

Bound By Oath Episode 404 | Younger Abstention

John: Hello and welcome to Episode 4 of Season 4 of Bound By Oath, a podcast on civil rights and constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. On this episode, which will be the final episode of the season, we will return to our exploration of doctrines that federal courts use to dismiss constitutional cases without addressing the merits, sending people packing even if they have suffered clear harm and even though Congress has said they should have their day in court.

Chief Justice Warren: Number 163, Evelle J. Younger, appellant, versus John Harris, Jr. et al.

John: On this episode, we'll explore the doctrine of *Younger* abstention.

Sam Gedge: What the *Younger* abstention doctrine says is that notwithstanding this congressional grant of jurisdiction to the federal courts, we the federal courts are going to take it upon ourselves to say that we're not going to hear that case after all.

John: Which, this far into the season, should sound familiar. But fear not, on this episode, we are telling a story that lawyers and law students and fed courts enthusiasts do not know: the backstory to the case of *Younger v. Harris* itself.

Fred Smith: I was talking to a civ pro professor and he was really very surprised. And that's the reaction that I'm getting across the board from people who work in this space and who have

been experts in the field of federal courts for decades. This is just a story that people did not know.

CA AG: This whole incident occurred in April 1966 about six months after the great Watts riots. It grew out of the shooting and killing of a man named Leonard Deadwyler in Los Angeles. He was a black man and it turned out he was taking his pregnant wife to hospital. ... Now, there was great furor about that in the Los Angeles community.

John: *Younger v. Harris* was about whether the state of California could put a man named John Harris, Jr. in prison for decades for handing out leaflets in protest of a fatal police shooting in Los Angeles. Or more precisely, the case was about whether John Harris, Jr. could go to a federal court and have the federal court intervene and put a stop to his prosecution in state court. But the Supreme Court said no.

Fred Smith: The holding of *Younger* is probably not that objectionable. And when you limit *Younger* to what it said, it rests on a long, deep tradition in equity.

John: Indeed. With some important exceptions, federal courts traditionally do not interrupt ongoing prosecutions in state courts. Even so, the Court's ruling in *Younger v. Harris* marked the beginning of a departure from history and tradition that continues to this day.

Sam Gedge: Soon after the Supreme Court introduced so called *Younger* abstention in 1971, a majority of the Court started relentlessly expanding it.

Fred Smith: *Younger* is a highly consequential doctrine, and it is expanding.

John: Today, *Younger* abstention is expanding. It is unmoored from its roots. And on the list of procedural pitfalls that can doom worthy civil rights cases, it is right near the top. Right up there with the *Rooker-Feldman* doctrine about which we have a little update straight from the Supreme Court that we will conclude this episode with. I'm John Ross. Thanks for listening to Bound By Oath.

BBO montage

John: My friends, we have discussed the history and tradition of federal courts intervening in ongoing state criminal prosecutions numerous times on this podcast on past episodes. Sort of by accident and without really saying so. The basic rule is that federal courts generally aren't too keen on defendants who are being prosecuted in state court running to federal court and asking for the federal court to intervene. Nevertheless, there are exceptional circumstances when it is not only appropriate but vitally important and frankly not particularly controversial. For example, last season we discussed the case of [*In re Lee Sing*](#), which was decided in 1890.

Charles McClain: San Francisco Board of Supervisors passed a law saying that all the Chinese in San Francisco, not just in Chinatown but anywhere – quite a few lived outside, should either leave the city or remove to an area of the city that had been set aside for slaughterhouses.

John: In the case, San Francisco passed an ordinance telling about 20,000 Chinese people to abandon their homes and their businesses and either leave town or move into a ghetto. Or, go to

prison. Soon afterward, by agreement between the Chinese consulate and the city, a single Chinese person was arrested for violating the ordinance.

Charles McClain: It was a kind of collusive arrest in that it was designed to test the validity of the ordinance.

John: That is to say that by mutual agreement, both parties agreed that the proper way to test the constitutionality of the ordinance was to put the prosecution of Lee Sing in California court on pause, and repair to federal court. Which did indeed intervene and declared that the ordinance violated federal constitutional rights.

Sam Gedge: The rule that federal courts generally won't intervene in state prosecutions has deep roots, and it is probably a sound rule.

John: That is my colleague at the Institute for Justice, Senior Attorney Sam Gedge.

Sam Gedge: It would undermine the jury process, the law enforcement process, and just the general administration of justice if a criminal defendant could run to the federal courthouse whenever they think something about their prosecution is constitutionally problematic. Because realistically what criminal defendant doesn't think there's something about their criminal prosecution that's problematic?

John: Say they weren't allowed to confront an accuser as the Sixth Amendment requires, for example. Or there was a problem with the jury instructions. Those are constitutional problems, but they can be sorted out on appeal.

Sam Gedge: But at the same time, dating back to England and the courts of chancery, you do have this principle that there are circumstances when it's appropriate for criminal defendants to file a separate lawsuit in a separate court that challenges the basis for their prosecution.

John: For example in 1737 the case of *Mayor of York v. Pilkington*, where, it was alleged, the same individuals prosecuting Pilkington in a local court were also the judges in the same case. That warranted intervention by another court. And in the early republic period in the United States there are a few cases that certainly fit into that mold.

Sam Gedge: But really the key date is in 1868 when the 14th Amendment was ratified. One of the animating principles of the 14th Amendment, of course, was that state courts were not adequately protecting people's rights, and that civil rights plaintiffs should be able to go to federal court. So after 1868, you see people do exactly that in cases where they're being actively prosecuted, or even just threatened with prosecution in state forums.

John: Cases like *In re Lee Sing*. The best place to go and read in depth about those cases is an article that we will link to in the show notes by Stanford Law Professor Fred Smith.

Fred Smith: One starting point that one can could use to think about this is the 14th Amendment, because that's when you see much more in the way of state and local prosecutions where people are going to federal court to enjoin them. You don't have nearly as much of that before the 14th Amendment, for obvious reasons.

John: So, what are the circumstances when you could go to federal court to enjoin a state prosecution? Professor Smith has collected the cases, and he says that traditionally plaintiffs needed to make a showing that if the federal court did not intervene they would suffer great, immediate, and irreparable harm.

Fred Smith: You don't always see that exact formulation – sometimes you would see irreparable harm and not see the word great associated with it.

John: What did it mean to suffer great and irreparable harm versus just regular amounts of harm?

Sam Gedge: So there are a few different buckets of cases from that era that illustrate what harms were sufficiently grave as to warrant an injunction. One of them is being held in jail without an opportunity for a hearing to see if you can be released before trial, even for a relatively short period of time. The idea being that being stuck in jail is an irreparable harm. You can't get that time back.

John: In one case, the case of [*Tuchman v. Welch*](#), from 1890, a federal district court said that holding an arrestee in jail for three days without an opportunity to seek bond was sufficient harm. That case involved an employee of the Anheuser-Busch brewing company, who was accused of violating Kansas law by selling beer. But that law, the federal district court said, was on shaky ground, and in any case, closing down someone's business and arresting them without

first giving them some notice and an opportunity to be heard was a great and irreparable injury.

