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Our Federalism Out West: The Tenth Circuit and Younger Abstention

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"OUR FEDERALISM" OUT WEST: THE TENTH CIRCUIT AND *YOUNGER* ABSTENTION

INTRODUCTION

In the Tenth Circuit's recent disposition of *Brown ex rel. Brown v. Day*,[1] the majority found *Younger* abstention inapplicable to ongoing state administrative proceedings deemed remedial in nature.[2] In doing so, the Tenth Circuit heeded the approach of several other circuits in applying *Younger* deference solely to *coercive* state administrative proceedings, adopting court created tests that deem proceedings coercive if either the State initiates the proceeding or the substance of the action is in response to an alleged "bad act."[3] Despite enduring criticism from academics challenging the constitutionality of federal abstention doctrines,[4] the Tenth Circuit's decision in *Day* will have significant implications for practicing attorneys, state administrative systems, and federal plaintiffs seeking Section 1983 relief from state proceedings gone awry.

I. BACKGROUND

A. The Origin of Judicial Abstention and Its Adoption in American Courts

The practice of judicial abstention is rooted in age-old equitable customs originating in the English King's Court of Chancery.[5] The Court of Chancery, a legal tribunal in which equitable relief flowed from the King's "Fountain of Justice,"[6] sought to render "executive justice rather than justice according to law" through a chancellor who spoke "directly in the name of the king."[7] As the authority of the chancellor steadily grew, particularly between the reigns of Edward I and Edward IV,[8] their rulings gradually established the long recognized precedent that courts of equity possess internal discretion to forbear on exercising their own ju-

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1. 555 F.3d 882 (10th Cir. 2009).
2. *Id.* at 884.
3. *See id.* at 889, 891.
4. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 77 (1984).
5. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 571 (1985).
6. JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY 9 (1828) ("It is well known, that in the fictions of law and the language of Lawyers, the King is the 'Fountain of Justice.' Justice, or what was denominated justice in England, has from time immemorial been administered in the name of the King.").
7. M. T. VAN HECKE, CASES AND MATERIALS ON EQUITY 3–4 (4th ed. 1948); *cf.* PARKES, *supra* note 6, at 10 (citing records from the Treasury of the Exchequer that Henry II, Richard III, and Henry VII "often presided personally in Court").
8. VAN HECKE, *supra* note 7, at 2 (noting that under Edward the IV's reign the Chancery became a separate jurisdiction but still lacked authority to issue decrees by virtue of his own title until 1474).

risdiction.[9] The chancellor's discretion to abstain from hearing cases was reconciled primarily with the court's equitable power to issue injunctive relief.[10] In this sense, the chancellors used their injunctive discretion to halt litigation that was, at least in their own individual determinations, contrary to the best interest of the court or society at-large.[11]

Centuries later, these pivotal canons of English legal heredity were incorporated into the American system through the ascendancy of Article III of the Constitution, as well as its enabling legislation—namely, the Judiciary Act of 1789.[12] Both of these documents equipped the federal courts with authority to issue equitable relief—an impetus to the early adoption of "doctrines of judicial restraint developed in the English Chancery Court," including a wide range of situations favoring abstention.[13]

Despite the unambiguous historical authority of equitable courts to decline jurisdiction, uncovering legitimate legal justifications for abstention in American courts has persistently haunted the federal judiciary since the early days of the Republic.[14] Due to the particular limitations set forth in the United States Constitution, the utilization of abstention by federal courts ushers in far-reaching implications for separation of powers[15] and federalism.[16] Indeed, even the great Chief Justice John Marshall once commented on the tenuous foundation abstention theory enjoys: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."[17] Nevertheless, the longstanding American roots of equitable discretion empowered federal courts to create and shape varying abstention doctrines. In a famous maxim, the Supreme Court proclaimed: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[18] Thus, through the continued application of equitable authority to shape public priorities, the judiciary has allocated federal abstention a unique and active role in American jurisprudence.

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9. *See id.* at 571.

10. LARRY W. YACKLE, FEDERAL COURTS 501 (3d ed. 2009).

11. *See* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 383 (1983).

12. *See id.* at 384.

13. *See id.*

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

15. ROBERT N. CLINTON, RICHARD A. MATASAR & MICHAEL G. COLLINS, FEDERAL COURTS: THEORY AND PRACTICE 1228 (1996).

16. YACKLE, *supra* note 10, at 491 (describing the complex relationship of abstention among state and federal courts).

17. *Cohens*, 19 U.S. at 404.

18. Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937).

B. Congressional and Judicial Abstention

Congress, as the primary architect of federal court jurisdiction,[19] has utilized its nearly plenary authority over the courts to enact several important statutes that compel federal abstention.[20] These include the Anti-Injunction Act,[21] three-judge court statutes,[22] the Johnson Act,[23] and the Tax-Injunction Act.[24] In light of Congress's undisputed role in defining federal jurisdiction, these statutes remain a settled byproduct of our constitutional system.

Conversely, abstention doctrines emanating from Supreme Court edicts remain the subject of significant controversy.[25] To some, the act of forgoing jurisdiction expressly given by Congress to the courts is strictly disallowed by the Constitution.[26] Specifically, opponents argue that judicially created abstention doctrines violate separation of powers principles due to the inability of federal courts to "ignore or invalidate" congressional statutes conferring jurisdiction merely because they disagree "with their substance."[27] Others rebuff this contention and argue that federal abstention safeguards states' rights[28] and promotes longstanding standards of federalism by allowing state courts to retain decision-making authority over areas of law with which they are familiar.[29]

Nevertheless, the Supreme Court has consistently justified abstention in order to ensure the federal government cannot easily encroach upon state interests.[30] In *Railroad Commission of Texas v. Pullman Co.*,[31] the Court issued its first major abstention decision to the lower courts.[32]

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19. *See* U.S. CONST. art. III, §§ 1–2.

20. *See, e.g.*, YACKLE, *supra* note 10, at 491–92.

21. 28 U.S.C. § 2283 (2006) (barring federal court interference by staying state court proceedings).

22. *Id.* § 2284 (mandating three-judge district court review of legislative apportionment cases).

23. *Id.* § 1342 (prohibiting federal court enjoinment of state agency decisions regarding utility rates).

24. *Id.* § 1341 (excluding federal courts from suspending state tax enforcement).

25. *See, e.g.*, Redish, *supra* note 4, at 75–76.

26. *Id.* at 77 ("If Congress intended that the federal courts exercise a particular jurisdiction, either to achieve substantive legislative ends or to provide a constitutionally-contemplated jurisdictional advantage, a court may not, absent constitutional objections, repeal those jurisdictional grants. But one may question why, if the courts do not possess the institutional authority to repeal the legislature's jurisdictional scheme, they possess any greater authority to modify the scheme in a manner not contemplated by the legislative body. In either repealing or modifying the legislation, the court would be altering a legislative scheme because of disagreement with the social policy choices that the scheme manifests. Thus, if a judge-made form of partial abstention is inconsistent with congressional intent to leave federal court jurisdiction unlimited, the fact that the abstention leaves intact a portion of the jurisdictional grant will not insulate it from a separation-of-powers attack.").

27. *Id.*

28. *See* Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1117–18 (1985).

29. Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 550 (1989).

30. *See, e.g.*, YACKLE, *supra* note 10, at 500.

31. 312 U.S. 496 (1941).

32. *Id.* at 501–02.

In *Pullman*, which entailed a Fourteenth Amendment challenge to a then-controversial Texas law regulating railroad staff, the Court pronounced that federal courts should abstain from hearing cases centered on uncertain state laws until state courts first attempt to resolve the ambiguity.[33] Two years later, in *Burford v. Sun Oil Co.*,[34] the Court mandated federal abstention when complex state regulatory schemes are at issue.[35] In the late 1950's, the Court laid down ground rules in *Louisiana Power & Light Co. v. City of Thibodaux*[36] for federal courts to mimic *Pullman* abstention when sitting in diversity, despite *Erie Railroad Co. v. Tompkins*'s[37] requirement that federal courts apply state law when deciding a case founded on diversity jurisdiction.[38] Lastly, in *Colorado River Water Conservation District v. United States*,[39] the Court held that "exceptional circumstances" permit federal courts to abstain when parallel proceedings exist in a state court.[40]

These examples illustrate the numerous and frequently employed federal abstention doctrines. While all of the foregoing cases represent the Supreme Court's slow expansion of abstention principles, *Younger* abstention, at issue before the Tenth Circuit in *Day*, has undergone perhaps the most significant individualized expansion of any judicially created abstention doctrine.

C. Younger *and Its Progeny*

1. The Birth of "Our Federalism": *Younger* and Abstention in State Criminal Proceedings

In 1971, the Supreme Court, again relying on its equitable authority, handed down its seminal opinion in *Younger v. Harris*.[41] The case revolved around a challenge to the California Criminal Syndicalism Act by plaintiff John Harris Jr., who was arrested under the Act for distributing political pamphlets that encouraged "force and violence or unlawful methods" for attaining political change.[42] The Los Angeles District Attorney, Evelle J. Younger, brought charges against Mr. Harris in California state court.[43] In response, Mr. Harris filed suit in federal district court alleging that the Act violated his constitutional rights under the First and

33. *See id.* at 498–500.
34. 319 U.S. 315 (1943).
35. *See id.* at 320, 324–25.
36. 360 U.S. 25 (1959).
37. 304 U.S. 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state").
38. *See Louisiana Power & Light Co.*, 360 U.S. at 29–30.
39. 424 U.S. 800 (1976).
40. *See id.* at 813–14 (internal quotation marks omitted) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)).
41. 401 U.S. 37 (1971).
42. *Id.* at 40 n.1.
43. *Id.* at 40.

Fourteenth Amendments.[44] In light of the purported constitutional violations, the district court issued an order halting District Attorney Younger from prosecuting Mr. Harris in state court.[45] On appeal, the U.S. Supreme Court reversed the lower court, proclaiming that federal jurisdiction in this instance would constitute "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstance."[46]

Notwithstanding some elaboration on the types of state proceedings that warranted federal abstention, the Court relied heavily on the annals of American legal history to justify their decision.[47] Noting that Congress had long directed federal courts to refrain from employing their equitable discretion to interfere with state court proceedings,[48] the Court rested its reasoning on the importance of upholding notions of "comity" that promote "a proper respect for state functions."[49] The Court highlighted its "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."[50] The Court labeled this concept "Our Federalism," describing it as "a system in which there is sensitivity to the legitimate interests of both State and National Governments" and where federal interests do not "unduly interfere with the legitimate activities of the States."[51] The convictions at heart in "Our Federalism" thus formed the basis of the Supreme Court's rigid abstention doctrine preventing federal courts from intervening in ongoing state criminal proceedings.[52]

2. The Gradual Expansion of *Younger* Deference to State Civil Proceedings

While the *Younger* rule has received serious criticism for its constitutional and equitable implications,[53] the Court has continued to expand *Younger*'s main tenet of non-interference with state proceedings into other areas of state law.[54] As Judge Ebel observed in the *Day* opinion, "[f]rom the *Younger* acorn—a holding barring federal courts from enjoining ongoing state criminal prosecutions—a judicial oak has grown."[55] Indeed, the extension of *Younger* to other types of state proceedings besides criminal prosecutions has been precipitous.

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44. *Id.* at 39.
45. *Id.* at 40.
46. *Id.* at 41.
47. *Id.* at 41, 43.
48. *Id.* at 43.
49. *Id.* at 44.
50. *Id.*
51. *Id.*
52. *Id.* at 54.
53. *See, e.g.*, Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 637 (1979).
54. *See, e.g.*, Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194–95 (1977).
55. Brown *ex rel.* Brown v. Day, 555 F.3d 882, 884 (10th Cir. 2009).

The first major expansion of *Younger* abstention was into ongoing state *civil* proceedings. In *Huffman v. Pursue, Ltd.*,[56] a case involving a civil challenge to an Ohio law branding pornographic theatres as a public nuisance, the Court held that the criminal nature of state nuisance laws justified *Younger* abstention even though nuisance suits are generally not considered true criminal proceedings.[57] A few years later, in *Trainor v. Hernandez*,[58] the Court expanded *Huffman* and mandated federal abstention in all state civil proceedings in which the state is a party.[59] Following on the heels of *Trainor*, in *Moore v. Sims*,[60] the Court applied *Younger* deference to state civil proceedings where the state is a party *and* the substance of the proceeding involve "important state interests."[61] In 1987, after experiencing a steady increase in the applicability of *Younger* to state civil proceedings, the Court dramatically expanded *Younger* in *Pennzoil Co. v. Texaco, Inc.*[62] to include *private* state civil proceedings that involve important state interests.[63] However, two years later in *New Orleans Public Service, Inc. v. Council of New Orleans*,[64] the Court declined to go as far as mandating federal abstention in all civil litigation, and conversely, held that federal courts may exercise jurisdiction over ongoing state civil proceedings under limited circumstances.[65]

3. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*[66] and Abstention in State Administrative Proceedings

In the early 1980s, the Supreme Court first considered extending "Our Federalism" and *Younger* treatment to state administrative proceedings.[67] In *Dayton Christian Schools*, the Court solidified the applicability of *Younger* abstention to state administrative proceedings "in which important state interests are vindicated."[68] *Dayton Christian Schools* involved a sexual harassment claim filed with the Ohio Civil Rights Commission, prompting the defendants to file suit in federal district court to enjoin the state administrative proceeding.[69] The Court declared that the district court should have abstained because federal courts should not

56. 420 U.S. 592 (1975).
57. *See id.* at 604.
58. 431 U.S. 434 (1977).
59. *See id.* at 444.
60. 442 U.S. 415 (1979).
61. *See id.* at 423.
62. 481 U.S. 1 (1987).
63. *See id.* at 13–14.
64. 491 U.S. 350 (1989).
65. *See id.* at 372–73.
66. 477 U.S. 619 (1986).
67. *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432–34 (1982).
68. *See Dayton Christian Sch.*, 477 U.S. at 627.
69. *Id.* at 621, 623–24.

interfere with state administrative actions when a state proceeding has already been initiated and involves important state interests.[70]

While the evolution of *Younger* deference has been volatile over the last several decades, the Tenth Circuit summarized the relevant *Younger* case law into a paragraph-long test encompassing all of the Supreme Court's major rules of law:

