"OUR FEDERALISM" REEXAMINED: FEDERAL JURISDICTION VIEWED THROUGH THE LENS OF AMERICAN POLITICAL HISTORY*

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The Supreme Court's doctrine of "Our Federalism" is extremely puzzling. In Younger v. Harris*, the Court held that, with rare exceptions, federal courts must abstain from enjoining an ongoing state criminal prosecution to enforce Section 1983 civil rights claims because state courts are presumed to provide an adequate forum for protecting constitutional rights. But just a year later, in* Mitchum v. Foster*, the Court ruled that Congress gave federal courts the express authority to hear such cases because Congress believed that state courts did not adequately protect constitutional rights. The Court has never explained this clear contradiction. This Article argues that* Younger*'s assumption of state and federal court parity stems from the false "Reconciliationist" narrative of the post-Reconstruction era as opposed to a faithful interpretation of Congress's intent when passing the Civil Rights Act of 1871—the original form of Section 1983. By adopting this false history, the* Younger *Court violated the core principles of separation of powers by openly contradicting the reasons Congress created federal civil rights jurisdiction, thus usurping the legislative authority over federal jurisdiction. This Article offers a fresh interdisciplinary perspective, exploring the link between federal court jurisdiction and American political history and thought, to better understand the problems of "Our Federalism."*

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INTRODUCTION

The Supreme Court's jurisdictional doctrine known as "Our Federalism" is plagued by logical and historical contradictions. In its pathbreaking decision in *Younger v. Harris*,[1] the Supreme Court held that, with rare and often puzzling exceptions, federal courts may not enjoin ongoing state court criminal proceedings under the foundational federal civil rights statute, 42 U.S.C. § 1983.[2] Justice Black, writing for the majority, stated that principles dating back to the nation's founding—equity, comity, and federalism, grouped under the heading, "Our Federalism"—require federal courts to assume that state courts will protect federal rights just as effectively as they would.[3] Therefore, a

1. 401 U.S. 37 (1971).
2. *Id.* at 53; *see* discussion *infra* Section I.A.
3. *Younger*, 401 U.S. at 43–44.

federal court must assume that the defendant's ability to raise the constitutional defense in state court will provide an adequate remedy at law.

Only one year later, however, the Court held in *Mitchum v. Foster*[4] that Section 1983 constitutes an expressly authorized exception to the Anti-Injunction Act's[5] prohibition of federal injunctions against state judicial proceedings, because the predecessor to Section 1983, the Civil Rights Act of 1871,[6] reflected Congress's complete mistrust of state courts' willingness and ability to enforce federally protected rights.[7] The *Mitchum* Court reached this conclusion on the basis of a detailed examination of the congressional debates recorded in the *Congressional Globe*.[8] Yet in the years following *Mitchum*, the Court continued to rely on the *Younger* Court's unsupported assumption of state and federal court fungibility as enforcers of federal rights, often in civil as well as criminal cases.[9] Indeed, the Court has emphasized the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'"[10]

When compared with the Court's approach in *Mitchum*, the reasoning in both *Younger* and the post-*Mitchum* decisions is incoherent. The Court's decision in *Younger* is predicated on the presumption that state and federal courts are equal adjudicators of federal rights—the principle of judicial parity.[11] Under this reasoning, federal courts must assume that state courts offer an adequate remedy at law—equal to what the federal courts would provide—as a forum for protecting federal rights. Yet, at no point do any of these decisions even attempt to provide evidence for this assumption. More importantly, the Court has never attempted to explain how it can simply assume state-federal court fungibility in light of Congress's unambiguous rejection of such an assumption in the enactment of the Civil Rights Act of 1871.

It is, of course, at least conceivable that by 1971 the situation had changed; perhaps the state courts, which had been so categorically mistrusted by the

4. 407 U.S. 225, 242–43 (1972).

5. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (modern version codified at 28 U.S.C. § 2283).

6. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

7. *See* discussion *infra* Section I.B.

8. *Mitchum*, 407 U.S. at 240–42.

9. *See, e.g.*, Pennzoil v. Texaco, Inc., 481 U.S. 1, 2 (1987); Moore v. Sims, 442 U.S. 415, 416–17 (1979).

10. Steffel v. Thompson, 415 U.S. 452, 460–61 (1974) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

11. *See* Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2085–90 (2022) [hereinafter Funk, *Equity's Federalism*]; Aviam Soifer & H.C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1147–48 (1977); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 86–87 (1984); Fred O. Smith Jr., *Abstaining Equitably*, 97 NOTRE DAME L. REV. 2095, 2096–97 (2022).

Congress of 1871, were, 100 years later, now equal to their federal counterparts. But this assumption is plagued by problems. First, at the very least, the Court logically should have acknowledged the inconsistency and then attempted to distinguish the situations. Yet it made no such attempt. Second, the desperate attempts of civil rights activists to avoid the state courts in the South in the mid-1960s should at least have given pause to anyone who would cavalierly assume that state courts were any better protectors of federal rights than they had been in 1871.[12] Surely, the *Younger* Court could not blithely assume parity without acknowledging and responding to the counterevidence relied on in *Mitchum*. Finally, and most importantly, Congress itself, the very body which enacted Section 1983 and its legislative predecessor, had never altered the directive of the Civil Rights Act of 1871 or in any way indicated a rejection of its original purposive foundation. How could the unelected, unrepresentative Court so easily ignore that congressional directive without making a finding of unconstitutionality?

Though much has been written about the theory of judicial parity over the years, none of these writings has sought to explain the stark logical and historical inconsistency lying at the base of the doctrine of Our Federalism. But by viewing this federal jurisdiction doctrine through the lenses of both American political history and political theory, we have found the explanation for this doctrinal inconsistency.

A careful examination of American political history reveals that for approximately the first 100 years of the nation's existence, Congress expanded federal jurisdiction to rectify state court inadequacy.[13] Through sweeping jurisdictional statutes, such as diversity of citizenship, federal officer removal, and civil rights jurisdiction, Congress either anticipated or responded to examples of state courts' unwillingness to protect both federal rights and interests.[14] Those statutes on their face, as well as the political history surrounding them, demonstrated widespread congressional concern that state courts would seek to undermine federal interests, and far-reaching congressional efforts to employ jurisdictional legislation to prevent such a result.[15] At the same time, Supreme Court decisions, either overtly or implicitly, reflected a similar concern.[16] It was this concern, exacerbated by southern hostility to Reconstruction, that led Congress to enact the Civil Rights Act of 1871.[17]

12. *See* Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 147 (2015).

13. *See* Richard Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. 1083, 1089 (2021).

14. *See* discussion *infra* Part II.

15. *See* discussion *infra* Section I.A.

16. *See* discussion *infra* Section I.B.

17. Funk, *Equity's Federalism*, *supra* note 11, at 2075–76; *see* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 403–05 (1982).

Though in the nation's early years the federal mistrust of and hostility towards state courts was not sectionally confined, the post-Civil War era effectively tied federal hostility towards state courts to the Southern states. Prior to the Civil War, the South relied on a theory of states' rights to preserve the immoral institution of slavery. After the war ended, Southern politicians and judges interfered with federal policies and rights on the grounds of protecting traditional state sovereignty.[18] Thus, national hostility to state courts in general and hostility towards the South tended to merge in the post-Civil War period known as Reconstruction.