Quote: “The law loathes judgment without a hearing.”¹

Sam Gedge: There are cases about making release from jail contingent upon paying a fine that you can’t afford. There are cases about being jailed for failure to pay a fine if you weren’t given a chance to challenge the fine.

John: For example, the case of *Ex Parte Stricker*, from 1901, which involved a lawyer in Kentucky who, at the request of his client and in accordance with state law, tried to get a special judge appointed to hear his client’s case because the regular judge had been away for an extended period. But the clerk didn’t allow it, and when the regular judge returned, he fined the lawyer \$25. Stricker, the lawyer, spent months in jail for nonpayment without being given a chance to challenge the fine.

Sam Gedge: And here too, the federal court issued the injunction, finding federal intervention was warranted to protect federal constitutional rights. Generally, if the harm you are trying to avoid, like pretrial detention, if it’s not something you cannot adequately challenge in the state court proceeding that you are being subjected to, that’s a key reason for federal court intervention.

John: Another bucket is bad-faith prosecutions, where the government isn’t necessarily trying to get a conviction but is just using the legal process to harass people they don’t like. Like, the

¹ “A most earnest appeal is made by respondent to this court to leave unmolested the officers of the state in this controversy to proceed through the customary channels of the state courts, leaving the petitioner his remedy, after final decision in the court of last resort in the state, of appealing to the United States supreme court. We sensibly recognize the importance of the rule of comity invoked, as essential to the preservation Of the harmony and peaceful operation between the courts of the two jurisdictions; but”

case of *M. Schandler Bottling Company v. Welch*, where a county prosecutor and sheriff were accused of repeatedly arresting and re-arresting a brewing company's employees on essentially the same charges to try and drive the company out of town.

Sam Gedge: And the federal district court in that case said that because the prosecutions and threatened prosecutions were quote "hostile, vexatious, and unwarranted" and involved quote "the wanton destruction of or injury to property interests of the accused," federal court intervention was appropriate to prevent great harm.

John: In 1907, an unnamed correspondent summed up the rule in the pages of the *Harvard Law Review*. Quote: "Ordinarily equity will not interfere with criminal proceedings. But where irreparable damage would otherwise follow, the majority of the many conflicting cases will be found to hold that equity will restrain the enforcement of penalties ... which the court deems unconstitutional." So that is the history and tradition of criminal abstention. Unlike other abstention doctrines, it's been around for a long time. But somewhere along the line the link to history and tradition has been severed. Courts today abstain in cases where there is no ongoing criminal prosecution and even if a plaintiff alleges they will suffer what traditionally courts considered to be great, immediate, and irreparable harm. That trend begins with the case of *Younger v. Harris*.

Chief Justice Warren: Number 163, Evelle J. Younger, appellant, versus John Harris, Jr. et al.

John: Which was first taken up by the Supreme Court in 1969. But then reargued in the spring of 1970.

Chief Justice Burger: First case on for argument today is Number 4, Younger against Harris. **CA AG:** Thank you, Mr. Chief Justice.

John: And then argued for a third time in the fall of 1970.

Chief Justice Burger: Younger against Harris. Counsel, you may proceed whenever you are ready.

John: And then finally decided by the Supreme Court in 1971. The case began one evening in 1966, when Los Angeles police stopped an unarmed, 25-year-old black motorist named Leonard Deadwyler. He was a construction worker and he had been speeding with his pregnant wife to the hospital. Soon after, an officer shot him dead at point-blank range.²

CBS news anchor: Mrs. Deadwyler testified that she, her husband, and a passenger were speeding to the hospital on May 7th in the belief she was about to give birth prematurely.

Barbara Deadwyler: My husband leaned over me to look at the officer and he asked him if he would lead him out to General Hospital or take me there. And then the gun went off.

John: Deadwyler had tied a [white handkerchief](#) to his antenna, which in the rural south – where he was from – was a readily understood symbol of distress, a symbol that unfortunately did not mean anything to officers in L.A. Police said they had been chasing Deadwyler for over 40 blocks when he finally pulled over. At which point, a 23-year-old patrolman named Jerold Bova

² Jury finds for city in suit on Deadwyler, *The Los Angeles Times*, Oct 1, 1971.

leaned through the passenger seat window across Barbara Deadwyler³ and pressed his service weapon into Leonard's abdomen. According to Bova, he was trying to pull the key out of the ignition with his other hand when the car then lurched forward unexpectedly, and he accidentally fired. Barbara Deadwyler testified that the car never moved and that the shooting was deliberate.⁴

Barbara Deadwyler: After the gun went off, I asked him why did he shoot my husband.

He didn't say anything. He just turned around and was putting his gun in his holster.

John: His last words were "she's having a baby."⁵ The shooting took place less than a year after the great Watts riots of 1965, six days of violence in a nearly 50-square-mile section of the city, which had resulted in 34 deaths, over a thousand reported injuries, and 600 buildings burned or looted. The riots had been sparked by police beating up a black motorist and his mother in front of a crowd of onlookers. After the Deadwyler shooting, the city braced for more disorder.

LAPD loudspeaker: I hereby command you to disperse. You have five minutes to clear the area here. Anyone remaining after I give this order will be arrested for failure to disperse.

John: The district attorney, a man named Evelle Younger, and the Younger in *Younger vs. Harris*, declined to bring charges against Officer Bova, saying that quote: "I have the responsibility to see that an officer attempting to perform his responsibility of protecting the community from a

³ Deadwyler verdict - 'Accidental homicide,' *Independent*, Jun 1, 1966.

⁴ Art Berman, Inquest jury rules shooting of Deadwyler was an accident, *The Los Angeles Times*, June 1, 1966; Deadwyler widow asks \$3 million, *Independent*, Sept 8, 1971.

⁵ Art Berman, Last words of Deadwyler told by Bova partner, *The Los Angeles Times*, May 27, 1966.

very dangerously driven motor vehicle through a populated area shall be treated fairly ... I will not make the officer a sacrificial lamb to satisfy the emotional clamor of the few who threaten to overturn the rule of law.”⁶

Fred Smith: This was infuriating to a community that had experienced other acts of police brutality. But this one in particular really struck people to the core.

John: That is Professor Fred Smith of Stanford Law School, who has written several outstanding articles on the doctrine of *Younger* abstention, including one with his co-author Peter O’Neill on the origins of the case.

Fred Smith: When you read memoirs from people like Johnny Cochran, what they say is there wasn't you couldn't find anybody in Los Angeles who didn't know the name Leonard Deadwyler. Given its proximity to the Watts uprising, people were afraid that this would turn into another uprising of its sort. And one of the ways that Evelle Younger attempted to deal with that was by having an eight-day televised inquest.

John: To assuage an outraged community after he declined to bring charges himself, Evelle Younger turned to a little-used procedure called a coroner’s inquest that could also have resulted in criminal charges for Officer Bova.