> Under *Younger* and its progeny, "[a] federal court must abstain from exercising jurisdiction when: (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.'"[71]

II. *BROWN V. DAY*

A. Facts and Procedural History

Dena K. Brown, a developmentally disabled adult, possessed the mental capacity of a three to four year-old child.[72] Due to her disabilities, Ms. Brown lived at a private residential care facility in Kansas.[73] Ms. Brown's monthly income was limited to the $864 she receives in Social Security payments.[74] Because her Social Security payments were not substantial enough to cover the $5,000 monthly cost of residing at the facility, Ms. Brown relied on Medicaid payments to defray the remaining balance due.[75] The State of Kansas, as a participant in the Medicaid program, is bound by federal statute to cover "categorically needy" individuals collecting Supplemental Security Income ("SSI") from the Social Security Administration.[76] Congress—in an attempt to preclude states from shortchanging the "categorically needy"—limited a state's ability to disqualify these individuals by mandating that any Medicaid termination reflect "reasonable standards that only factor in income and resources which are available to the recipient and which would affect the person's eligibility for SSI."[77] To further brighten the line for states participating in Medicaid, the Social Security Administration promulgated rules outlining sources of income that could potentially disqualify a SSI recipient

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70. *See id.* at 627–28.
71. Brown *ex rel.* Brown v. Day, 555 F.3d 882, 887 (10th Cir. 2009) (alteration in original) (quoting Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F. 3d 1160, 1163 (10th Cir. 1999)).
72. *Id.* at 885.
73. *Id.*
74. *Id.*
75. *Id.*
76. *See id.*
77. *Id.* (citing 42 U.S.C. § 1396a(a)(17) (2006)).

under Medicaid.[78] These sources include assets available for liquidation and trust funds that the beneficiary controls.[79]

In 2003, upon the death of her mother, Ms. Brown was named the beneficiary of a residuary trust comprised of a cash gift, two annuities, and the rights to land in Kingman County, Kansas.[80] Each of the three trust components was valued well over $10,000.[81] However, in light of Ms. Brown's disabilities, her brother was designated trustee over the new assets and retained sole discretion over funds spent on Ms. Brown's behalf.[82] On July 1, 2004, Kansas amended its Medicaid eligibility law to recognize trust income "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."[83] As a result of the new state law, Robert M. Day, Director of Kansas's Division of Health Policy and Finance ("HPF"), informed Ms. Brown that her Medicaid benefits would be terminated after August 31, 2005.[84]

Through her attorney, Ms. Brown requested a hearing before the HPF to challenge the cancellation of her benefits on grounds that the new state law could not be applied to her retroactively.[85] The HPF officer conducting the hearing determined the new law did not extend retroactively to trusts previously vested, ruling in Ms. Brown's favor.[86] Despite Ms. Brown's victory at the hearing, Director Day proceeded with his ultimatum and issued a final order on April 26, 2006 to discontinue Ms. Brown's benefits because she could temporarily finance her own care with the trust's assets.[87] In the decree, Director Day mentioned that Ms. Brown had thirty days to seek state court review of the HPF's final order.[88]

Ms. Brown did indeed pursue judicial review. However, she sidestepped her uncontested right to state review under Kansas Law[89] and filed a claim against Director Day in the U.S. District Court for the District of Kansas.[90] Ms. Brown based her complaint on 42 U.S.C. § 1983, alleging HPF breached "federal Medicaid law when it determined that the assets in the trust left to Brown by her mother are 'available as-

78. *See id.*
79. *Id.*
80. *Id.* at 886.
81. *See id.*
82. *Id.*
83. *Id.* (internal quotation marks omitted) (quoting KAN. STAT. ANN. § 39-709(e)(3)(B) (1997 & Supp. 2008)).
84. *Id.* at 885–86.
85. *Id.* at 886.
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* KAN. STAT. ANN. § 77-613(b) (1997 & Supp. 2008).
90. *See Day*, 555 F.3d at 886–87.

sets.'"[91] Considering a prayer for equitable relief, the district court granted Ms. Brown's motion for a preliminary injunction preventing the HPF from terminating her benefits.[92] The district court reasoned that the HPF's final order was an arbitrary and capricious violation of the federal Medicaid statute's prohibition against eligibility tampering among the "categorically needy."[93]

One month later, Director Day filed a motion to dismiss the court's order contending that the federal courts should abstain from hearing the case on account of Ms. Brown's failure to exhaust her state court remedies.[94] The district court granted the motion to dismiss, agreeing that "*Younger v. Harris* and its progeny commanded abstention" because Ms. Brown failed to exhaust her state options, those state options were adequate to address her claims, and Kansas had sufficient "interest in '[p]rotecting the fiscal integrity of public assistance programs.'"[95] After Ms. Brown's motion to alter or amend the judgment was denied, she appealed the district court's decision to the Tenth Circuit for review.[96]

B. Majority Opinion

Judge Ebel, writing for the majority, quickly noted the Tenth Circuit's prior position on the precarious circumstances *Younger* abstention invites into federal courts: "[T]his court 'must be sensitive to the competing tension between protecting federal jurisdiction and honoring principles of Our Federalism and comity.'"[97] From there, Judge Ebel narrowed the disposition of the case to nothing more than resolving the first prong of the *Younger* complex: whether "there is an ongoing state criminal, civil, or administrative proceeding."[98] To properly analyze this question, the majority split the prong into "two sub-parts": (1) identifying whether an ongoing state proceeding existed, and if so, (2) "whether that proceeding is the *type* of state proceeding that is due the deference accorded by *Younger* abstention."[99] Noting that both sub-parts presented issues of first impression for the Tenth Circuit, the majority declined to abstain under *Younger* because the type of proceeding in question was improper.[100] In doing so, the court chose not to address the remaining sub-

91. *Id.* at 887.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (alteration in original).
96. *Id.*
97. *Id.* at 887–88 (quoting Taylor v. Jaquez, 126 F.3d 1294, 1296 (10th Cir. 1997)).
98. *Id.* at 887.
99. *Id.* at 888 (citing New Orleans Pub. Serv., Inc. 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.")).
100. *Id.*

part of whether there was an ongoing proceeding, effectively reserving that question for future litigation.[101]

In support of its holding that the proceeding initiated by the HPF did not warrant *Younger* deference, the majority relied on the Supreme Court's opinion in *Dayton Christian Schools* and gleaned factors that determine the types of administrative proceedings that warrant *Younger* abstention.[102] As the majority put it, *Dayton Christian Schools* serves to clarify "some of the occasions when *Younger* deference was appropriate and some occasions when it was not."[103] The *Dayton Christian Schools* holding was an important case for the majority because it differentiated the types of proceedings from another relevant Supreme Court case, *Patsy v. Board of Regents of Florida*.[104]

In *Patsy*, the Supreme Court allowed a federal claim to proceed despite the availability of adequate state administrative proceedings.[105] This stands in stark contrast with the *Dayton Christian Schools* decision, which serves as the legal backbone for applying *Younger* deference to state administrative proceedings.[106] To justify the apparent disparity between the two cases, *Dayton Christian Schools* distinguished *Patsy* on the ground that the administrative proceedings were remedial rather than coercive.[107] More precisely, the Court elaborated on the difference between the two cases by noting:

> 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 brining 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.[108]

Hence, according to the majority's interpretation of the Supreme Court's language in *Dayton Christian Schools*, if a state administrative proceeding is classified as "remedial," then a federal court does not have to decline to exercise jurisdiction, and it can hear the case. On the other

101. *Id.*
102. *Id.*
103. *Id.*
104. *See id.* (citing Patsy v. Bd. of Regents of Fla., 457 U.S. 496 (1982)).
105. *Patsy*, 457 U.S. at 516.
106. *Compare id.* (holding exhaustion of state judicial and administrative remedies is not a prerequisite to a discrimination action under § 1983), *with* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 620 (1986) (holding the district court should have abstained from deciding the case based on the *Younger* doctrine).
107. *See Dayton Christian Sch.*, 477 U.S. at 627 n.2.
108. *Id.* (emphasis added) (citation omitted).

hand, if the administrative proceeding is deemed "coercive," then federal courts must abstain under *Younger*.[109]

Because the Supreme Court declined to formulate a test to determine whether a state proceeding is remedial or coercive, and because the concept of remedial and coercive administrative proceedings constituted a matter of first impression to the Tenth Circuit, the majority in *Day* resorted to the relevant case law from their "sister circuits."[110] As such, the majority adopted the approach taken by the First Circuit in *Kercado-Melendez v. Aponte-Roque*.[111] The First Circuit's test "asks the court to consider two issues in deciding whether *Dayton Christian Schools* or *Patsy* controls."[112] The first prong seeks to discover if "the federal plaintiff initiated the state proceedings of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory (a coercive proceeding)."[113] The second prong of the First Circuit's test prompts the courts to "differentiate cases where the federal plaintiff contends that the state proceeding is unlawful (coercive) from cases where the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial)."[114]

In addition to the First Circuit's approach in *Kercado-Melendez*, and in an attempt to further resolve the coercive and remedial distinction, the majority turned to cases from other circuits that involved the correlation between *Younger* abstention and the punishment of bad acts.[115] These cases usually entail federal plaintiffs seeking to "thwart a state administrative proceeding" initiated against that plaintiff for punishment of a bad act.[116] Accordingly, the majority deduced that "a common thread appears . . . that if the federal plaintiff has committed an alleged bad act, then the state proceeding initiated to punish the plaintiff is coercive," thus inviting *Younger* deference.[117] In a case decided by the Fourth Circuit, the court held that the plaintiff's conduct violating Maryland's Dewatering Act, which resulted in fines to a mining company, was a sufficiently bad act to justify abstention.[118] Additionally, in a case challenging the City of Philadelphia's parking ticket procedures, the Third Circuit favored abstention on a bad act theory because "[t]he plaintiffs had amassed a slew of parking tickets over the years and sought to avoid

109. *See id.*
110. Brown *ex rel.* Brown v. Day, 555 F.3d 882, 889 (10th Cir. 2009).
111. *Id.* at 890 (citing Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987)).
112. *Id.* at 889.
113. *Id.*
114. *Id.*
115. *Id.* at 891.
116. *Id.*
117. *Id.*
118. *Id.* (citing Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 166–67 (4th Cir. 2008)).

paying them."[119] Last, in a ruling handed down by the Seventh Circuit, abstention was upheld when the federal plaintiff "had allegedly euthanized elderly patients."[120] Following this approach, the majority reasoned that bad acts and punishment are important indicators into the propriety of *Younger* abstention.[121]

Last, the majority analyzed other important *Younger* abstention cases, such as *Huffman* and *Moore*, and concluded that "[t]he essence of each of these opinions is that a state's enforcement of its laws or regulations in an administrative proceeding constitutes a coercive action, exempt from *Patsy* and entitled to *Younger* deference."[122] On the other hand, the majority contended, administrative proceedings not in line with the coercive model are automatically considered remedial in nature.[123]

In applying the case law to the situation at hand, the majority disagreed with the district court's reasoning that the HPF proceedings were coercive "because they stemmed from Kansas's decision to terminate Brown's benefits."[124] Instead, the majority adopted the First Circuit's test and concluded the HPF proceedings against Brown were remedial.[125] The majority articulated three main reasons for its conclusion. First, Brown's participation in the proceeding was not mandated by any State action against her, but rather she initiated the hearing herself.[126] Second, the court reasoned that the basis of Brown's claim "alleged that the application of this new law to her violates federal law because it contravenes certain terms of the federal-state Medicaid pact," and not the underlying state proceedings themselves.[127] Last, in accordance with the bad act jurisprudence of the other circuits, the majority noted that Brown did not commit a "cognizable bad act that would have precipitated state coercive proceedings."[128] In light of its conclusion that the HPF proceedings against Brown were remedial, rather than coercive, the Tenth Circuit reversed and remanded the case to the district court.[129]

C. Dissenting Opinion

Judge Tymkovich issued a dissent challenging the majority's holding that the HPF proceedings were remedial.[130] In addition, Judge Tymkovich faulted the majority for failing to address the second prong of the

119. *Id.* at 892 (citing O'Neill v. City of Phila., 32 F.3d 785, 788–89 (3d Cir. 1994)).
120. *Id.* (citing Majors v. Engelbrecht, 149 F.3d 709, 711–12 (7th Cir. 1998)).
121. *See id.*
122. *Id.* at 890.
123. *Id.*
124. *Id.* at 893.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 894.
130. *Id.* at 894 (Tymkovich, J. dissenting).

Younger test: whether the state administrative proceeding is ongoing.[131] In making these two points clear, the dissent began by questioning the applicability of the *Dayton Christian Schools*'s remedial and coercive distinction, observing that the Supreme Court not only refused to elaborate on the variances, but also communicated them obscurely in a footnote of the *Dayton Christian Schools* opinion.[132] The dissent questioned the effectiveness of the First Circuit's test in *Kercado-Melendez*, remarking that the test for determining coercive versus remedial proceedings is not correctly detected by examining "who initiate[d]" the administrative process.[133] Instead, the dissent applauded the district court for adopting the tests formulated by the Third, Fourth, and Seventh Circuits, which look "to the underlying nature and substance of the proceedings rather than to the initiating party."[134] Judge Tymkovich noted that "focusing primarily on who initiates administrative process fails to recognize that the labels 'remedial' and 'coercive' can simply be opposite sides of the same coin."[135] As he explained:

> If a federal plaintiff initiates a state administrative process, the First Circuit's approach in *Kercado-Melendez* would call that process remedial. But that federal plaintiff surely felt coerced by the challenged state action he or she is now seeking to remedy. On the flip side, if the government initiates administrative process against a would-be federal plaintiff, *Kercado-Melendez* would label that process coercive. But that would-be federal plaintiff, forced into the state-initiated administrative proceedings, can also be described as attempting to remedy governmental coercion through the administrative hearing. *Kercado-Melendez*'s interpretation of the coercive–remedial distinction, while easy to apply, does not explain why it modifies the *Younger* abstention doctrine.[136]