This skepticism, however, would not last. Shortly after the end of Reconstruction, historians, sympathetic to the South, undertook an attempt to "whitewash" the South's severely tarnished reputation.[19] Instead of acknowledging the South's immoral link to one of the world's most heinous practices, Southern historians began an effort—one which proved remarkably successful—to restyle the Southern states' secession not as an effort to preserve slavery, but rather as a noble effort to preserve a "gentlemanly" and noble way of life.[20]

All of this, of course, was pure historical fantasy. The South built its economic and social structure on a foundationally immoral premise: the concept of race-based slavery. It is difficult to imagine a more offensive form of immorality. To suggest that the South sought to secede for any reason other than the preservation of slavery is simply incorrect.[21]

That simple fact did not deter post-Reconstruction Southern-sympathizing historians, however. They developed what came to be known in recent years as "the Myth of the Lost Cause."[22] The North, wearied by Reconstruction, eventually accepted the myth's premises. Rather than viewing the South as willing to disrupt the entire nation and effectively cause the death of thousands of young men for little more reason than to protect an inherently evil institution, the North ultimately acquiesced.[23] Thus, from approximately

18. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2116–17 (2019).

19. Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1587–88 (2012) [hereinafter Foner, *The Supreme Court and Reconstruction*].

20. For further discussion, see W. STUART TOWNS, *Creating the Myths of Reconstruction, Redemption, Reconciliation, and the New and Future South: The Rest of the Story*, *in* ENDURING LEGACY 96–115 (2012).

21. For a detailed examination of the South's motivations for secession, see ROBERT W. MERRY, DECADE OF DISUNION: HOW MASSACHUSETTS AND SOUTH CAROLINA LED THE WAY TO CIVIL WAR, 1849–61 (2024).

22. *See, e.g.*, THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 33–34 (Gary W. Gallagher & Alan T. Nolan eds., 2000) (collecting essays on the creation and impact of the Lost Cause).

23. *See generally* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001) (detailing the relationship between the North and South post-Civil War and the compromises involved in reconciliation).

1880 until at least the Civil Rights Movement of the 1960s, the dominant narrative of the Civil War was that the South had simply been defending its "noble" way of life.[24] And since it was assumed that the South had fought for the nobility of states' rights, the logical implication was that maybe states' rights, as well as state governmental institutions, were deserving of respect. It was during these years that most Confederate monuments were erected.[25] And with all this came the belief that to suggest state courts were not equal to their federal counterparts as protectors of federal rights amounted to an unwarranted insult.

How, then, does all this political history relate to the seemingly inexplicable inconsistencies between *Younger* and *Mitchum*? The answer is all too simple: The Court in *Younger* relied for its conclusion of judicial parity on a series of earlier Supreme Court decisions, all of which had been decided at the height of the nation's acceptance of the Lost Cause myth.[26] *Mitchum*, in stark contrast, relied on the statements of the members of Congress made during the height of federal hostility towards both the South and state courts more broadly.

Which side should win in this historically grounded conflict? The answer should be clear on two grounds. First, as purely a historical matter, *Younger* and its predecessors are grounded in a fiction. Modern historians now recognize the inherent and pervasive falsity of the Lost Cause myth. Indeed, the very fact that historians universally refer to it as a "myth" should be a dead giveaway on that front. Thus, we should reject *Younger*'s false narrative of comity in judicial federalism in favor of an accurate telling of the relationship between state courts and the federal government.

Second, and more importantly, these decisions unconstitutionally usurped a power over federal jurisdiction that, subject to constitutional restrictions, had been placed in the hands of the representative branches of the federal government.[27] The federal law sought to be enforced in *Younger* was enacted by the very same Congress that was unambiguously motivated by a concern over the inability or unwillingness of state courts to protect federal rights—a concern inconsistent with the foundational premises of the later precedents relied upon in *Younger*.

In this Article, we use American political history and American political theory to explain the previously puzzling inconsistency in the foundations of the doctrine of Our Federalism. With these interdisciplinary insights, we

24. Howard K. Beale, *On Rewriting Reconstruction History*, 45 AM. HIST. REV. 807, 808–10 (1940).

25. Heather A. O'Connell, *More than Rocks and Stone: Confederate Monuments, Memory Movements, and Race*, 100 SOC. FORCES 1479, 1481 (2022).

26. *See* Foner, *The Supreme Court and Reconstruction*, *supra* note 19, at 1588–89.

27. There may exist constitutional restrictions which limit congressional power to control federal jurisdiction, but none of those conceivable restrictions is even arguably relevant in this context.

demonstrate that the doctrine of Our Federalism lacks any basis in history or theory.

This Article proceeds in five Parts. Part I lays bare the glaring inconsistency between the Court's reasoning in *Younger* and *Mitchum*. Part II details the long and rocky relationship between Congress and the Supreme Court on the one hand and state courts on the other. Part III then describes the post-Reconstruction development of the Myth of the Lost Cause and the resulting period of "Reconciliation." Part IV explores the implications of the Reconciliation period for the law of federal jurisdiction, describing in detail the false assumptions upon which the Court relied in *Younger* and other early twentieth-century opinions. Lastly, Part V refutes the alternative justifications for the Court's defiance of Congress's intent through *Younger*. This Article concludes that unless and until the political branches of the federal government legislatively supersede or alter the legislative directive of the Civil Rights Act of 1871, it is constitutionally improper for the Court to proceed on contrary assumptions about the parity of state and federal courts.

When the historical dust settles, the puzzling inconsistency between the foundational premises of *Younger* and *Mitchum* comes down to simply this: The Court in *Mitchum* properly drew its history of federal and state court relations from Congress's legislative decision to grant federal courts jurisdiction over federal civil rights claims against those acting under color of state law. In stark contrast, the *Younger* Court relied on prior decisions which were shaped under the false Reconciliationist narrative, assuming fungibility between federal and state courts, lest the Court appear to disrespect state courts.[28] By adopting the mythical assumptions of the Reconciliationist period, rather than an accurate reading of Reconstruction, the Court defied Congress's unambiguous intent.

I. THE PUZZLING INCONSISTENCY OF OUR FEDERALISM

The inconsistency inherent in the underlying foundation of the *Younger* doctrine is stark: *Younger* and its progeny categorically assume—absent any evidentiary grounding—that state courts are equals to federal courts in interpreting, enforcing, and protecting federal rights, while the *Mitchum* Court proceeded on the basis of the exact opposite premise as an explanation for congressional enactment of the Civil Rights Act of 1871.

To better understand this irreconcilable conflict inherent in the Court's jurisdictional doctrine, this Part is divided into three sections. First, it discusses the Court's decision in *Younger* and its reasoning regarding the relative adequacy of state and federal courts. Second, it examines *Mitchum*'s interpretation of

28. Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORN. L. REV. 463, 466–70 (1978).

Congress's purpose for implementing Section 1983. Lastly, it compares the two cases' reasoning to illustrate their incompatible approaches to parity.