Fred Smith: Nothing of the sort had happened, at least in Los Angeles, ever before. And it was an inquest to try to understand the cause of this particular shooting and determine whether or not to prosecute the officer.

⁶ Deadwyler verdict - ‘Accidental homicide,’ *Independent*, Jun 1, 1966.

News anchor: A crowd of 600 persons, mostly negroes, turned out for the inquest. The hostility was obvious. And it showed clearly the explosive emotional state of the negro community.

John: After days of testimony, including testimony from police experts who said that leaning halfway into a car with a gun drawn is not proper procedure, the jury found that the shooting was accidental, and no charges were brought. The rules of the inquest were that the jury could recommend charges only for intentionally killing Deadwyler; accidentally shooting him – and thus recommending charges sounding in negligence rather than murder – was outside their purview.⁷ In any case, during the inquest, a crowd who couldn't fit into the hearing room gathered outside on the steps of the courthouse. And among them was a man named John Harris, Jr., who was black and a member of the communist Progressive Labor Party. He was only 22, but he was already a veteran civil rights activist.

Fred Smith: John Harris, he wasn't in the courtroom. He was – among others – he was not alone, but he, among others, were outside on the courthouse steps, and they were handing out flyers. And the flyers had very, very strong language, but none of which was in language that would be inciting any kind of imminent threat.

John: The flyers noted other police killings of African Americans that had been deemed justifiable homicides.

⁷ Paul Houston, Reaction to inquest: Praise and criticism, *The Los Angeles Times*, June 1, 1966.

Fred Smith: They talked about black unemployment in Watts. That was a big focus, and the fact that there were lots of places in Watts that wouldn't hire black residents. And how that was contributing to high unemployment.

John: The flyers quoted Frederick Douglass on the need for violent struggle to put an end to slavery as well as standard communist language about revolution and workers uniting.

CA AG: Mr. Harris was out there handing these leaflets out in this setting. And the leaflet – I'm not – certainly wouldn't read the whole thing, but it says, "Wanted for the murder of Leonard Deadwyler, Bova the cop.

John: And some of the language seemed to the authorities to be a bit intemperate.

CA AG: The gist of it was that Watts was a great concentration camp. Bova was a guard and Deadwyler an inmate. And we have to exterminate them before they exterminate us.

...

Justice Fortas: Do you say that that is advocating extermination of the police?

CA AG: Yes, we do.

Justice Fortas: And do you say that he was calling on people to go ahead and immediately to rise and to attack the police?

CA AG: Well, I'm not – that is something for the court – the trial court to determine and the jury to determine I think.

John: Also outside the courthouse were undercover officers conducting surveillance.

Fred Smith: There were photos being taken. And whether or not it was LAPD who took the photos or the FBI, I'm not sure. But there were photos taken, and those the photos eventually make their way into a [congressional report](#). One striking thing about L.A. was the number of government officials at the at the local level who had ties to the federal government who had been in federal intelligence before they ended up being involved in local government.

John: Officials like the mayor of Los Angeles, Mayor Yorty, who was a former federal intelligence official, and who was dismissive of concerns about police brutality.

Fred Smith: He even put together a brochure where he where he suggested that police violence was not a significant problem in Los Angeles, and that these were people who were just rousing up folks in ways that could undermine public safety.

John: Another official with federal intelligence connections was District Attorney Evelle Younger.

Fred Smith: Evelle Younger had worked for the precursor to what became the CIA. His rhetoric was much softer than a lot of the rhetoric that you would have heard during that time. I haven't been able to get my hands on any of his sort of private papers and that sort of thing. I've watched interviews, though, that he's given. And he talks much more mildly than, say, Mayor Yorty, who openly castigated protesters.

John: And certainly much more mildly than the chief of police who, speaking of intemperate language, was prone to using racial slurs and openly lamented the influx of African Americans coming to L.A. from the South. Anyway, notably, John Harris, Jr. was not the only activist outside the courthouse.

Fred Smith: And they didn't just take his picture. They took pictures of other people who were there. There was a white person who was associated with the Communist Party of America, I think they called themselves, who was handing out flyers. He did not get arrested. He did not get indicted. So one puzzle is why John Harris gets singled out when other people who are handing out flyers didn't.

John: Also notably, John Harris was not arrested at the courthouse during the protest. Instead, he was arrested four months later.

Fred Smith: So this is a decision that came from the top – presumably came from Evelle Younger. What we don't know is how much pressure, if any, he was getting from the governor. We don't know how much pressure he was getting from the federal government, either.

John: There are extensive communications between Evelle Younger and the FBI in the FBI's files. And you can ask to see those files.

Fred Smith: But things are so blacked out. They're so redacted that you don't know who's communicating with whom, almost, and what they're saying, right? So there were communications going back and forth between the federal government and Evelle Younger that involved John Harris's name. That I have. But what they said, I don't know. It's also striking to me that they're still redacting the documents. Evelle Younger is dead. So is John Harris. I'm not sure what it is that they exactly would be attempting to protect at this moment. It certainly isn't an ongoing prosecution.

John: So, who was John Harris?

Fred Smith: He was born in Birmingham, and he was born at a time where his childhood would have been marked by great deal of violence.

John: Birmingham, Alabama was by any measure an extraordinarily violent place during Harris' childhood. He would have lived through the regular bombing of black homes when black people moved to the periphery of the city's white neighborhoods. He would have known about church bombings by the Klan – purportedly in cahoots with the police – and of mob and police violence against civil rights activists.

Fred Smith: And so that would have been formative. His mother encouraged him to stay out of trouble.

John: When he graduated from high school, he headed to Washington, D.C. for college at Howard University.

Fred Smith: When he got to Washington, D.C., as a student at Howard, it was there that he got particularly active in issues of racial justice. Like a number of students, he went down to Mississippi as a part of Freedom Summer. And that's where he was assigned to Sunflower County to work on issues of integration and voting rights.

John: In 1964, in Sunflower County, Mississippi, African-Americans made up 70 percent of the population, but they were not permitted to vote. When John Harris arrived, he and his compatriots went door-to-door encouraging black people to register to vote. The day after that,

the church that served as the group's headquarters was firebombed. Shortly after their arrival, they also learned that three other young activists participating in Freedom Summer just a few counties over, had disappeared, and the world would eventually learn they were murdered by Klansmen, including a police officer.

Fred Smith: You get the sense that he had a strong personality. There's one moment where he's protesting peacefully, and police officers come over and tell them to move and he shouts at the police officer, or certainly strongly expresses his view that the police officer was on the wrong side of this racial justice question.

John: Harris' group was handing out leaflets with lyrics to protest songs, and several of them were arrested for unlawful distribution of literature. Harris spoke up and then was arrested as well, and as he was taken away he shouted to the locals quote: "If you register and vote, you won't have to elect stupid public servants like this one!"

Fred Smith: He was arrested, along with other civil rights protesters, multiple times. This is brave to do this work by any metric.

John: The group also traveled around the county attempting to desegregate movie theaters, motels, and restaurants. At a protest outside of a segregated public library, a police officer hit John Harris in the face with a billy club.