Rejecting the First Circuit approach, the dissent favored a different test for distinguishing the remedial from the coercive: "The question we must therefore ask is whether administrative proceedings represent state enforcement efforts—regardless of who initiates them."[137]

Additionally, the dissent argued that the "bad act" test used by the majority was also inconclusive for the purposes of applying *Younger*. Primarily, Judge Tymkovich took issue with the fact that some violations of the law, under the majority's test, are not considered "bad acts."[138] As an operation of law, the dissent argued, any violation of the law should

131. *Id.*
132. *Id.* at 895 (citing Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 n.2 (1986)).
133. *Id.* at 896.
134. *Id.* (citing Brown *ex rel.* Brown v. Day, 477 F. Supp. 2d 1110, 1116 (D. Kan. 2007)).
135. *Id.*
136. *Id.*
137. *Id.* at 897.
138. *Id.* at 898.

be considered a "bad act."[139] As Judge Tymkovich wrote, "An element of subjective moral culpability seems unimportant to this inquiry."[140] Hence, considering Ms. Brown did violate the Kansas statute dictating the terms of Medicaid benefits, the dissent contended that the majority's "bad act" approach "weighs in *favor* of finding the proceedings here were coercive in nature."[141] Following this line of reasoning, and because Judge Tymkovich argued the proceedings were still ongoing, the dissent asserted that *Younger* deference was indeed warranted.[142]

III. ANALYSIS

A. Day *and the Coercive–Remedial Distinction as a Remnant of the* Patsy-Dayton Christian Schools *Disparity*

1. The Circuits and the Rise of the Coercive–Remedial Distinction

The majority and dissenting opinions in *Day* demonstrate the substantial strain that beleaguers lower federal courts due to the conflicting holdings in *Patsy* and *Dayton Christian Schools*.[143] As discussed in Part I.C, the Supreme Court vaguely distinguished *Patsy* from *Dayton Christian Schools* on grounds that the proceedings in the latter case were (1) coercive rather than remedial, (2) began before substantial advancement in the federal action, and (3) involved an important state interest.[144] Considering there is no other Supreme Court pronouncement to help decipher the practical meaning of these three differentiating factors, a lingering sense of uncertainty has compelled federal judges to elicit new tests to determine whether *Younger* deference is warranted.[145] The approach taken by the First Circuit in *Kercado-Melendez*, as well as the reasoning applied in the various "bad act" cases, reflects the laborious effort put forth by the courts to adequately define the coercive and remedial dividing line.[146] The opposing viewpoints presented in *Day* are no exception to this ongoing endeavor.

In fact, as inferred from the analysis of the *Day* opinions, the enigmatic character of the three factors separating *Patsy* and *Dayton Christian Schools* has become so pronounced that the circuits have clashed considerably over the coercive–remedial dynamic, producing a textbook "circuit split on the issue."[147] Nevertheless, as Judge Tymkovich argued in his dissent, despite its location in a footnote, "[t]he Supreme Court . . .

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See id.* at 895–96.
144. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 n.2 (1986).
145. *See Day*, 555 F.3d at 896 (Tymkovich, J., dissenting).
146. *See id.* at 888–89 n.5 (majority opinion); Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 260 (1st Cir. 1987).
147. *Day*, 555 F.3d at 896 (Tymkovich, J., dissenting).

must have thought the distinction important, because otherwise no need for differentiating between coercive and remedial proceedings exists."[148] Accordingly, as a court considering the coercive–remedial issue for the first time, the Tenth Circuit majority made clear from the onset that they would consider the distinction "as the touchstone for determining whether the administrative proceeding is the type of proceeding that merits *Younger* abstention."[149] Yet in arriving at this course of action, the majority supported the decision to concentrate on the coercive–remedial distinction not because they believed the Supreme Court had so mandated them, but instead because their "sister circuits tend to use that articulation."[150] This is arguably an important concession by the court, as it illustrates the influence exerted by the circuits in shouldering the coercive–remedial distinction to the forefront of the *Younger–Dayton Christian Schools* abstention analysis.[151] Despite other crucial intricacies surrounding *Younger* abstention, the circuits have clearly elevated the coercive–remedial distinction as the chief obstacle litigants must overcome in order to shield a state administrative proceeding from federal consideration under a *Younger–Dayton Christian Schools* theory.[152]

2. The Inherently Coercive Nature of *Younger* and Its Progeny

One apparent explanation for the rise of the coercive–remedial distinction among the circuit courts can be traced back to the underlying fact pattern in the *Younger* case.[153] Some circuits cling to the abstract coercive–remedial distinction because the principal holding in *Younger* originally compelled federal abstention only in state *criminal* proceedings.[154] As Judge Ebel described it, "The *Younger* doctrine originated in concerns that federal plaintiffs might stymie state coercive proceedings by bringing suit in the federal courts."[155] Under this line of reasoning, it is argued that no other type of legal proceeding embodies the coercive nature of governmental action more irrefutably than criminal proceedings.[156] This viewpoint commands substantial respect, as it was even supported by Judge Tymkovich in a portion of his dissent rejecting the *Kercado-Melendez* test.[157] He stated that "the Supreme Court in *Dayton* likely employed the coercive–remedial distinction to limit the extension of *Younger* to those administrative proceedings—and only those administrative proceedings—that are most like *Younger* itself, which was a

148. *Id.* at 895.
149. *Id.* at 888–89 n.5 (majority opinion).
150. *Id.* at 889 n.5.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *Id.*
156. *See id.*
157. *See id.* at 896 (Tymkovich, J., dissenting).

criminal case."[158] With little guidance from the Court regarding the ambit of the coercive–remedial distinction, it is certainly a tenable conclusion for circuit judges to assume that the coercive test should turn on the presence of prosecutorial action or the immoral behavior of individuals.[159]

Further bolstering this line of reasoning is the argument put forth by the majority in *Day* that *Younger* abstention's encroachment into civil proceedings was originally recognized only because the civil suits in question were "closely related to criminal statutes," and therefore coercive in nature.[160] This rationale is most evident in the reasoning handed down by the Court in *Huffman*, *Trainor*, and *Moore*. In *Huffman*, the Court held that proceedings triggered by violation of an Ohio state nuisance law were "more akin to a criminal prosecution than are most civil cases."[161] Likewise, in *Trainor*, the Court extended *Younger* abstention to a civil fraud proceeding because the "state authorities also had the option of vindicating the[] policies through criminal prosecutions."[162] This line of thought was also employed by the Court in *Moore*, where *Younger* deference was applied to a civil state proceeding involving child abuse because of its innate relationship to criminal law.[163] Thus, it is likely that the Court's dearth of clarification in *Dayton Christian Schools* spurred the circuit courts to turn to *Younger* and its progeny for guidance regarding the true origins of the coercive–remedial distinction, an undertaking that has only heightened the distinction's prominence in the post-*Dayton Christian Schools* era.[164]

B. The Various Coercive–Remedial Tests and Day*'s Modification of Current Precedent*

1. The First Circuit's *Kercado-Melendez* Test

The *Day* case is a prime resource for better understanding the multiple coercive–remedial tests currently employed by the federal courts. Given that the coercive–remedial distinction is likely to serve as the predominate factor in determining a state administrative proceeding's compatibility with *Younger* abstention, it is important to isolate the separate standards and their ramifications. Chief among these standards, and the one most relevant to the disposition in *Day*, is the approach handed down