A. *Our Federalism, Judicial Parity, and the Rationale of* Younger v. Harris

Younger v. Harris involved a state indictment of John Harris Jr. under the California Criminal Syndicalism Act.[29] The Supreme Court had previously invalidated an analogous law criminalizing speech in *Brandenburg v. Ohio*.[30] Harris, a member of the Progressive Labor Party, was charged with distributing leaflets which allegedly urged efforts to engage in the violent overthrow of the government.[31] Claiming that both the Act and the prosecution chilled his First Amendment right of free expression, Harris filed a complaint in federal court under Section 1983, seeking declaratory and injunctive relief against the ongoing state prosecution.[32] The district court granted the injunction, but the Supreme Court reversed, holding that the federal court must abstain from hearing the case unless there was a showing of "bad faith [or] harassment" on the part of those bringing the prosecution or that the state statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph."[33]

Writing for the majority, Justice Black relied on a line of cases from the first half of the twentieth century. One of those decisions, *Fenner v. Boykin*,[34] held that "[t]he accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection."[35] Grounded in the traditional requirements for equity, the Court reasoned that it could only assert jurisdiction over an equitable claim when there was no adequate remedy at law.[36] But because state courts were seen as fully competent to protect federal rights, and the defendant could appeal to the U.S. Supreme Court, any suggestion that the opportunity to raise a constitutional defense in state court did not represent an adequate remedy at law might give rise to unnecessary friction between state and federal courts.[37]

29. Younger v. Harris, 401 U.S. 37, 38 (1971); California Criminal Syndicalism Act, ch. 188, 1919 Cal. Stat. 281 (repealed July 29, 1991); Soifer & Macgill, *supra* note 11, at 1144.

30. 395 U.S. 444 (1969).

31. *Id.*

32. *Younger*, 401 U.S. at 38–39.

33. *Id.* at 37, 53.

34. 271 U.S. 240 (1926).

35. *Id.* at 244.

36. *Id*.

37. *Id.* ("An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.").

The Court explained this equity-federalism interplay more clearly seventeen years later in *Douglas v. City of Jeannette*,[38] the case most heavily relied upon by the *Younger* Court.[39] In *Douglas*, a group of Jehovah's Witnesses sued to restrain the city from enforcing an ordinance that prohibited the solicitation of orders for merchandise without first procuring a license and paying a tax.[40] Notably, the same ordinance had been held to be an unconstitutional abridgement of free speech, press, and religion the very same day.[41] Notwithstanding the ordinance's unconstitutionality, the Court held that equity would not interfere with criminal prosecutions for violations of that law absent a danger of irreparable harm.[42] The plaintiffs made no such showing, and the Court assumed that the state government would "acquiesce in the decision of this Court holding the challenged ordinance unconstitutional as applied to petitioners."[43]

The *Younger* Court relied on this line of cases without even considering the possibility that the sharp differences between federal and state court treatment of civil rights claims in the South in the 1960s might have altered the blanket assumption of state-federal court fungibility. Rather, Justice Black sought to reverse engineer those cases from the first half of the twentieth century by providing a delineation of the bases for federal court deference to state proceedings—an effort which earlier decisions had never attempted. The *Younger* Court relied on the tripartite structure of equity, comity, and federalism.[44] The Court defined "comity" as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[45]

But surely the Court did not mean to suggest that states should be permitted "to perform their separate functions in their separate ways" if what the states

38. 319 U.S. 157 (1943). In the years between *Fenner* and *Douglas*, the Court, in several decisions, reiterated and refined the limits on federal court power to enjoin state criminal prosecutions. *See, e.g.*, Watson v. Buck, 313 U.S. 387, 387 (1941); Beal v. Mo. Pac. R.R. Co., 312 U.S. 45, 45 (1941); Spielman Motor Co. v. Dodge, 295 U.S. 89, 90 (1935).

39. Younger v. Harris, 401 U.S. 37 (1971) (citing to *Douglas* throughout).

40. *Douglas*, 319 U.S. at 159.

41. Murdock v. Pennsylvania, 319 U.S. 105, 105 (1943) (holding the City of Jeannette's ordinance an unconstitutional abridgement of free speech, press, and religion on May 3, 1943).

42. *Douglas*, 319 U.S. at 165 ("In any event, an injunction looks to the future. And in view of the decision rendered today in *Murdock v. Pennsylvania*, we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate." (citations omitted)).

43. *Id.*

44. *See Younger*, 401 U.S. at 43–44.

45. *Id.* at 44.

wished to do violated the Fourteenth Amendment—a question the federal court does not definitely determine at the time of issuing a preliminary injunction.[46] Thus, implicit in the *Younger* Court's explication of comity is its assumption that state courts are the equal of the federal courts in deciding whether the state action is constitutional.

The same can be said for the Court's reliance on its "federalism" prong. According to Justice Black, the interests of federalism "represent . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments," where the federal government attempts to protect federal rights "in ways that will not unduly interfere with the legitimate activities of the States."[47] This statement is important because it reflects the manner in which the Court's deference to state courts was seen as one element of a broader deference to state political interests. But what the opinion seemed to ignore was that the adoption of the Fourteenth Amendment placed major and unprecedented federal restrictions on states' abilities to pursue their interests in the way they choose. And once again, the issue comes down to exactly who gets to determine whether the states' actions are consistent with the dictates of the Fourteenth Amendment—state courts or federal courts? Thus, once again, the Court's analysis implicitly but necessarily assumes that state courts are fungible with federal courts as interpreters and enforcers of federal constitutional rights.

It is astonishing that the *Younger* Court and the earlier decisions on which that Court relied could so easily ignore the long history of hostility between state courts and the federal government, both before and during the period of Reconstruction.[48] But, as discussed in Part II, even more shocking is that one year later, in *Mitchum v. Foster*, the Court held that Section 1983 constituted an expressly authorized exception to the Anti-Injunction Statute on the grounds that Congress passed the Civil Rights Act of 1871 because it doubted state courts' ability to protect constitutional rights.[49] The Court reached this conclusion without even acknowledging, let alone explaining, the glaring

46. *Id.*

47. *Id.*

48. *See* discussion *infra* Part II. It might be responded that the *Younger* Court did in fact provide an opportunity for litigants to demonstrate the inadequacy of state courts, because it proceeded on the assumption that there existed an "adequate remedy at law" in the state court. Thus, if the litigant could demonstrate that, in the individual case, the state court remedy was not adequate, the federal court could enjoin. But the Court left no such opportunity. Rather, it recognized only several rigid and narrow exceptions to its otherwise unbending prohibition on federal equitable relief which allowed no opportunity to challenge the adequacy of the state court proceeding in the individual case. *See Younger*, 401 U.S. at 53–54.

49. 407 U.S. 225, 242–43 (1972); 28 U.S.C. § 2283 (prohibiting federal courts from enjoining ongoing state judicial actions except (1) where "expressly authorized by an Act of Congress"; (2) where issued in aid of the federal court's jurisdiction; and (3) where necessary to "protect or effectuate [the federal courts'] judgments.").

contradiction between the *Mitchum* Court's reliance on congressional mistrust of state courts and the *Younger* Court's ironclad assumption that state courts are in complete parity with federal courts as interpreters and protectors of federal rights.

B. *Our Federalism, Judicial Parity, and the Rationale of* Mitchum v. Foster

The Court in *Younger* avoided deciding whether the Anti-Injunction Act prohibited injunctions of state court proceedings granted via Section 1983. Originally passed in 1793,[50] the most recent version of the Anti-Injunction Act forbids federal courts from enjoining state court proceedings absent three limited exceptions.[51] The Court in *Younger* did not reach this question because even if Section 1983 expressly authorized an injunction, the Court would decline to permit a federal court to enjoin an ongoing state criminal prosecution except in the most extreme situations, purely as a matter of judge-made discretion.[52] One year later, in *Mitchum*, however, the Court decided to resolve this issue.