Fred Smith: These were young people, college students who went down there and did this work. And then, when you think about their age, it's enough to make you feel a little bad about yourself in terms of the courage that it took to do this.

John: The following year, in 1965, John Harris and his friend and roommate Jim Dann left Mississippi for Los Angeles, which was becoming a center of gravity for the civil rights movement.

Fred Smith: He and his roommate said they want to be working on and near the center of the revolution as they understood it.

John: And in 1966, he was being prosecuted by Evelle Younger for handing out leaflets.

Fred Smith: So prosecutors dusted off a law that hadn't been used since the 1930s, a law that had been used during the first Red Scare, and charged him with three counts of a felony called criminal syndicalism.

John: Charges that could have resulted in decades in prison – and did result in the LAPD ransacking John Harris and Jim Dann's apartment, seizing literature, films, and a mimeograph machine, which, in the era before home printers, was the low-cost way to make pamphlets and flyers. Incidentally, Harris' arrest occurred the day after Barbara Deadwyler filed a civil suit against the city over her husband's death represented by Johnnie Cochran. According to other folks in Harris' orbit, his arrest felt like the police were trying to send a message. For instance, Clay Carson, who is now a professor emeritus at Stanford and the custodian of Martin Luther King, Jr.'s files. In 1966, he was a journalist who knew Harris personally and who was also being followed around by undercover agents.

Fred Smith: What Clay Carson who was on the ground at the time, said, was that it felt like it was kind of to send a message broadly. It was a way of sending a message to protesters, at least that's how it felt. Because if John Harris could get indicted for a felony for this, then what else could you get indicted for criminal syndicalism for?

John: It was the first time in 29 years that California had tried to enforce its criminal syndicalism statute, which made it a crime to advocate for social change by violent means. Harris spent two days in jail before he could make bail, and a state judge ordered a trial to commence in three weeks' time.

Fred Smith: One thing that probably made John Harris's case difficult from a First Amendment perspective is that this criminal syndicalism statute had been upheld in a case called [Whitney versus California](#), where a wealthy progressive woman with communist sympathies in the 1920s was indicted ~~for~~ under this very statute.

John: Under current First Amendment doctrine, doctrine that was developed nearly contemporaneously with the *Younger* case, you cannot be imprisoned for intemperate speech unless you are actively and imminently inciting people to violent action, a line that courts today would say John Harris did not cross. But in 1966, First Amendment doctrine was murkier. And so when John Harris went to federal court and tried to put a stop to his state prosecution, he and his lawyers, from the ACLU and the National Lawyers Guild, were expecting to have a fight about the meaning of the Constitution's protections for speech, and in particular whether that case decided by the Supreme Court 30 years earlier and relied upon heavily by the state, *Anita Whitney v. California*, was still good law.

Fred Smith: She was arrested right after she gave a speech, an anti-lynching speech. And the speech itself, when you read it, it's hard to find anything particularly objectionable about it. In fact, it's very patriotic. Not to say she was arrested just for that speech, but she was arrested right after that speech. Like she steps down from the speech, and she's arrested. And her conviction is upheld by the Court. And so given that, to the extent that he was launching a facial challenge against the law that would have made his claim at least somewhat difficult.

John: Before Harris' criminal trial started, he and several co-plaintiffs filed a civil suit arguing that the criminal syndicalism act was unconstitutional. The other plaintiffs included Jim Dann and also a college history professor, who taught about Marxism and who LAPD officers also followed around taking photos of. And finally a college student who was also a member of the Progressive Labor Party. In federal district court, before a three-judge panel, they won.

Fred Smith: A three-judge panel concludes that that there is sufficient irreparable harm for this case to be able to to the civil case to be able to go forward, and they conclude that this law was unconstitutional.

John: The court said that ordinarily, a federal court should not halt an ongoing state prosecution because of some constitutional defect. That's what appeals are for, and state courts are perfectly capable of handling federal constitutional issues. But in a case called [*Dombrowski v. Pfister*](#), decided by the Supreme Court in 1965, the Court had said there are extraordinary circumstances where federal courts should intervene.

Fred Smith: So Justice Brennan had written a case called *Dombrowski* that had allowed an injunction against prosecutions when it came to some some black civil rights folks and other

civil rights people – Dombrowski himself actually was white – in law in New Orleans. And so the prosecution was able to be enjoined because of the harassment. At least that's how we now understand the case.

John: In *Dombrowski*, the plaintiffs were ministers and lawyers who were leaders of a socialist-leaning civil rights group. Police had searched their homes, automobiles, and offices, hauled off their files, and arrested them for criminal syndicalism and failing to register as members of a subversive organization. After their arrests were quashed, Louisiana officials continued to threaten them with prosecution. Today, the case is understood as laying down a rule that intervention is appropriate when a prosecution is undertaken in bad faith. But when it came down, people, including several members of the Supreme Court thought it might stand for something broader – that anytime someone's speech is chilled they could go to federal court.

Fred Smith: The Court also implied in *Dombrowski* that when it came to prosecutions that had a chilling effect on speech that that constituted irreparable harm, that justified intervention.

John: So in Harris's case, the [district court](#) relied on that to say that *Whitney* was no longer on firm ground. Additionally, *Whitney* had relied on cases about economic regulation, but in the years afterward, the Supreme Court had begun to say that the freedom of speech was entitled to much more stringent constitutional protection than freedom from unreasonable regulation. And under that standard, California's syndicalism law had some problems. It was vague as to what exactly it prohibited. Not only could it be read to prohibit teaching about Marxism, the court said, but also it might prohibit teaching about the Revolutionary War. The Founders, after all, had certainly advocated social change by violent means.

Fred Smith: If the case had ended there, then the prosecution would have ended. All that said, one consequence of a three-judge panel is that both then and today, there is mandatory appellate jurisdiction before the Supreme Court. So it's not a space for the Supreme Court had or has discretion about whether to hear it. So this case ends up in front of in front of the Court.

John: From there, the case went straight to the Supreme Court, which had to hear it. Indeed, ever since *Dombrowski*, the court had been inundated with cases presenting more or less the same issue.

Fred Smith: After *Dombrowski*, there were a lot of these petitions. There were a lot of petitions before the Supreme Court from people who had been arrested in First Amendment settings. The Court called all of these cases, including *Younger*, they called all these cases the *Dombrowski* cases. And they were trying to figure out what the right rule should be for the *Dombrowski* cases. And at least some of the justices thought that a rule that anytime there was a chilling effect, that there could be an intervention in a criminal prosecution. Some of them thought that that was too broad. But exactly what the rule should look like that was that was something that was very much up for grabs at the time that *Younger* was argued.

John: The case was argued three times, as we said, in part because two justices left the Court and two new justices were appointed between 1969 and 1970 and in the interim there was not enough agreement to get to a 5-justice majority opinion. By the third argument, the state was pretty tired of waiting to prosecute Harris.

CA AG: We have been without the statute for all practical purposes for three years. ...

Now we think if the –

Justice Stewart: Well, have you missed it very much?