158. *Id.*
159. *See, e.g.*, *id.* at 889 n.5 (majority opinion).
160. *Id.* (internal quotation marks omitted) (quoting Moore v. Sims, 442 U.S. 415, 423 (1979)).
161. *Id.* (internal quotation marks omitted) (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)).
162. *Id.* (internal quotation marks omitted) (quoting Trainor v. Hernandez, 431 U.S. 434, 444 (1977)).
163. *Id.* (citing *Moore*, 442 U.S. at 423).
164. *See id.*; *see also id.* at 896 (Tymkovich, J., dissenting).

by the First Circuit in *Kercado-Melendez*.[165] That case involved an educator's wrongful termination claim that culminated in the plaintiff's election to file a § 1983 action instead of pursuing available state administrative remedies.[166] The School Board argued that *Younger* and *Dayton Christian Schools* compelled federal abstention.[167] The First Circuit ultimately rejected the argument for two primary reasons grounded on inherent differences between *Patsy* and *Dayton Christian Schools*. First, the court held that *Younger* abstention was not applicable in this situation because, similar to *Patsy*, the claim in question was not obligatory but initiated voluntarily by the plaintiff.[168] Second, the court opined that "[i]n *Patsy* and cases like it, abstention was unnecessary because the federal plaintiffs did not allege injury arising from, or seek relief directed to, an ongoing state proceeding."[169] Because the plaintiff was contesting the legality of actions taken by the state, and not conduct related to the state proceedings, the state interest component of *Younger* abstention was "severely diminished."[170]

The majority in *Day* adopted the *Kercado-Melendez* approach of scrutinizing the coercive–remedial distinction through the lens of the initiating entity.[171] In addition to the arguments put forth by Judge Tymkovich's dissent in *Day*,[172] the implications of the First Circuit's test might also undermine the traditional principles of *Younger-Dayton Christian Schools* by further constraining the autonomy of state administrative proceedings. Considering that one of the fundamental aims of the *Younger* abstention was to secure a system in which "[s]tates and their institutions are left free to perform their separate functions in their separate ways,"[173] the *Kercado-Melendez* approach seems to unnecessarily invite federal jurisdiction into essentially coercive cases solely because the state was not the initiating party.[174] That is, a whole class of state administrative proceedings with criminal underpinnings could be heard in federal court merely because a non-governmental individual or organization filed the complaint. In this scenario, an individual filing a "remedial" claim similar in scope to *Trainor* or *Moore*, hinging on a civil claim with criminal parallels (such as child abuse or fraud), possesses the authority to litigate solely in federal court and shut out state participation

165. *See id.* at 890 (majority opinion) (citing Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1st Cir. 1987)) ("The First Circuit has provided the clearest guidance as to how to decide whether a state administrative proceeding is coercive or remedial.").

166. *Kercado-Melendez*, 829 F.2d at 257–58.

167. *Id.* at 258–59.

168. *Id.* at 260.

169. *Id.* at 260–61.

170. *Id.* at 261.

171. *See* Brown *ex rel.* Brown v. Day, 555 F.3d 882, 893 (10th Cir. 2009).

172. *See id.* at 896 (Tymkovich, J. dissenting).

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

174. *See Day*, 555 F.3d at 897 (Tymkovich, J. dissenting) ("The question we must therefore ask is whether administrative proceedings represent state enforcement efforts—regardless of who initiates them.").

altogether. In doing so, the First Circuit's approach to the coercive–remedial distinction carves out a substantial role for federal courts to adjudicate the merits of at least some state administrative proceedings, a number of which could involve important state interests.

2. The "Bad Act" Test

The second test employed by the *Day* court is examining whether or not the federal plaintiff committed a "bad act."[175] Specifically, the test first seeks to unearth whether "the federal plaintiff has committed an alleged bad act," and if so, "then the state proceeding initiated to punish the plaintiff" is deemed coercive, effectively requiring federal abstention under *Younger*.[176] As noted in the *Day* dissent, this test centers "on the underlying nature and substance of the administrative proceeding[]," standing in direct contrast to the *Kercado-Melendez* test.[177] As discussed in Part II.B, the "bad act" test is the test other circuits most commonly used to unravel the coercive–remedial quandary.[178] The test has been employed by the Third Circuit in *O'Neill v. City of Philadelphia*,[179] the Fourth Circuit in *Moore v. City of Asheville*[180] and *Laurel Sand & Gravel, Inc. v. Wilson*,[181] and the Seventh Circuit in *Majors v. Engelbrecht*.[182] The majority in *Day* captured the core reasoning of these cases, opining that:

> Each of these cases addressed state administrative enforcement proceedings; that is, each originated with the state's proactive enforcement of its laws (horse training regulations, noise ordinances, parking ticket procedures, and licensing laws for the nursing profession). As such, each federal case arose out of situation where the federal plaintiff had engaged in misconduct and sought to block proceedings that would ultimately impose punishment for that misconduct.[183]

Echoing Judge Tymkovich's criticism of this approach, the "bad act" test unduly demarcates the coercive proceedings to only those in which a federal plaintiff possesses "[a]n element of subjective moral culpability."[184] It seems contrary to the spirit of *Younger* and *Dayton Christian Schools* to abstain only when the federal plaintiff has committed an act with a mens rea component. After all, even the basis of the suit against the federal plaintiff in *Younger*—political speech—would plausi-

175. *See id.* at 893 (majority opinion).
176. *Id.* at 891.
177. *Id.* at 896 (Tymkovich, J., dissenting).
178. *See id.*
179. 32 F.3d 785, 791 n.13 (3d Cir. 1994).
180. 396 F.3d 385, 393 (4th Cir. 2005).
181. 519 F.3d 156, 166 (4th Cir. 2008).
182. 149 F.3d 709, 712 (7th Cir. 1998).
183. *Day*, 555 F.3d at 892.
184. *Id.* at 898 (Tymkovich, J., dissenting).

bly be immune from the "bad act" test, as the plaintiff was originally charged with a crime likely afforded some First Amendment protection in the wake of *Brandenburg v. Ohio*.[185] Hence, the "bad act" test appears to overcomplicate an essentially simple concept: compliance with the law. In keeping with analogies to the coercive nature of criminal law, perhaps the courts would better serve the *Younger* ethos if they adopted a "strict-liability" approach that commanded abstention anytime a federal plaintiff violated the law, irrespective of individual immorality.

3. The *Day* Test as a Combination of Judicial Precedent

The *Day* majority appears to have created a third test for abstention under *Younger*, although it did not admit as much. In addition to the *Kercado-Melendez* test and the "bad act" approach, the *Day* majority arguably formulated a new test by combining those two standards into one.[186] While the majority expressly acknowledged that the *Kercado-Melendez* approach "provided the clearest guidance as to how to decide whether a state administrative proceeding is coercive or remedial,"[187] under the Tenth Circuit's methodology in *Day*, the "bad act" test also stands as a sentry to abstaining under *Younger*.[188] In practice, this two-pronged formula may lead to scenarios that undermine key portions of the *Day* rationale.