The Court held in *Mitchum* that Section 1983 falls under the expressly authorized exception to the Anti-Injunction Act (despite the statute's omission of any explicit words to that effect).[53] In finding the statute to constitute an expressly authorized exception, the Court cited overwhelming legislative history that demonstrated one of Congress's primary purposes for creating a remedy at law and in equity via the Civil Rights Act of 1871 (the origin of Section 1983) was to provide plaintiffs a federal forum.[54] As recorded in the *Congressional Globe*, proponents of the "legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights."[55] For example, the Court pointed to Representative Lowe's claim that the Act of 1871 "throws open the doors of the United States courts to those whose rights under the Constitution are denied

50. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (modern version codified at 28 U.S.C. § 2283).

51. 28 U.S.C. § 2283.

52. *Younger*, 401 U.S. at 53–54.

53. *Mitchum*, 407 U.S. at 243–44; *see, e.g.*, Gene R. Nichol Jr., *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 965–69 (1987); Alexandra Nickerson & Kellen R. Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1763, 1779 (2023).

54. *Mitchum*, 407 U.S. at 238–42. The Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, which established the cause of action that is now Section 1983, is referred to by many different names, including the "Enforcement Act of 1871," the "Civil Rights Act of 1871," and the "Ku Klux Klan Act of 1871." For the purposes of this article, we refer to the law as the Civil Rights Act of 1871 since that is how the Supreme Court referred to the law in *Mitchum*. *Id.*

55. *Id.* at 240.

or impaired."[56] It further noted Senator Osborn's argument that "[i]f the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate."[57]

Based on its examination of this forceful and clear legislative history, the Court concluded that the Civil Rights Act of 1871 extended "federal power in an attempt to remedy the state courts' failure to secure federal rights."[58] The Court stated that "[t]he very purpose of [Section] 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[59] In stark contrast to *Younger*, the Court in *Mitchum* recognized that the friction between state and federal courts caused by injunctions was not a defect but rather a feature of the judicial system.

C. *Explaining the* Younger-Mitchum *Inconsistency Through Analysis of American Political History*

The glaring inconsistency underlying *Younger* and *Mitchum* is best explained by examining the contrasting historical sources upon which the two decisions draw. *Younger* relied upon sweeping, unsupported historical premises about the fungibility of state and federal courts. Yet the Court gleaned these premises exclusively from a series of Supreme Court cases decided in the years 1926 to 1941.[60] On the other hand, *Mitchum* reached its conclusion because of its careful examination of the congressional debates contained in the *Congressional Globe* and the historical context in which those debates took place.[61]

The historical ether in which the two decisions were made came from very different historical worlds. It is only by careful examination of these two distinct versions of American history and their impact on the nation's psyche that we can understand this dramatic historical contradiction. In Part II, this Article explores the historical relationship between state courts and the federal government from the nation's beginning until the end of Reconstruction. Part III examines the gradual but ultimately complete departure from the predominant premises and beliefs controlling until the end of Reconstruction, towards the so-called period of "Reconciliation" and the so-called "Myth of the Lost Cause." It then explains how this dramatic shift in the nation's attitudes underlies the blatant inconsistencies between the two contrasting visions of the federal government's relationship with state judiciaries.

56. *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374–76 (1871)).
57. *Id.* at 240–41 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871)).
58. *Id.* at 241.
59. *Id.* at 242 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).
60. *See* Younger v. Harris, 401 U.S. 37, 45–46 (1971); *see supra* notes 8–9.
61. *See Mitchum*, 407 U.S. at 238–43.

II. THE FEDERAL GOVERNMENT'S RELATIONSHIP WITH STATE COURTS FROM THE NATION'S FOUNDING UNTIL THE END OF RECONSTRUCTION

While Justice Black's opinion in *Younger* seeks to tell a compelling story of the long-lasting harmony between the federal government and the state courts,[62] nothing could be further from the historical truth. In fact, his description of the interaction is blatantly inconsistent with the nation's long history of tension and hostility between state courts and the branches of the federal government (in particular, Congress and the federal courts).

To be sure, under the so-called "Madisonian Compromise," which led to the structuring of Article III of the Constitution, Congress was not required to create lower federal courts at all.[63] Therefore, Congress could have chosen—consistent with the Constitution—not to create any lower federal courts, instead relying fully on state courts for the adjudication of all federal claims, subject to review in the United States Supreme Court. But this constitutional choice likely reflects a political compromise between the two factions of Framers, the Federalists and the anti-Federalists, rather than a permanent statement that state and federal courts are equal adjudicators of federal rights.

While it has always been true that state courts are constitutionally capable of adjudicating federal claims, from the nation's inception the federal government reflected substantial mistrust of state courts. This Part examines the most significant examples of that conflict: (1) the creation of the diversity jurisdiction; (2) the enactment and subsequent legislative expansion of the federal officer removal statute; and (3) the post-Civil War enactment of the civil rights jurisdiction—the Civil Rights Act of 1866 as well as the Civil Rights Act of 1871—combined with (4) the Court's recognition of Congress's distrust of state courts.

A. *Diversity Jurisdiction*

If both the Constitution's Framers and the first Congress believed in state and federal court parity, there presumably would have been no need for a category of federal jurisdiction based solely on the fact that the parties were from different states. But from the very inception of federal courts, the Constitution permitted, and Congress established, diversity jurisdiction.[64] Both the Framers and the first Congress wanted out-of-state litigants to have the

62. *See supra* text accompanying notes 9–10.

63. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). For a detailed exploration of the origins and meaning of the Madisonian Compromise, see Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52–56 (1975).

64. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

option to bring suits grounded almost exclusively in state law in federal court, since state courts might favor their own citizens.[65]

Unlike federal judges, who were constitutionally guaranteed life tenure during good behavior, state judges could be appointed and removed by state legislatures.[66] Thus, political pressures from local interests could be placed on state judges, to which federal judges were not susceptible.[67] These structural deficiencies with state courts threatened out-of-state litigants' access to impartial adjudication of their claims. As such, diversity jurisdiction was created to protect out-of-state litigants from state courts' structural deficiencies,[68] as well as to ease concerns over "the influence of debtor interests in state legislatures" and the resultant fear that "state judges might be reluctant to enforce unpopular contracts or generally to foster the stable legal conditions necessary for commercial growth."[69] Alexander Hamilton, writing in *The Federalist Papers*, argued that "[t]he reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be presumed to be impartial, speaks for itself."[70] Thus, in stark contrast to the premises underlying the creation of Our Federalism, diversity jurisdiction was created for the very reason that state and federal courts were *not* fungible, and, in suits involving out-of-state citizens, could not be fully trusted.

The first Congress had the same fear of state courts, quickly enacting diversity jurisdiction.[71] The same Congress extended access to a federal forum to defendants through authorization of removal.[72] Notably, state law was still applied even in federal diversity cases, meaning that Congress's concern was

65. State courts' bias against out-of-state litigants became apparent during the Articles of Confederation. *See* Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 BUFF. L. REV. 477, 504 (2015) (arguing that state court adjudication of naval capture cases during the Revolutionary War were fraught with complaints of state court bias towards in-state litigants); Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1070–90 (2007) (discussing the Framers' concern that local juries would favor in-state litigants over out-of-state litigants).

66. *See* Freer, *supra* note 13, at 1089.

67. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1427, 1448 (1989); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 88 (1993).

68. *See* John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 9 (1948).

69. RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 6–7 (3d ed. 2005), https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf [https://perma.cc/4YXD-ES53].