CA AG: Well, I think Justice Stewart if you read the California papers and follow the almost daily bombings and police assassinations and other things we're familiar –

Justice Stewart: There are many other statutes that cover that sort of conduct I presume in California.

John: Unfortunately, at oral argument, neither of the parties nor the Court were particularly attuned to the deep history of criminal abstention that we started this episode with.

A.L. Wirin: Now for the purposes of my argument, I'm going to assume that it is the law, ... that there should be abstention only in unusual cases.

John: That is legendary civil rights advocate A.L. Wirin, whose initials, by the way, stood for Abraham Lincoln, and who argued the case all three times on behalf of John Harris. And he argued that the case presented an unusual circumstance in which intervention was appropriate.

A.L. Wirin: Now, I suggest that the following circumstances in this case are the special circumstances which warranted the district court in not abstaining.

John: Mostly on the basis of the notorious history of the criminal syndicalism statute being used to punish dissent.

A.L. Wirin: [T]he statute is sweeping on its face. It is an old statute, it has been on the statute books of California over 50 years. ... a statute which in actual enforcement has been cruel with respect to which California and the entire nation ought to be thoroughly

ashamed because it was used solely for the solely for the purpose of suppressing opinion.

John: But the Supreme Court, by a vote of 8 to 1, said no. Sort of. It held that Harris' co-plaintiffs did not have standing to challenge the law because they had not been arrested, or threatened with prosecution, or otherwise molested by the authorities. Which is a little hard understand, at least in the case of Harris' roommate, who also had his apartment searched and his stuff seized. Fortunately, that is no longer the law of standing. Today, someone who wants to challenge a law no longer has to wait until they are arrested before they can go to court. Anyway, as to John Harris himself, the Supreme Court said his criminal trial could go forward back in state court.

Fred Smith: The holding of *Younger* is probably not that objectionable. It's that federal courts should not intervene to stop an ongoing or pending criminal prosecution unless there are exceptional circumstances, including great and immediate harm.

John: The Court reiterated what had already been the law – that there are unusual circumstances that would indeed warrant federal court intervention. But in the main, and in John Harris' case, courts should abstain.

Fred Smith: The Court concludes that a prosecution in and of itself, a criminal prosecution in and of itself, is not enough to constitute great and immediate irreparable harm. So that's the holding.

John: Even though holding was unremarkable and largely consistent with tradition, the decision was the beginning of the doctrine being severed from the historic roots of criminal abstention. Which we will explore in just a second. But first, we should digress over a couple points. For one, while Harris' case was being argued and reargued, the Supreme Court did, in a different case, overrule *Whitney* and address the First Amendment arguments that Harris tried to raise. In the case of [Brandenburg versus Ohio](#), the Court struck down Ohio's criminal syndicalism law and gave us the standard that we are operating under today, which is that speech that does not actively incite imminent violent, lawless action is protected. That case also involved intemperate speech, not by a civil rights activist but by a leader of the Ku Klux Klan. Here's his lawyer, who was also from the ACLU, at oral argument at the Supreme Court.

ACLU lawyer: These are the facts in this case. ... A movie was taken in which a cross was burned, ... and then a single figure was panned in on, and he made a speech, a speech full of ... hyperbola, self-evidently stupid and silly.

John: When John Harris' criminal case returned to California court, a [state appeals court](#) held that under *Brandenburg*, Harris' speech was protected and ordered that his indictment be dismissed. And separately, one other point of interest is that, just a few weeks before that, a jury finally heard Barbara Deadwyler's case against the City of Los Angeles for the wrongful death of her husband.

Barbara Deadwyler: After the gun went off, I asked him why did he shoot my husband. He didn't say anything. He just turned around and was putting his gun in his holster.

John: The jury ruled in favor of the city. And so that is the end of our story about the Deadwylers and about John Harris, himself, who went on with his life, continuing to work as an activist but eventually, according to [his obituary](#), moving on to a career in the field of mental health. He died in Birmingham, Alabama in 2012. Now, back to the *Younger* decision.

Fred Smith: So there's *Younger* the holding, which is probably not deeply inconsistent with other rulings from throughout the 20th century and the late 19th century. And then there's *Younger* the rhetoric, which is new. That's much fluffier. And so it famously it speaks to Our Federalism. Capital "O." Capital "F."

John: A nod, of course, to Felix Frankfurter, who by then had left the Court. In addition to the decision's holding, it also included language that you will remember from our episode on *Pullman* abstention about federal courts respecting state institutions.

Fred Smith: Broad, sweeping language about harmony between federal and state relations. And that rhetoric has had its own legs.

John: The Court reiterated that longstanding policy counseled against federal interference in state proceedings, but it also said that there was a quote "even more vital" reason to abstain.

Younger: 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, ... 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 ... is referred to by many

as 'Our Federalism,' ... It should never be forgotten that this slogan, "Our Federalism," ... occupies a highly important place in our Nation's history and its future."

John: It is that rhetoric that is the legacy of *Younger*. It is that rhetoric that courts cite as they have expanded *Younger* far beyond its holding. And as Professor Smith and his co-author Peter O'Neill point out in their article, it is more than a little ironic that the Court waxed eloquent about federal courts respecting state operations in John Harris' case of all cases – where the FBI was intimately involved and possibly even pulling the strings.

Sam Gedge: Soon after the Supreme Court introduced so called *Younger* abstention in 1971, a majority of the Court started kind of relentlessly expanding it.

John: And armed with that lofty language about federalism, courts began to abstain in all manner of cases, including cases that had nothing to do with ongoing criminal proceedings.

Sam Gedge: The criminal dynamic was really important to the *Younger* Court's reasoning. But within a couple of years, the Supreme Court started expanding that logic to abstain, or to require the federal courts to abstain, not just from lawsuits that would interfere with state court criminal prosecutions, but to an ever expanding set of other kinds of state enforcement actions.

John: Starting the case of [*Huffman v. Pursue*](#) in 1975. There, a prosecutor in Lima, Ohio filed a civil enforcement action – which is emphatically not a criminal case – to close down a theater that was showing naughty movies.

Justice Rehnquist: On this appeal we don't reach the merits of the First Amendment issues because we have concluded that the district court should not have asserted jurisdiction over this case absent a showing of the extraordinary circumstances recognized in *Younger against Harris*.

John: That was Justice Rehnquist announcing the opinion.

Justice Rehnquist: We conclude that the notions of comity and federalism which underlie *Younger* are applicable when a federal court is asked to interfere with a state civil proceeding.

John: And if you will permit a small and entirely juvenile aside, fidelity to the historical record demands that we play a clip from oral argument from *Huffman v. Pursue*. Full disclosure, for those listeners with children nearby, maybe it's best to skip ahead a few seconds. Anyway, here's the lawyer for the government explaining to the Court what would happen if he were to lose.

