because its suit was in aid of the criminal law—in other words, coercive. Trainor v. Hernandez, 431 U.S. 434, 444 (1977). One authority interpreted this to mean that a federal court must abstain from all civil proceedings in which the state is a party. MOORE ET AL., *supra* note 3, § 122.05[2][c], at 122-73 (citing *Trainor*, 431 U.S. at 444).

188. *See* Moore v. Sims, 442 U.S. 415, 423 (1979).

189. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In *Middlesex*, the state's interest was demonstrated by a state agency-initiated disciplinary proceeding, but the Court cited *Trainor* and *Juidice* to restate that the state's substantial interest also could be shown in other types of proceedings. *Id.* As in other abstention cases, the facts in *Middlesex* involved a coercive proceeding, but the rationale behind the decision stressed that comity requires abstention when important state interests exist. *Id.*

190. *See Trainor*, 431 U.S. at 449-50 (Blackmun, J., concurring) ("The propriety of abstention should not depend on the State's choice to vindicate its interests by a less drastic, and perhaps more lenient, route.").

of its Medicaid program.[191] To find otherwise disregards the notion of comity in the federal-state relationship.[192]

2. *Pennzoil* Shattered the Pattern

The *Brown* court also failed to evaluate the effect of *Pennzoil*, which shattered the pattern of *Younger* cases applying only to state-initiated enforcement proceedings.[193] There may have been a time when the window was open for a plausible argument that the remedial-coercive distinction mattered, but *Pennzoil* closed that window.[194] *Pennzoil* contradicts every point of the argument that *Younger* applies only to state-initiated enforcement proceedings, including those made by Texaco.[195] After *Pennzoil*, whether the state initiated the proceeding is irrelevant.[196] *Pennzoil*, even though the state was not a party, made clear that the presence of an important state interest is the determining factor in deciding which ongoing proceedings require abstention, not whether they involve enforcement action.[197]

Texas's interest in the validity of its appeals process met the Court's standard for mandating abstention, which *Pennzoil* defined as "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[198] Likewise, Kansas's interest in

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191. *See* Brown v. Day, No. 06-2212-KHV, 2006 WL 3087111, at *3 (D. Kan. Oct. 27, 2006). The district court noted that Brown did not challenge that "[p]rotecting the fiscal integrity of public assistance programs is an important state interest." *Id.*

192. *See* Pennzoil, Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987). The Court recognized a strong policy that a federal court should not displace a state court from its own process. 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, 1077 (1988).

193. *See* Althouse, *supra* note 192, at 1081 ("[N]o state official was engaged in an activity invested with a state interest."). The Court nullified the district court's rationale that it could hear the case because a federal injunction would not "interfere with a state official's pursuit of a fundamental state interest." *Pennzoil*, 481 U.S. at 7 (quoting Texaco, Inc. v. Pennzoil, Co., 626 F. Supp. 250, 260 (1986)).

194. *See* Alleghany Corp. v. Haase, 708 F. Supp. 1507, 1535 (W.D. Wis. 1989), *rev'd*, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 499 U.S. 933 (1991).

195. *Id.* Texaco argued that the Court's *Younger* cases each involved a state enforcement action against the federal plaintiff. Brief of Appellee at 25-26, Pennzoil, Co. v. Texaco, Inc., 481 U.S. 1 (1987) (No. 85-1798). Texaco unsuccessfully argued abstention was not required because the action did not involve a state enforcement action. *See id.*

196. *Alleghany Corp.*, 708 F. Supp. at 1518 n.8 (noting most courts held that *Younger* applied only to a "state-initiated adjudication pending in a state forum . . ." until *Pennzoil*) (quoting Jordi v. Sauk Prairie Sch. Bd., 651 F. Supp. 1566, 1575 (W.D. Wis. 1987)).

197. *See Pennzoil*, 481 U.S. at 11. The *Pennzoil* Court stated:

> [Proper respect for state functions] mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.