70. THE FEDERALIST NO. 80 (Alexander Hamilton).

71. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

72. *Id.* § 12, 1 Stat. at 79–80.

not the efficient administration of substantive federal law, but mistrust of state courts in adjudicating cases involving out of state litigants.[73]

After the Civil War, Congress expanded removal jurisdiction in cases of diversity.[74] It did so because of evidence that the defeated Southern states were harassing the newly freed Black Americans and Northerners through litigation in state courts.[75] One method involved bringing frivolous litigation against out-of-state Northerners.[76] To keep suits in state courts, Southern plaintiffs would often include in-state defendants, thereby destroying complete diversity and preventing defendant removal. To avoid such situations, Congress enacted three statutes. The Separable Controversy Act of 1866[77] prevented Southern plaintiffs from abusing the complete diversity requirement against Northern transplants.[78] The Local Prejudice Act of 1867[79] permitted parties to remove claims to federal court if they believed they could not obtain justice due to prejudice or local influence.[80] Finally, the Removal Act of 1875[81] authorized removal for parties in state court where neither party was an in-state citizen.[82]

Ultimately, the history of the diversity jurisdiction, from the nation's founding until the post-Civil War period, clearly demonstrated Congress's complete mistrust of state courts, even when they were adjudicating purely state law claims.[83] *A fortiori*, it would seem, mistrust of state courts would have been appropriate when those courts were asked to rule on federal constitutional challenges to state laws and policies. Yet neither the *Younger* Court nor the Court in any of its decisions handed down in the early twentieth century ever acknowledged the existence of this well-established history.[84]

73. *Id.* § 34, 1 Stat. at 92 ("[T]he laws of the several states . . . shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply.").

74. Zambrano, *supra* note 18, at 2116–17.

75. William W. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 340–42 (1969).

76. *Id.* at 340.

77. Act of July 27, 1866, ch. 288, 14 Stat. 306.

78. *Id.*; *see* Wiecek, *supra* note 80, at 340.

79. Act of Mar. 2, 1867, ch. 288, 14 Stat. 558.

80. *Id.*; *see* Wiecek, *supra* note 80, at 340; *see also* Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1474 n.140 (2008) (outlining the role state court bias played in the expansion of diversity jurisdiction through Class Action Fairness Act ("CAFA")).

81. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

82. *Id.*; *see* Wiecek, *supra* note 80, at 341–42.

83. *See* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 287 (2019) (discussing the importance of removal as indicating the continued relevance of local bias); *see also* James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 8–9 (1964); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 623–24 (2004).

84. It is worth noting that even in the modern era, Congress has substantially expanded diversity jurisdiction to avoid state court adjudications of class actions, only requiring minimal diversity among the parties. *See* 28 U.S.C. § 1332(d) (CAFA)).

B. *Federal Officer Removal*

The long history of congressional legislation authorizing removal of state court suits against federal officers to federal court further indicates congressional recognition that state courts may not be trusted in such situations. This conclusion can be reached using simple logic: If state courts were truly in parity with federal courts as interpreters of federal law and protectors of federal interests, Congress could rest assured that federal officers would receive the same level of justice and fair treatment in state court that they would receive in federal court. But even a brief examination of the history of federal officer removal shows Congress's concern over Northern, as well as Southern, state court adjudication.

Congress first enacted a federal officer removal statute during the War of 1812 with Great Britain in order to combat state court interference with federal policy.[85] During the war, the United States imposed an embargo on goods shipped from Great Britain and its colonies, including Canada.[86] These embargoes frustrated the Northern states, which relied on manufacturing and trade with Great Britain and its colonies. In defiance of Congress's wartime policies, Northern manufacturers and merchants continued their preexisting trade practices.[87]

As a means of opposing the embargoes, Northern merchants brought civil charges in state courts against federal officers for damages incurred when the merchants' products were seized. Congress concluded that state courts could not be trusted in such situations to recognize the constitutional supremacy of federal law.[88] In 1815, Congress took legislative action. Entitled "An Act to Prohibit Intercourse with the Enemy[],"[89] the law granted federal customs officials the power to remove cases against them from state court to federal court.[90] In its original form, the law limited the privilege of removal to "the continuance of the present war between the United States and Great Britain, and no longer."[91] However, in 1817 Congress reenacted this law, extending it for four years.[92]

Congress again enacted federal officer removal to protect federal revenue officers from state interference during the 1832–33 "Nullification Crisis."

85. Haiber, *supra* note 88, at 620.

86. *See* Donald R. Hickey, *American Trade Restrictions During the War of 1812*, 68 J. AM. HIST. 517, 531–32 (1981).

87. *Id.* at 534–35.

88. *See id.*

89. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 200.

90. For a more detailed discussion of this history, see generally Elizabeth Johnson, *Removal of Suits Against Federal Officers: Does Malfeasant Mailman Merit a Federal Forum?*, 88 COLUM. L. REV. 1098 (1988).

91. Act of Feb. 4, 1815, ch. 31, § 13, 3 Stat. 195, 200.

92. *See* Tennessee v. Davis, 100 U.S. 257, 267–68 (1879).

South Carolina had enacted laws of nullification, declaring the federal tariffs of 1828 and 1832 "null, void, and no law."[93] The state then prosecuted federal officers seeking to enforce the tariffs and forbade appeals involving the tariffs to the United States Supreme Court.[94] The federal statute extended federal jurisdiction to cases "arising under the revenue laws of the United States" and authorized federal officers prosecuted "for or on account of any act done under the revenue laws of the United States" in state court to remove those suits to federal court.[95]

These examples from early in the nation's history are clearly inconsistent with the presumption of parity between state and federal courts, which underpins the *Younger* doctrine.[96] But even more inconsistent was the next set of removal statutes enacted by Congress. The Habeas Corpus Act of 1863[97] authorized removal by federal officers acting on behalf of the Union war effort.[98] Congress again expanded removal jurisdiction in the Internal Revenue Act of 1866[99] and the Second Enforcement Act of 1871.[100]

C. *Post-Civil War Expansions of Federal Civil Rights Jurisdiction*

As the preceding discussions demonstrate, both diversity jurisdiction and federal officer removal jurisdiction conclusively demonstrate that *Younger*'s assumption of state-federal judicial parity never accurately described congressional attitudes towards state courts.[101] But the hostility of

93. South Carolina, Ordinance to Nullify Certain Acts of the Congress of the United States, Purporting to be Laws, Laying Duties and Imposts on the Importation of Foreign Commodities (Nov. 24, 1832), *reprinted in* STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 170–73 (Herman V. Ames ed., 1906).

94. *Id.* at 171–72.

95. Act of Mar. 2, 1833, ch. 57, §§ 2–3, 4 Stat. 632, 632–33.

96. Professor Diego Zambrano sketches an alternative view of federal-state court relations prior to 1875. Zambrano, *supra* note 18, at 2113–16. Zambrano argues that the omission of general federal question jurisdiction reflected a partial integration of state and federal courts, where federal courts heard state law cases through diversity jurisdiction and states enforced federal statutes. *Id.* at 2113–14. While we take issue with Professor Zambrano's omission of early federal officer removal cases, his argument still points out that "even though state courts were dominant, when federal judges dealt with cases defining federal judicial power, they did not develop a language of, deference, to state judiciaries." *Id.* at 2116.

97. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

98. Ch. 81, § 5, 12 Stat. 755, 756; *see* Wiecek, *supra* note 80, at 338; John S. Strayhorn Jr., *The Immunity of Federal Officers from State Prosecutions*, 6 N.C. L. REV. 123, 131 (1928).