Lawyer for Ohio: It is a principle of the common law that the king cannot sanction a nuisance. ... And it seems to me that if this condition is to prevail, then it must be concluded the federal system of justice is underwriting, to put it crudely and bluntly, cock sucking and whore mongering. Which to me is completely in violation of my thinking of an American way of life and American justice. Now, that's the first time I've ever used those words in my entire life and yet I think it's appropriate that I use it now so that this Court understand what is occurring in the federal court system. ...

Justice Stewart: Mr. Clancy ... I don't think I heard you mention the case of *Younger against Harris*. Do you think that's ...

Lawyer for Ohio: No, your honor. I think it should be decided on the res exception ...

Justice Stewart: So you don't think *Younger against Harris* has any relevance here?

John: That's right, though the state was indeed asking for the case to be sent back to state court, it was was not asking for *Younger* abstention. That's just something the Supreme Court decided to do on its own.

Sam Gedge: The *Younger* doctrine, and indeed all abstention doctrines, are different from a doctrines like *Rooker-Feldman* in that abstention doctrines are generally not considered jurisdictional. Which means that courts, including the Supreme Court, really shouldn't be relying on *Younger* unless the government affirmatively brings up on its own. And if the government doesn't bring it up, the *Younger* issue should be waived or at least forfeited.

John: In any case.

Sam Gedge: In 1982, only 11 years now after *Younger*, the Supreme Court expands it again further and says, well, bar disciplinary proceedings. That's close enough to a criminal prosecution that we're not going to let the respondents in those kinds of disciplinary proceedings go to federal court to try to vindicate whatever they say are the federal rights at stake.

John: In the case of [*Middlesex County Ethics Committee v. Garden State Bar Association*](#), a lawyer who was representing a woman being held in isolation filed a civil suit challenging the conditions of her confinement. And for you fellow 90s kids, it may interest you to know that she was the step aunt and godmother of Tupac Shakur. She was about to go on trial for the murder

of a policeman, and while the jury was being selected, the lawyer, who was not a part of the criminal defense team, gave a press conference where he said that the murder case was a quote “legalized lynching” before a quote “kangaroo court.” The New Jersey bar did not much like those comments and it opened a disciplinary proceeding accusing him of making statements “prejudicial to the administration of justice.” Rather than defend himself in that disciplinary process, he filed a federal lawsuit.

Sam Gedge: And a [lower court](#) said his lawsuit could proceed in federal court because he was not going to have a meaningful chance to raise his First Amendment claims before the ethics committee itself. That’s just not a forum where you can raise constitutional issues. And the court, like the lower court in *Younger*, went ahead and decided his constitutional issue and found that the bar’s restrictions on speech actually did violate the First Amendment.

John: But the Supreme Court reversed. It cited *Younger*’s flowery rhetoric about respect for state interests and it said attorney regulation is an important state function that federal courts are bound to respect.

Sam Gedge: For 20 or 30 years after the *Middlesex* decision came down, you saw lower courts reading *Middlesex* to mean that *Younger* abstention applies whenever there’s some kind of state action that implicates important state interests. And if you squint and you’re a federal judge, what kind of state action can’t be said to implicate important state interests?

John: After *Middlesex*, the doctrine expanded further.

Sam Gedge: So now it's not just criminal prosecutions, of course, now it's quasi criminal civil enforcement proceedings. It's not just enforcement proceedings in state courts in front of state court judges, but it's enforcement proceedings in front of state or even local administrative agencies. You see cases where, in fact, the federal lawsuit starts first, but soon after state enforcers bringing some kind of enforcement action against the federal plaintiff. And the Supreme Court says, well, yes, the state enforcers lost the race to the courthouse, but they were pretty close second place, which means they win.

John: And sometimes that means that would-be civil rights plaintiffs are stuck in forums where their constitutional claims cannot be heard.

Sam Gedge: In many states, the agency adjudicators not only may not have the expertise to entertain federal constitutional challenges, they don't actually have the authority to. You can present a federal constitutional challenge to a state ALJ and they're going to say, I don't have the statutory power to even hear this. So you're going to have to litigate your way all the way through that multi-year potentially agency enforcement process, just to get to a state trial judge who will have the jurisdiction to even let you talk about the federal constitutional issues that you wanted to get relief from the federal courts for five years before. So you're stuck spending money facing intrusive discovery, litigating for years before you even get in front of a judge in the state court system who can even hear what you think are persuasive federal constitutional defenses, reasons why you shouldn't be subjected to this in the first place.

John: And I'm sorry to say that on occasion we do detect an attitude among some federal judges that there is something untoward about running to federal court before that state process plays out.

Sam Gedge: It seems like the unspoken part of those questions is a criticism of the federal plaintiffs for not trusting state court judges to adjudicate federal rights. And I don't really think that's what's going on in most of these cases. I think what's going on is a recognition on behalf of the federal plaintiffs that trying to raise complicated federal constitutional issues defensively presents a lot of challenges and hurdles that aren't presented if you seek to vindicate your rights offensively in federal court.

John: There are real practical differences between litigating constitutional issues as a defendant or respondent in a criminal or quasi-criminal proceeding – on the back foot, so to speak – versus raising your arguments in an offensive, forward-looking civil lawsuit as a plaintiff.

Sam Gedge: The federal civil apparatus is very well suited to litigating and developing the record on complicated federal constitutional challenges. The courts are used to hearing these cases. You have all the tools of discovery, classic discovery about the state interests involved, and the tailoring. Because criminal prosecutions aren't designed to test the validity of statutes against the Constitution in that way, in a way that we do all the time at IJ in forward looking civil enforcement actions. So I think there are just a lot of reasons why folks might want to get an answer quickly in a forum that's used to handling these issues, rather than spending years and years under the threat of liability, under the threat of punishment, oftentimes in front of a decision maker who can't even hear their constitutional claims.

John: Anyway, in an interesting parallel to the *Rooker-Feldman*, the high tide for *Younger* abstention, at least at the Supreme Court, was in the 1980s.

Sam Gedge: The Supreme Court really loses interest in *Younger* abstention as soon as their mandatory docket is shrunk in 1988. But the lower courts, of course, do not have discretionary jurisdiction, and they're operating now with almost 20 years worth of Supreme Court precedent saying *Younger* abstention all the time. So from the late 1980s through 2013 or so, you see the the district courts and the circuit courts kind of building on the Supreme Court's *Younger* doctrine, making it increasingly baroque, expanding it more and more. Any time there's a nexus to some kind of state proceeding, odds are that the federal courts are going to abstain.

John: And then in 2013, again in parallel with *Rooker-Feldman*, the Supreme Court again told lower courts to tone it down.

Justice Ginsburg: In the main, federal courts are obliged to decide cases over which they have jurisdiction.

Sam Gedge: Now, in 2013 in *Sprint Communications*, the Supreme Court gets involved in *Younger* abstention for the first time in this millennium. And they do it to say, okay, pump the brakes lower courts. *Younger* abstention is indeed the exception and not the rule.

John: In *Sprint*, a federal appeals court had abstained in a civil case between two private parties, phone companies who were in dispute over the proper charge for long-distance calls before an Iowa administrative agency.

Justice Ginsburg: The Court has extended the *Younger* doctrine to certain civil proceedings, but circumstances fitting within the doctrine remain exceptional.