For example, suppose Director Day, in an effort to terminate Ms. Brown's Medicaid benefits in accordance with the new Kansas statute, was the individual who originally initiated the proceeding against Ms. Brown. Had that been the case, under the Tenth Circuit's reasoning, the underlying nature of the proceeding would be classified as coercive, thus requiring *Younger* deference. Yet, considering nothing in this altered fact pattern fundamentally modified Ms. Brown's own actions, the court would be hard-pressed to assert any other holding contrary to the actual disposition in *Day*, and thereby conclude that Ms. Brown "committed no cognizable bad act."[189] Accordingly, under the second prong of the *Day* test, the proceeding would be characterized as remedial.

Conversely, assume that Ms. Brown was the initiating party—as she was—to contest an HPF decision terminating her Medicaid benefits. Now suppose further, *in arguendo*, that the HPF's basis for termination was not an alteration in the Kansas statute, but merely evidence suggesting Ms. Brown committed insurance fraud vis-à-vis the state Medicaid

185. *See* Younger v. Harris, 401 U.S. 37, 40–41 (1971) (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)) (noting that while the Court's decision did not turn on the constitutionality of California's criminal syndicalism, the Supreme Court has held criminal syndicalism statutes that forbid or punish mere advocacy of violence unconstitutional under the First and Fourteenth Amendments, thereby overruling *Whitney v. California*, 274 U.S. 357 (1927)).

186. *See Day*, 555 F.3d at 893.

187. *Id.* at 890.

188. See *id.* at 893.

189. *Id.*

program. If the HPF terminated the benefits immediately and gave Ms. Brown only notice and the *opportunity* to be heard, the state would force Ms. Brown to be the initiating party if any proceeding were to be held. Under the two-pronged test in *Day*, this framework would create a situation where the federal plaintiff committed an alleged "bad act," inviting *Younger* deference, even though the underlying nature of the proceeding is designated "remedial," which effectively encourages the exercise of federal jurisdiction.

The foregoing examples demonstrate the inherent conflict that could possibly arise when both the *Kercado-Melendez* and "bad act" tests are used in tandem. While the facts of *Day* did not involve a situation capable of creating a "perfect storm" of contradiction, the vast legions of state administrative claims are bound to produce some such result eventually. Consequently, it would be advisable for courts confronting the coercive–remedial distinction as an issue of first impression to be mindful of the discordant results that might ensue when both tests are utilized simultaneously.

4. The Coercive–Remedial Distinction and the Importance of Venue

Even without determining the positive or negative implications of each test, an aggregate analysis of all the varying coercive–remedial standards leads to one definitive conclusion: when attempting to either quash or achieve *Younger* deference for a state administrative proceeding, venue matters.[190] It is clear that the outcome of a *Younger* claim turns on the circuit in which it is brought. For instance, the party initiating the claim may carry less weight in the eyes of the Fourth Circuit,[191] but could be the dispositive factor in the First and Tenth Circuits.[192] As such, until the Supreme Court reconciles the competing standards, venue may be the best barometer of whether or not federal courts will abstain under *Younger*.

C. State Activity and State Interest as the True Custodian of Younger *Deference*

The tendency of the circuit courts to dwell on the coercive–remedial distinction, while certainly important, neglects other key factors that further elucidate whether *Younger* abstention is proper or not. These alternate factors embody the other two abstention prongs referenced by the Court in *Dayton Christian Schools*: whether the state proceeding (1) be-

190. *See id.* at 896 (Tymkovich, J., dissenting).
191. *See id.*
192. *See id.*

gan before substantial advancement in the federal action, and (2) involved important state interest.[193]

First, differentiating *Patsy* and *Dayton Christian Schools* solely through the coercive–remedial distinction does not adequately distinguish *Patsy* as a case centering on § 1983 *exhaustion* instead of *Younger* abstention.[194] When understood in this context, the main contrast between the two cases appears not to be grounded on coercion, but the presence of state action. Second, while the Tenth Circuit did not directly confront the state interest prong in *Day*, the majority suggested in dicta that even if the first two prongs were met, the state interest requirement might be preempted by the federal interest in enforcing Medicaid laws.[195] Though the merits of this assertion are certainly open to debate, at the very least the majority's dicta represents the looming quandaries the courts will face in sorting out notions of federalism in the state-interest prong.

1. *Patsy* and *Dayton Christian Schools*: The Importance of State Interest

To adequately understand the importance of the state interest prong, it is crucial to analyze the facts and rationale of the *Patsy* and *Dayton Christian Schools* cases more closely. The *Patsy* case revolved around a Florida International University ("FIU") employee who asserted that FIU "denied her employment opportunities solely on the basis of her race and sex."[196] She filed a § 1983 claim in the U.S. District Court for the Southern District of Florida seeking declaratory and injunctive relief, as well as damages in the alternative.[197] In response, the FIU Board of Regents filed a "motion to dismiss because petitioner had not exhausted available administrative remedies."[198] The essence of the Board of Regents' argument was that, even though neither party initiated a state proceeding, the plaintiff should be barred from federal review until she had exhausted all remedies available via state administrative proceedings.[199] On that account, the underlying issue in *Patsy* was not whether or not the federal court should abstain, but if the federal plaintiff should *exhaust* available state administrative remedies.[200] All the same, however, there was no

193. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 627 n.2 (1986).
194. *See* Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 498 (1982) ("This case presents the question whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983.").
195. *See Day*, 555 F.3d at 894 n.10.
196. *Patsy*, 457 U.S. at 498.
197. *Id.* at 498–99.
198. *Id.* at 499.
199. *Id.*
200. *Id.*

pending or ongoing state administrative proceeding present in *Patsy*, only the prospect that the plaintiff could commence one as a remedy.[201]

Ultimately the Supreme Court rejected the Board of Regents' claim due to the unique legislative history of § 1983, which according to the Court, was designed as a mechanism to ensure the Civil Rights Act of 1871 "'open[ed] the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights."[202] On these historical grounds, the Court held that petitioner's § 1983 claim could proceed because "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent."[203] Thus, while implications for federal abstention were certainly at stake, the underlying issue in *Patsy* was narrowly focused on the exhaustible capability of § 1983, and not whether there was an ongoing proceeding with sufficient state interest to trigger *Younger* treatment.[204]

On the other hand, in *Dayton Christian Schools*, the facts and timing surrounding the federal claim were much more conducive to *Younger* deference. The plaintiff was a teacher who alleged that her employer, Dayton Christian Schools, a private nonprofit organization providing elementary and secondary education, wrongfully refused to renew her contract because she was pregnant.[205] Upon receiving a letter from the plaintiff's lawyer threatening litigation unless she was reinstated at the school, Dayton immediately terminated her.[206] In response, the plaintiff filed a complaint with the Ohio Civil Rights Commission on grounds that Dayton's conduct "constituted sex discrimination" in violation of Ohio state law.[207]

The Commission commenced a preliminary investigation and informed Dayton that failure to consider a settlement would lead to formal adjudication.[208] After concluding that there was probable cause that the plaintiff was wrongfully terminated, the Commission "sent Dayton a proposed Conciliation Agreement and Consent Order that would have required Dayton to reinstate" the plaintiff.[209] The consent order was conditional, carrying with it the specter of formal proceedings if rejected.[210] Dayton did not agree to the consent order and the Commission initiated formal proceedings.[211] Because Dayton's employment policies were