99. Act of July 13, 1866, ch. 184, 14 Stat. 98; Wiecek, *supra* note 80, at 339.

100. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433. In something of an aberration from changing national attitudes, *see* discussion *infra* Part III, Congress continued to expand federal officer removal in future years, so that today the statute is as broad or broader than it has ever been. *See* 28 U.S.C. § 1442; *see also* Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 915 (2021) (discussing the legislation Congress enacted to enforce the Reconstruction Amendments).

101. Perhaps demonstrating that American history is nonlinear, the existence of the Anti-Injunction Statute since early in the nation's history, codified as amended at 28 U.S.C. § 2283,

Congress towards state courts became even clearer through post-Civil War civil rights legislation.

One of the strongest examples of this dramatic expansion of congressional mistrust came in the enactment of the Civil Rights Removal Statute.[102] This statute expands removal in two contexts. First, it allows a defendant to remove "civil actions or criminal prosecutions" filed in state court when she is "denied or cannot enforce in the courts of such State a right under any law providing for equal civil rights."[103] Second, it permits a federal officer to remove such state court actions that are brought for "any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."[104]

The congressional mistrust reflected in this statute was well founded. Even after the enactment of the Thirteenth Amendment banning slavery, the former Confederate states quickly enacted the so-called "Black Codes."[105] These segregationist policies enabled state governments to treat Black Americans harshly and punish minor crimes such as vagrancy with forced labor.[106] On the basis of testimony by federal officials operating in the former Confederate states, the Joint Committee on Reconstruction decided that, absent federal court intervention, state courts would continue these illegal practices.[107]

In a series of questionable decisions in both the late nineteenth and mid-twentieth centuries, the Supreme Court effectively rendered the Civil Rights Removal Statute useless.[108] But when the statute is viewed not for its current

prohibits federal courts from enjoining ongoing state judicial proceedings. The exact rationale for this statute's original enactment is not entirely clear, however, and the current version of the statute, enacted in 1948, contains three explicit exceptions. We discuss the statute in some detail in a subsequent section. *See infra* Section V.C. At this point, however, we should point out that congressional efforts to prevent federal courts from interfering with ongoing state proceedings—most of which will, quite naturally, concern predominantly or exclusively issues of state law—can manifest congressional recognition of the values of federalism without necessarily reflecting acceptance of judicial parity.

102. *See* 28 U.S.C. § 1443.

103. *Id.* § 1443(1).

104. *Id.* § 1443(2). While Section one extends the right of removal to "any person," the Supreme Court has been construed Section two only to apply to "federal officers and to persons assisting such officers in the performance of their official duties." City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 815 (1966).

105. ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 47 (2019) [hereinafter FONER, THE SECOND FOUNDING].

106. *See* Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 815–17 (1965); Andrew Straky, Note, *The Brief Life and Enduring Promise of Civil Rights Removal*, 124 COLUM. L. REV. 123, 128 (2024); Martin H. Redish, *Revitalizing Civil Rights Removal Jurisdiction*, 64 MINN. L. REV. 523, 530 (1980) [hereinafter Redish, *Civil Rights Removal Jurisdiction*].

107. *See* R. Malloy McKeithen, *Removal of Civil Rights Cases—Recent Developments*, 44 N.C. L. REV. 380, 382–83 n.12 (1966).

108. *See City of Greenwood*, 384 U.S. at 834–35 (1966); Georgia v. Rachel, 384 U.S. 780, 807–08 (1966); Strauder v. West Virginia, 100 U.S. 303, 311–12 (1879); Virginia v. Rives, 100 U.S. 313, 322–

legal impact but for its role in American political history, it strengthens our thesis that prior to the post-Reconstruction period, congressional treatment of state courts reflected substantial mistrust of the competence and good faith of state courts in interpreting and enforcing federal constitutional and legislative directives.

The most important post-Civil War development demonstrating total congressional mistrust of state courts was the enactment of the Civil Rights Act of 1871, the source of today's Section 1983. It was the legislative history behind this enactment on which the *Mitchum* Court relied in finding Section 1983 to be an expressly authorized exception to the Anti-Injunction Act.[109] The Civil Rights Act authorized injured individuals to sue for legal or, where appropriate, equitable relief against anyone acting under color of state law who had violated those individuals' federal rights. Also, in what is now 28 U.S.C. § 1343, Congress extended federal court jurisdiction to adjudicate these suits.[110]

The historical grounding of this law is instructive in establishing congressional mistrust of state courts. After the war, despite federal occupation, White Southerners continued violent resistance, both officially through the legal system and unofficially through the violent actions of terrorist organizations such as the Ku Klux Klan.[111] These organizations would commit crimes yet face little or no consequences from state authorities.[112] In 1871, President Grant called upon Congress to expand federal enforcement powers against the South.[113] The Civil Rights Act of 1871 was the congressional response.

Members of Congress repeatedly justified the law based on state courts' unwillingness or inability to protect federal rights. The myriad statements of members of both Houses of Congress could not be clearer in their condemnation of the state courts.[114] Moreover, the 1871 Act included a specific grant of federal jurisdiction for these claims.[115]

24 (1879); Redish, *Civil Rights Removal Jurisdiction*, *supra* note 106, at 528–29. The timing of all of these decisions, we should note, is consistent with our thesis, which focuses on the dramatic shift in national attitudes towards the Southern states and the resultant "rewriting" of the history of state-federal judicial parity. *See infra* Part III.

109. *See* discussion *supra* Section II.A; *infra* Section V.C.

110. Since no general federal question jurisdictional statute existed at the time, Congress was obligated to create a jurisdictional statute tied to these suits.

111. *See* Nichol, *supra* note 53, at 973–74.

112. *Id.* at 974–76.

113. *See* Monroe v. Pape, 365 U.S. 167, 172–73 (1961) (citing CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

114. *See* Nichol, *supra* note 53, at 974–76 (cataloguing numerous statements made in the 42d Congress accusing state judges of conspiring with the Ku Klux Klan).

115. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (providing that "such proceeding [is] to be prosecuted in the several district or circuit courts of the United States . . . .") (codified at 28 U.S.C. § 1343). For further discussion of the role of Reconstruction era legislation on mandatory jurisdiction, see Smith Jr., *supra* note 11.

Four years later, Congress enacted a general federal question jurisdiction statute with an amount in controversy requirement.[116] However, the specific grant of civil rights jurisdiction remained without an amount in controversy requirement.[117] This demonstrated Congress's awareness that litigants needed to have an opportunity to advocate their federal claims in federal court.

D. *Supreme Court Mistrust of State Courts*

The federal government's hostility towards state courts was not a secret. Despite *Younger*'s claims, the nineteenth century Supreme Court recognized Congress's mistrust of state courts. As far back as the Supreme Court's 1824 decision in *Osborn v. Bank of the United States*,[118] the Court interpreted the constitutional limits on federal court jurisdiction with a recognition of the danger of state court hostility to federal interests. There, in a suit against the Bank of the United States, Chief Justice Marshall adopted an extremely broad construction of Article III's "arising under" jurisdiction, which would support federal question jurisdiction in suits grounded entirely in state law. It is true that at no point did Marshall expressly acknowledge his concern about possible state court hostility towards the Bank of the United States. But widespread state discontent with the Bank was widely known, and leaving such decisions to the local courts threatened the supremacy of federal law. Based on the Court's reasoning, Professor Paul Mishkin argued that *Osborn* represented a form of "protective jurisdiction," essentially federal jurisdiction grounded not in an issue of substantive federal law, but in the need to protect a preexisting federal legislative program from state court prejudice.[119]

Arguably more explicit in the expression of concern over state court interference with federal interests is a series of Supreme Court decisions holding that state courts lack constitutional power to directly control the actions of federal officers (decisions which remain good law to this day). As early as 1821, in *McClung v. Silliman*,[120] the Court held that state courts lacked authority to issue writs of mandamus to federal officers.[121] However, it was in the post-

116. Act of Mar. 3, 1875, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331).

117. Hague v. C.I.O., 307 U.S. 496, 530–32 (1939) ("The conclusion seems inescapable that the right conferred by the Act of 1871 to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights . . . .").