John: The Supreme Court, in a unanimous opinion, said that courts should not be abstaining anytime they can identify a quote “plausibly important state interest.” The Court did not overturn *Middlesex*, but it said that *Younger* only applies to ongoing state criminal prosecutions as well as certain, narrow categories of civil proceedings.

Sam Gedge: Which is great. That certainly does mark the boundaries with relative clarity for folks now who are trying to think through, okay, if we're looking at Supreme Court precedent what are our options when we're facing either some kind of state investigation or state enforcement action or the threat of one? The danger, though, is that still at the circuit court level, you see various regional circuits that are stuck in the 80s, stuck in the 70s, and they're viewing abstention as this kind of freewheeling doctrine that lets them just boot federal cases when it has the vibe of interfering with some kind of active or pending state court litigation.

John: At IJ, we spend a lot of time thinking about *Younger*.

Sam Gedge: *Younger* abstention unquestionably does play a big role when it comes to thinking about how we tee up our cases. There are endless procedural hurdles that make it hard to get to the merits in civil rights litigation, and *Younger* abstention is one of them. So this impacts a bunch of different ways that we can think about our cases. If we're, for example, talking to a potential client who is actively in an administrative enforcement proceeding, we're gonna have to think about, okay, can we bring a federal court constitutional challenge on this person's behalf now, or do we have to wait until that administrative proceeding has ended. If it ends in a certain way, will that nonetheless create *Younger* abstention problems if we were to file a federal lawsuit afterwards? It's very much a maze, in a way that some people might say is inconsistent with

what Chief Justice Marshall said back at the Founding, which is that the federal courts have a duty to hear cases within their jurisdiction. What the *Younger* abstention doctrine says is that notwithstanding this congressional grant of jurisdiction to the federal courts, we the federal courts are going to take it upon ourselves to say that we're not going to hear that case after all.

Fred Smith: *Younger* is a highly consequential doctrine, and it is expanding. So again, there's *Younger* the holding, which is not, in my opinion, the biggest deal. I don't think that *Younger* the holding is a dramatic expansion of prior Supreme Court law. It may not be an expansion at all. But that rhetoric has led lower courts to sometimes say things like if you can go to a state civil proceeding, if you can file this in state court, instead of filing this in federal court, then you need to go to state court.

John: The thrust of *Younger* abstention runs in stark contrast, not only to Chief Justice Marshall's warning that courts should exercise the jurisdiction that they've been given but also equally important Supreme Court precedent that says there is no such thing as an exhaustion requirement that forces would-be civil rights plaintiffs to exhaust their remedies in state court before they go to federal court. That would undermine the purpose of the 14th Amendment, and in particular Section 1983, which Congress passed to give jurisdiction to federal courts to hear federal constitutional claims. Nevertheless, today, in some instances, federal appeals courts have introduced exhaustion requirements.

Fred Smith: So the Eighth Circuit has suggested that in a case called *Oglala*, and the Fifth Circuit has said that in a case called *Daves versus Dallas County*.

John: We'll talk briefly about each of those cases. In the case of [*Oglala Sioux v. Fleming*](#), Indian tribes and tribal members challenged child-welfare proceedings in South Dakota. Here is a lawyer from the ACLU, representing the plaintiffs.

Plaintiff's lawyer: This lawsuit was filed in 2013, and we examined four years worth of child custody cases. ... During those four years the defendants removed 823 Indian children from their homes. They then convened a hearing for the parents – these 48-hour hearings – to determine whether the court would grant the state's petition to keep those children in custody or return them to their parents. The state won 100 percent of those hearings. It would have been a miracle for a parent to have prevailed because all of those parents were denied rudimentary due process.

John: On the basis of those hearings, South Dakota was taking hundreds of kids from their homes and placing them in state custody for 60 days without following basic procedures – mandated by previous cases and by federal legislation – for protecting against erroneously seizing children.

Plaintiff's lawyer: They were not allowed to see the petition accusing them of abuse and neglect. They were not allowed to see the ICWA affidavit that contained the factual allegations against them. They were not allowed to present evidence. They were not allowed to confront the caseworker who signed the affidavit, and finally, the judge then made a decision based upon that ex parte evidence. ... No wonder the district court issued the remedies it did.

John: And the district court said that was obviously unconstitutional. But on appeal, the Eighth Circuit reversed. Protecting parents and children from unfounded separations is important, the court said, but not as important as respecting state judicial processes. At oral argument, the court did not ask a single question to plaintiffs' attorney about *Younger*, and it only came up once, fleetingly, with a lawyer representing the government.

CA8 Judge: Should we get to the should we get to the merits of questions like that, or should this case go on jurisdictional questions like *Rooker-Feldman* and ~~Other~~ *Younger* abstention principles?

State's lawyer: We would prefer, Your Honor, that it be dealt with on the substantive reasons. Both *Rooker* and *Younger* could probably be cured if you found the right the right plaintiff.

John: Nevertheless, the Eighth Circuit concluded that because the plaintiffs *could* have filed a lawsuit in state court raising their federal constitutional claims, they *had to* file in state court. Which is something that the Fifth Circuit has also held in recent years. And I'm sorry that they have done so on an issue that longtime listeners will remember from way back on Season 1.

Chief Justice Hecht: Twenty-five years ago, a third of the jail population was awaiting trial. Now the percentage is three-fourths. Most of those detained are non-violent, unlikely to reoffend, and posing no risk of flight. Many are held because they're too poor to make bail. Though presumed innocent and no risk to public safety, they remain in jail, losing jobs and families, and emerge more likely to re-offend.

John: That was the then-Chief Justice of Texas Supreme Court. Back on Season 1, we discussed a challenge to Harris County, Texas' system of money bail and pretrial detention. Pretrial detention is, of course, valid in cases where someone poses a danger to the public or is a flight risk. But in the case of [*ODonnell v. Harris County*](#), in 2018, the Fifth Circuit said that the Constitution requires that courts actually make that finding; we don't just lock up presumptively innocent people for days or weeks or months without giving them some kind of meaningful process. But since we released that episode, a follow-up case made it to the Fifth Circuit concerning pretrial detention in Dallas County, where just as in Harris County, if you were arrested and you couldn't afford bail and wanted to plead not guilty, you were going to be stuck in jail for a while.

Alec Karakatsanis: There is absolutely no opportunity for anyone who's being detained and deprived of their liberty ... You are told you cannot speak in court. ... Misdemeanor defendants were held incommunicado – we're not even given a lawyer, not even brought to a first court appearance for four to 10 days.

John: And the district court ruled that that was unconstitutional. But on appeal before the full en banc court at the Fifth Circuit, some of the judges wanted to know if they could even reach the constitutional issues:

Judge Jones: The Court did ask the parties to address *Younger v. Harris*. ... What's your position?

Judge Elrod: Can you tell me what page of your en banc brief addresses *Younger*?