201. *See id.* at 498–99.
202. *Id.* at 504 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871)).
203. *Id.* at 513.
204. *See id.* at 498.
205. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 622–24 (1986).
206. *Id.* at 623.
207. *Id.* at 624.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

promulgated in accordance with their religious beliefs, Dayton filed a § 1983 claim in the United States District Court for the Southern District of Ohio seeking to halt the state proceeding, arguing that "any imposition of sanctions for Dayton's nonrenewal or termination decisions would violate the Religion Clauses of the First Amendment."[212] In reply, the Commission contended that the district court "should refrain from enjoining the administrative proceedings based on federal abstention doctrines."[213] After the Supreme Court granted certiorari, Justice Rehnquist, writing for the majority, observed that "concern for comity and federalism is equally applicable to certain other pending state proceedings,"[214] and that the case law mandating abstention in criminal and civil proceedings "govern the present" state administrative proceedings as well.[215] As justification for extending *Younger* deference to the Commission's proceedings, the Court specified that "the elimination of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities" and that the Commission would provide Dayton with "an adequate opportunity to raise its constitutional claims."[216]

When analyzed in this comparative light, *Patsy* and *Dayton Christian Schools* demonstrate a fundamental difference that reflects a more comprehensive justification regulating *Younger* abstention than the coercive–remedial approach. The absence of *Younger* abstention in *Patsy* can be more readily explained by the conspicuous lack of state activity concerning the underlying dispute, a fact precluding *Younger* deference regardless of possible coercive and remedial dividing lines.[217] While there is no doubt that the plaintiff initiated the § 1983 claim in *Patsy*, deeming it remedial under current tests, the federal courts in *Patsy* possessed the ability to abstain only in a vacuum, due to a complete dearth of state activity regarding the original suit.[218] To the contrary, in *Dayton Christian Schools*, the Ohio Civil Rights Commission expended substantial time and resources on the wrongful termination claim before the § 1983 action was commenced.[219] Notwithstanding differences in the coercive–remedial distinctions, the *Dayton Christian Schools* Court had both the advantage and capability to defer to an *existing* state proceeding in a fashion that coincided with the *Younger* rationale of "Our Federalism."[220]

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212. *Id.* at 624–25.
213. *Id.* at 625.
214. *Id.* at 627.
215. *Id.* at 628.
216. *Id.*
217. *See id.* at 627 n.2.
218. *See* Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 498–500 (1982).
219. *See Dayton Christian Sch.*, 477 U.S. at 623–24.
220. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) ("The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts.").

In *Younger*, the Supreme Court relied on "Our Federalism" and comity between state and federal government as the impetus for vindicating federal abstention in state proceedings.[221] While the coercive–remedial distinction should continue to play an active role in *Younger* cases, perhaps federal courts would better honor the principle of "Our Federalism" by attempting to move away from the dubious coercive–remedial distinction and attempt to employ the second prong of state interest more zealously.[222] Federal courts faced with a *Younger* abstention decision would both comport with Supreme Court precedent and ease their own burden if they initially analyzed the degree of state time, resources, and energy devoted to a given proceeding when considering whether or not the federal court should exercise jurisdiction. Certainly, if the *Day* court had not been so squarely boxed into the coercive–remedial distinction, the Tenth Circuit would have been able to probe into the HPF's activities and more accurately resolve the propriety of *Younger* deference.

2. Medicaid and the State-Interest Prong

Because the *Day* majority decided the case based on the coercive–remedial distinction, the third prong of *Younger* abstention—whether the state proceeding entails a sufficient state interest—was not officially considered in the majority opinion.[223] However, in dicta, Judge Ebel hinted at an interpretation that considered the third prong against competing state and federal interests in the Medicaid program.[224] Specifically, Judge Ebel rendered the following analysis:

> The district court held that the "third requirement of *Younger* is met because important state interests are implicated in this case." Specifically, the court noted the state's interest in "[p]rotecting the fiscal integrity of public assistance programs" and in "construing state statutes with regard to federal law challenges to those statutes." However, the court did not mention the obvious *federal* interest in ensuring that Kansas does not enact and enforce laws that contravene the Medicaid federal-state covenant. Given that Congress created the Medicaid program as a cooperative federal-state endeavor, it would be peculiar to hold that a state's handling of Medicaid issues is a "matter[] which traditionally look[s] to state law for their resolution or implicate[s] separately articulated state policies." Therefore, this third factor would necessitate a comprehensive analysis were we to reach it.[225]

221. *See id.*
222. *See Dayton Christian Sch.*, 477 U.S. at 627 n.2.
223. *See* Brown *ex rel.* Brown v. Day, 555 F.3d 882, 894 n.10 (10th Cir. 2009).
224. *See id.*
225. *Id.* (alterations in original) (citation omitted) (quoting Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F.3d 1160, 1163 (10th Cir. 1992)).

This language reveals the possibility that courts will disagree about the state interest prong when considering federal legislation administered in conjunction with the states.[226] Joint federal and state ventures, such as the Medicaid program,[227] invite further confusion into the *Younger* analysis by clouding the level of state interest necessary to abstain. As an example, under a pro-*Younger* argument, the Tenth Circuit in *Day* usurped congressional authority conferred to Kansas and precluded Kansas state courts from defining the contours of their state Medicaid statutes.[228] On the other hand, an argument in support of Judge Ebel's dicta might suggest that the source of all state authority over Medicaid flows from Congress, and as such, the federal interest in Medicaid administration supersedes any local considerations.

While both arguments are persuasive, perhaps Congress should step in to clarify any looming uncertainty. Otherwise, the resolution of the state interest prong regarding complicated state and federal programs will ultimately fall to the courts. Congress is better equipped than the federal courts to set guidelines for abstention in joint state and federal ventures, because its authority over Medicaid regulation is supreme and its knowledge of local administrative considerations can factor into crafting a solution that comports with both state and federal interests.

CONCLUSION

In *Brown v. Day*, the Tenth Circuit joined the First Circuit in holding that *Younger* abstention is not applicable to state administrative hearings designated "remedial" in nature. According to the Tenth Circuit, *Younger* abstention—a judicially created mechanism that prohibits federal jurisdiction over ongoing state proceedings—is tenable only when a state initiates the proceedings in question or the federal plaintiff has committed an alleged "bad act."

This approach to the coercive–remedial distinction will likely create more confusion in the future than it will alleviate. Conflicting results follow from both tests and more important indicators of abstention, such as state activity and interests, are lost in the process. Nonetheless, the new test adopted by the Tenth Circuit to decipher remedial and coercive administrative proceedings offers a new blueprint for western district courts considering the applicability of *Younger*. At the very least, there is now some guidance in place for district courts attempting to wade through the difficult interpretive issues accompanying *Younger* abstention.

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226. *See id.*

227. *Id.* at 893. Under the Medicaid program, the federal government provides states with "financial assistance" to deliver health care services for the needy. *Id.* at 885. So long as the states administer their health care service programs "in compliance with federal statutory and regulatory requirements," states can continue to receive federal funds indefinitely. *Id.*

228. *See id.* at 894 n.10.

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