118. 22 U.S. (9 Wheat.) 738 (1824).

119. *See* Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 187–96 (1953). For a detailed analysis of the theory of protective jurisdiction, see MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER 90–95 (2d ed. 1990) [hereinafter REDISH, FEDERAL JURISDICTION].

120. 19 U.S. (6 Wheat.) 598 (1821).

121. *Id.* at 605.

Civil War decision in *Tarble's Case*[122] that the Court articulated a constitutional theory for denying state courts the power to issue a writ of habeas corpus to a federal officer. That theory was grounded in a form of dual federalism, positing a type of mutual exclusivity between state and federal courts.[123]

To be sure, the Court's reasoning in *Tarble* was constitutionally flawed. It turned on the assumption that state courts lacked constitutional authority to control the actions of federal officers, in direct contradiction to the Madisonian Compromise embodied in Article III. After all, given the history of the Madisonian Compromise, it has always been very clear that the Framers contemplated that state courts could and would adjudicate issues of federal law and even federal claims.[124] But the fact that the Court was willing to go to such extremes to prevent state courts from interfering with the implementation of federal policies only underscores the nineteenth-century Court's serious concern that state courts—including those in the North—might be hostile not only to federal rights but also to federal governmental interests.

III. FROM RECONSTRUCTION TO RECONCILIATION

Virtually nothing in the doctrinal and political history described in the prior section is new. On the contrary, our citation of numerous Supreme Court decisions, legislative debates, and scholarly articles makes clear that this historical ground had been worked well before our efforts in this Article. Indeed, the Court's modern decision in *Mitchum*, relying so heavily on much of this history, leaves no doubt that none of this represents any sort of original historical revelation. From the start of our nation until the mid-1870s, both Congress and the Supreme Court expressed mistrust of state courts. And while much of that hostility targeted Southern state courts, a significant portion of it was also directed at Northern state courts.[125]

The question, then, is not whether there was federal governmental hostility to state courts, but rather why modern Supreme Court decisions, with the glaring exception of *Mitchum*, have so completely ignored this history in interpreting federal jurisdictional statutes and shaping modern federal jurisdiction doctrine. It might be argued that the modern Supreme Court was of course familiar with this history but nevertheless concluded that state courts had become the equivalent of federal courts as enforcers of federal rights. There are, however, significant problems with this argument.

122. 80 U.S. (13 Wall.) 397 (1872).

123. REDISH, FEDERAL JURISDICTION, *supra* note 119, at 90–95.

124. For a critique of the reasoning in *Tarble*, see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982).

125. *See* discussion *infra* Sections III.A–B.

To start, other than in *Mitchum*, the modern Court has never even acknowledged the well-established historical mistrust between the federal government and state courts. In *Younger*, the Court relies heavily on the assumption of state-federal court parity; in *Mitchum* one year later, the Court relies expressly on Congress's historical rejection of parity. Yet the decisions that followed acted as if *Mitchum* had never been decided. The Court simply assumed parity, and the insult to state courts caused by even suggesting that they were not in parity with federal courts was one of the primary justifications for the continuation of the doctrine of Our Federalism.[126] At the very least, it would have been reasonable to expect the Court to acknowledge that it was now rejecting this history. Yet it has never done so.

Moreover, it would also be reasonable to expect the Court, in rejecting the well-established understanding of federal mistrust of state courts, to produce some evidence of parity. But the modern Court points to no empirical basis to assume that the situation was different in 1971 than it was in 1871. After all, state judges still lack the constitutionally dictated protection of life tenure given to federal judges, making them subject to potential local political pressures to which federal judges are never subject. In fact, it is difficult to reconcile the Court's unsupported assumption of judicial parity with the congressional expansion of the diversity jurisdiction in class action suits through Congress's enactment of the Class Action Fairness Act of 2005 (CAFA),[127] as well as the modern era expansion of federal officer removal to include all federal officers.[128]

There is an explanation for this puzzling dichotomy between the well-established history of Congress's mistrust of state courts and the modern Court's mysterious abandonment of that practice. That explanation is grounded in important shifts in Americans' understanding of American political history, beginning in the late nineteenth century. The historical analysis that follows explains the growth of "the Myth of the Lost Cause"—the manipulation and rewriting of American history in the later years of the nineteenth century and the first half of the twentieth century by historians sympathetic to the South in the Civil War. The envelopment of the nation in this historical myth,[129] combined with the nation's general weariness with the hostile attitudes between the federal government and the states of the former Confederacy, led to a

126. *See* discussion *supra* Section I.B.

127. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d)).

128. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850–51 (codified at 28 U.S.C. § 1442).

129. This myth was symbolized by the extremely popular 1939 movie, *Gone with the Wind*, which portrayed slaves as mostly happy and fiercely loyal to their masters, Southerners as desperate to preserve their noble way of life, and Union soldiers as evil. John David Smith, *Introduction*, *in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 1, 2 (John David Smith & J. Vincent Lowery eds., 2013).

widespread acceptance of the principle of "states' rights," for which this new myth claimed the South had really been fighting, rather than to defend slavery. As we shall show, this widespread popular commitment to states' rights led (for the most part)[130] to an unsupported assumption that state courts were in fact the equal of federal courts in interpreting and enforcing federal rights.

A. *State Courts, Reconstruction, and Radical Republicans*

The narrative of state court inadequacy reached its pinnacle during Reconstruction. Some eight months after Confederate General Robert E. Lee surrendered to General Ulysses S. Grant at Appomattox Court House, the Thirteenth Amendment was ratified, banning slavery.[131] Nevertheless, the Thirteenth Amendment did not guarantee the rights of freedmen.[132] Many in the South remained hostile towards the formerly enslaved Black race. Congress, controlled by Radical Republicans, enacted constitutional amendments and federal statutes designed to protect both the recently freed slaves and Northerners who had migrated to the South.[133]

As Reconstruction proceeded, however, the nation began to grow weary of the mistrust of the South and the resulting measures, which were both harsh and expensive. Thus, while Reconstruction-era legislation remained in place, the executive branch's willingness to enforce that legislation did not. In 1873, the country experienced a significant economic depression that strained government finances.[134] With the economy taking center stage, Northern voters soured on the costs of maintaining troops in the South.[135] Economic strain, combined with growing racism in the North, led to widespread fatigue over the need to defend Black Americans' rights.[136] Facing increasing political opposition and economic difficulties, President Grant reversed his enforcement policies

130. As already noted, certain exceptions persisted, such as the *Mitchum* decision, the enactment of CAFA, and the *Tarble* doctrine. *See supra* Part II.

131. U.S. CONST. amend. XIII.

132. *See* FONER, THE SECOND FOUNDING, *supra* note 105, at 30–31 (2019).

133. For a more detailed description of congressional efforts to curb Southern hostility toward Black Americans and Northerners by resorting to expanded federal jurisdiction, see *supra* Part III.