John: Dallas County did not raise *Younger* in its brief to the en banc court, and in its earlier, initial brief, the county discussed it only in a footnote. So, you would think that arguments based on *Younger* had been waived or forfeited. But the judges brought it up on their own.

Judge Elrod: There seems to be a lot of dispute about whether or not a federal court can go in and get involved in the state system. ... Why cannot all of this be done in the state court?

Alec Karakatsanis: We could very well file a lawsuit like that in Texas state court, and indeed we might have to if this court dismisses this case on these grounds. But I submit to you that Supreme Court's statement that federal courts have an unflagging obligation to hear these civil rights cases applies, and it is particularly important where the district court has found there is no adequate opportunity to remedy the harm that you suffer prior to suffering.

John: And ultimately the [Fifth Circuit](#) overturned its precedent that we discussed on Season 1 and, like the Eighth Circuit, said that the case belonged in state court. And to come to that conclusion it cited at length *Younger's* rhetoric about respecting state institutions. But in addition to relying on *Younger*, it also expanded it.

Fred Smith: The Supreme Court, in the years after *Younger*, made it clear that if there was no timely opportunity in that state proceeding to challenge great and irreparable harm, then you go to federal court. But it's as if that didn't happen. Because the Fifth Circuit in ends up saying that there is no timeliness exception to *Younger*.

John: *Younger*, and cases following *Younger*, and the cases we cited at the beginning of the episode pre-dating *Younger*, all say that abstention is inappropriate when you don't have an opportunity to raise your federal constitutional issue in the state court proceeding in a timely fashion. If a city or county's policies mean you're stuck in jail for days or weeks or months before you can seek review of your pretrial detention, you will have already suffered the great, irreparable, and immediate harm you are seeking to challenge. The Fifth Circuit's opinion washes that away. And I'm sorry to say that the Supreme Court did not grant review in either that case or in *Oglala Sioux*.

Fred Smith: I would like the Supreme Court to say, we meant what we said in *Younger*. They would say what they said in *Sprint* again, right? And they would just say we meant what we said it only applies in three categories.

John: Criminal prosecution, and the two kinds of quasi-criminal civil proceedings.

Fred Smith: And that's all, and that's it, and that's the list. Nothing else. If you're doing something like, Hey, there's this case called *Middlesex* for all these factors to figure out what's important, you're on the wrong track. How do we know? The Court said it in *Sprint*. Making clear that great and irreparable harm, that that's the boundary of this doctrine, and that federal courts should intervene. And then we can ask questions like, is spending a month in jail before you see a judge and have any kind of hearing or inquiry into your ability to pay, is that great and immediate irreparable harm?

John: It would be great if the Court would reaffirm that *Younger* only applies to a narrow subset of cases and even then courts should intervene to prevent great, immediate, and irreparable

harm. And it would be great if the Court were to rediscover its older criminal abstention cases from the 1800s rather than just relying on *Younger* and cases from the 1970s.

Fred Smith: And so just emphasizing that *Younger* isn't about its vibes. *Younger* is about what it said. And when you limit *Younger* to what it said, it rests on a long, deep tradition in equity. And when you start doing this other thing then you are on the wrong track. That doesn't have the same long and deep, equitable tradition, and it can be used in ways that allow great and irreparable harm to flourish.

John: And that my friends, concludes the episode. But before we go, I must in good conscience share an update with you regarding the *Rooker-Feldman* doctrine, which was of course the subject of episode one of this season. A few months ago, the Supreme Court considered whether to pare back or even eliminate the doctrine.

Lisa Blatt: No, you're not going overrule *Rooker*. I don't think you're going to do that. I mean, sorry, I don't think you're going to do that.

John: And it pains me to report that the lawyer for Team Pro-*Rooker-Feldman* was correct. The Court did not overrule the doctrine. And it didn't really pare it back either.

Ben Field: The ultimate result was a five-to-four decision with a somewhat unusual lineup. So we've got a majority by Justice Sotomayor with Thomas, Alito, Kavanaugh, and Jackson, a dissent by Barrett with Chief Justice Roberts and Justices Kagan and Gorsuch, and the majority says, we're leaving *Rooker-Feldman* as we found it. We're not expanding it.

John: That is Ben Field, IJ's resident *Rooker-Feldman* expert, who you will remember from episode 1.

Ben: The majority opinion, I think, just has this pragmatic sense that it doesn't really make a lot of sense to draw this distinction between cases where appeals are still ongoing versus ones where they're not. So they come up with sort of federalism-y and pragmatic reasons to say we're going to put this in the *Rooker-Feldman* bucket. But that's not expanding the *Rooker Feldman* doctrine.

John: As you will recall, *Rooker-Feldman* prevents filing a new lawsuit in a federal trial court if you have already lost a prior lawsuit in a state supreme court. If you lose in state supreme court, you have to appeal directly to the U.S. Supreme Court. The petitioner in the *T.M.* case had not lost in state supreme court; she still had appeals ongoing in state court. Nevertheless, the Supreme Court said, sorry, federal district courts still don't have jurisdiction.

Ben Field: Again, they have this pragmatic sense like, okay, if we're going to have the *Rooker-Feldman* doctrine it doesn't make sense for it not to apply just because appeals are ongoing. But they go out of their way to saying they're not expanding it, that it's narrow, that they're leaving it where they found it.

John: But along the way they had to invent a new justification for the doctrine's existence.

Ben Field: The thing that they have to deal with is that the *Rooker-Feldman* doctrine has always been based on 28 USC 1257, which is the statute that allows the Supreme Court to review state high court decisions, and it does require finality.

John: The statute says a final state high court decision is what gives jurisdiction. But since *T.M.* didn't have a final decision, the Supreme Court had to work it's way around that.

Ben Field: So the majority had to sort of retcon a new justification for the *Rooker-Feldman* doctrine. And so they say, well, actually, *Rooker-Feldman* has always really been about this distinction between original jurisdiction and appellate jurisdiction: If a case is acting kind of like an appeal, that they're going to treat it as being appellate and therefore not falling within the original jurisdiction of the district courts. And that's how they're able to sort of get around the problem of 1257's text.

John: Which is all to say that, on the one hand, the Court says it did not expand *Rooker-Feldman*. But on the other hand, they came up with a brand new justification for the doctrine and that is only going to cause more mischief. In the end, the outcome is a bit dispiriting for civil rights. In IJ's cases, we are never going to have appeals ongoing in state court when we file a federal lawsuit, so hopefully it won't affect us any more than the doctrine already does. But you never know. If there's any silver lining, it is that our episode on the doctrine and our history of Mr. Rooker and Prof. Feldman will remain relevant for the foreseeable future.

Conclusion

John: And so, that will conclude our season on abstention and related doctrines. There is such a thing as *Thibodeaux* abstention and *Colorado River* abstention. There is the *Heck* bar and all sorts of other doctrines that do similar work as the doctrines we've discussed this season. And if you really want episodes on those, well, anything is possible. But for now, we think you get the

idea. When we return next season, we will return to more traditional fare. We will return to the merits and to the meaning of the Constitution – specifically of the First Amendment. Thanks for joining us.

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