Id. *See* Daniel Jordan Simon, *Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of "Our Federalism,"* 99 NW. U. L. REV. 1355, 1360 (2005) ("[T]he key question in *Younger* analysis is whether the ongoing state court proceeding involves 'important' state interests.").

198. *Pennzoil*, 481 U.S. at 11.

its judicial process that statutorily mandates the availability of judicial review in a state district court is worthy of respect by the federal courts.[199] Granting an automatic right to detour into federal court against the Kansas Legislature's exclusive means of judicial review certainly disregards the comity between the Kansas courts and the federal courts.[200]

The Tenth Circuit's reliance on *Patsy* to conclude that remedial § 1983 cases do not require the exhaustion of state remedies denies the effect of later *Younger* cases, especially *Pennzoil*.[201] Just as the facts of *Juidice* broadened *Younger*-abstention application beyond criminal and quasi-criminal proceedings, the facts of *Pennzoil* eliminated the possible reading that abstention is limited to coercive proceedings based on the facts of previous Supreme Court cases.[202] The state interest in Brown's administrative hearing, whether it be labeled remedial or coercive, was important enough to meet the *Pennzoil* state interest threshold and the district court was right to abstain.[203]

VI. CONCLUSION

The federal district court got it right the first time.[204] The coercive-remedial distinction should not be determinative in *Younger* abstention.[205] The more important factor is a federal court respecting the state court in accordance with the values of comity and "Our Federalism."[206]

The remedial-coercive distinction may be used as one method to measure the state's interest, but it never was intended to create a roadblock to considering whether (1) there is an ongoing judicial proceeding, (2) there is an important state interest, and (3) there is an adequate forum to hear federal concerns in the state proceeding.[207] The Tenth Circuit has followed other lower courts in misapplying the remedial-coercive distinction to render decisions contrary to Supreme Court

199. Hui, *supra* note 44, at 1071 (noting the Supreme Court, in *Pennzoil*, "regarded almost every aspect of a legal action to be part of the core of the state's judicial system").

200. *See* Brown v. Day, 555 F.3d. 882, 906 (Tymkovich, J., dissenting). The legislature's intent is clear that appealing to a state trial court is the "exclusive means of judicial review of agency action." *See* KAN. STAT. ANN. § 77-606 (2009).

201. *See* Fraser, *supra* note 177, at 576.

202. *See* Alleghany Corp. v. McCartney, 896 F.2d 1138, 1145 (8th Cir. 1990) ("This holding broadens the applicability of *Younger* abstention beyond state enforcement proceedings."); WRIGHT ET AL., *supra* note 2, at § 4254, at 91 n.44 (quoting Tribe, the winning counsel in *Pennzoil*: "[T]he Younger abstention doctrine no longer applies only where there is a pending criminal case. Instead, it applies to any case where pending state judicial proceedings are structurally capable of resolving the problem."); Powell, *supra* note 32, at 1340 (restating that the principles of *Younger* and *Huffman* are not limited to the types of state proceedings that warranted abstention in those cases).

203. *See Brown*, 555 F.3d at 906 (Tymkovich, J., dissenting).

204. *See* Brown v. Day, No. 06-2212-KVH, 2006 WL 3087111, at *4 (D. Kan. Oct. 27, 2006).

205. *See supra* Part V.A.

206. *See supra* Part V.C.

207. *See supra* Part V.A.1.

precedent.[208] In doing so, the Tenth Circuit failed to follow its own precedent.[209]

From *Younger* and the decisions that followed, the rationale based on the more vital consideration of comity determined the scope of *Younger* abstention.[210] *Pennzoil* shattered the pattern of state-initiated coercive proceedings and set the standard that a court should abstain "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[211]

The Tenth Circuit disrespected the Kansas courts' ability to validate or correct its state's Medicaid law. Instead of granting an automatic detour into federal court, the Tenth Circuit should have affirmed the district court's decision to keep its hands off in *Brown.*

208. *See supra* Part V.A.2.
209. *See supra* Part V.B.
210. *See supra* Part V.C.1.
211. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987); *see supra* Part V.C.2.