134. *See* Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics*, 10 J. GILDED AGE & PROGRESSIVE ERA 403, 411–12 (2011) (discussing the economic depression in 1873 that shifted the focus from Reconstruction to economic issues on the political stage); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST–CIVIL WAR NORTH, 1865–1901, at 122–55 (Harvard Univ. Press 2009).

135. *See* Daniel Byman, *White Supremacy, Terrorism, and the Failure of Reconstruction in the United States*, 46 INT'L SEC. 53, 83 (2021) ("The priorities of Northern Republicans also shifted when the Panic of 1873 devastated the U.S. economy . . . and further reduc[ed] popular support for the Republican Party and the spending associated with Reconstruction.").

136. Even before Reconstruction, racism was deeply embedded in the North. For example, in the New York City Draft Riots, Black Americans were attacked in part of the opposition to the Civil War. FONER, THE SECOND FOUNDING, *supra* note 105, at 17.

against the Ku Klux Klan.[137] That year also saw the abolition of the Freedmen's Bureau, which had been a key source of support for formerly enslaved people in the South.[138] Largely due to this weakening Northern resolve, white Southerners gradually regained power. Known as "Redeemer governments," white Southern Democrats widely assumed control of state legislatures through intimidation of Black voters and the election of white former Confederates.[139]

Even as public support for Reconstruction waned, however, Congress continued to enact legislation designed to guarantee equal rights. In 1875, Congress passed another civil rights law, providing that Black Americans could not be denied access to public accommodations[140] or jury service.[141] Congress also expanded federal court jurisdiction, enacting a general federal question statute.[142] The continued expansion of rights and federal court access shows that Congress's belief in state court inadequacy did not change. Instead, political headwinds made enforcing these rights more difficult.

The 1877 electoral crisis became the final nail in the coffin for Reconstruction. Neither Republican candidate Rutherford B. Hayes nor Democratic candidate Samuel Tilden won a majority of electoral votes in the 1876 presidential election.[143] As part of an agreement to end the post-election controversy, Southern Democrats agreed to give Rutherford B. Hayes the electoral votes needed to become President if the next Republican administration would remove federal soldiers from the South, thereby ending Reconstruction.[144] During the campaign, President Hayes had already campaigned in favor of a return to local rule, but the agreement removed any chance he would change his mind on Reconstruction.[145] What followed was the beginning of a dramatic "rewriting" of American history—one in which the South no longer appeared to be an advocate for the evils of slavery, willing to

137. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876, 92 (2005) ("Beset with crunching financial woes, vulnerable to continuing charges of despotic, wasteful, corrupt and overly centralized government, and confronted with increasing Northern opposition to federal interference in Southern affairs, the fanciful logic of Southern Conservatives proved irresistible.").

138. *Id.* at 37.

139. *See* Daniel Farbman, *Redemption Localism*, 100 N.C. L. REV. 1527, 1534–35 (2022).

140. Act of March 1, 1875, § 1, 18 Stat. 335, 335–36, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

141. Act of March 1, 1875, § 4, 18 Stat. 335, 336–37 (codified at 18 U.S.C. 243).

142. Act of March 3, 1875, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331).

143. FONER, THE SECOND FOUNDING, *supra* note 105, at 126 (stating that the 1880s became a time of transition, as voting rights were eroded by Southern governments for Black citizens and the attempts to defend these rights were tried).

144. Gary W. Gallagher, *Jubal A. Early, the Lost Cause, and Civil War History: A Persistent Legacy*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 36.

145. FONER, THE SECOND FOUNDING, *supra* note 105, at 148 (pointing out that Rutherford B. Hayes, who promised before being president to return Southern local rule, eventually became disillusioned with states being unable to protect national elections at the end of his presidency).

take the lives of many young Americans on both sides in order to preserve the immoral institution.

B. *The Lost Cause, Reconciliation, and the Dunning School*

The end of Reconstruction marked a withdrawal from the federal government's careful policing of the Southern states' willingness to protect the rights of the recently freed slaves. In this state of ebbing political will, sociopolitical forces began to justify their withdrawal from enforcement by recasting Reconstruction as a grossly unnecessary expansion of federal power. But Reconstruction could only be politically dismissed as an undue expansion if the South did not require federal policing. This premise required a dramatic alteration in the North's traditionally suspect view of the South. In particular, it required an acceptance of two precepts: (1) While it had of course been necessary to defeat the South, the cause of the South—namely, to preserve its honorable and even noble traditions (the social precept) and to maintain the nation's tradition of states' rights (the political precept)—was worthy; and (2) in any event, the current political situation no longer required federal policing, because the states were now fully capable of guaranteeing individual rights.

Historian David W. Blight termed this historical retelling the "Reconciliationist" vision.[146] The problem, however, was that the historical grounding underlying the Myth of the Lost Cause had virtually no basis in reality. This troubling fact required substantial effort to alter the prevailing (and accurate) understanding to the contrary on both counts. Important Southern intellectuals concluded the real basis for the Civil War (namely, the South's desperate attempt to preserve a society grounded on the monstrous and immoral evil of race-based slavery) could be changed simply by rewriting history. And that is what leading Southern historians—some of them veterans of the Civil War—sought to do. The result, according to the works of numerous modern scholars of American history, was the creation of "the Myth of the Lost Cause."[147] The pro-Southern academics and politicians did not themselves alter the existing structure of federal judicial enforcement of federal civil rights. Rather, they promoted a version of American history that, if accepted, would logically remove the need for such protection. It is this historical delegitimization of the Reconstruction era and the related effort to emphasize

146. Blight lays out three separate visions: Reconciliationist, white supremacist, and emancipationist. BLIGHT, *supra* note 23, at 2. The Reconciliationist vision became the prevailing narrative and accommodated many of the white supremacist beliefs. *Id.* The emancipationist perspective, which represented Black Americans' view of the war and Reconstruction, was suppressed. *Id.*

147. *See, e.g.*, Gallagher, *Introduction*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 5–10 (introducing essays by modern scholars concerning the development of the "Lost Cause").

the nobility of states' rights that eventually led to the modern Supreme Court's empirically unsupported presumption of parity.

The origins of the myth came from the defeated South. This Lost Cause myth was developed both to minimize the South's role in causing the Civil War and to soften the perception of slaves as being mistreated.[148] The Lost Cause myth lionized the Antebellum South while whitewashing the horrors of slavery.[149] Advocates of the Lost Cause emphasized the supposed nobility of slaveholders, portraying that era as a golden age of the South.[150] Edward Pollard, a key figure in the Lost Cause movement, claimed that "[s]lavery established in the South a peculiar and noble type of civilization."[151] Enslaved individuals were not agitating for abolition, these historians argued.[152] Instead, it was the North that caused the growth of opposition to slavery.[153] By minimizing the South's role in the conflict, the former Confederate states could claim that they had been unfairly treated and therefore should now be trusted with local rule.

In addition to idealizing the Antebellum South, Lost Cause advocates argued that slavery had not been the real cause of the Civil War. Almost immediately after the Confederacy's surrender at Appomattox, Southern leaders such as former Confederate President Jefferson Davis contended that the South would have relinquished slavery.[154] According to this narrative, the war at its core was not a dispute about slavery but rather a conflict over states' rights.[155] Secession was seen as a constitutionally authorized act necessary to

148. The "Lost Cause" consisted of various assertions about the inevitability of northern victory and the nobility of Robert E. Lee. Gallagher, *Jubal A. Early, the Lost Cause, and Civil War History: A Persistent Legacy*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 43–44 (Jubal A. Early, a former Confederate military leader under Lee, was important for immortalizing Robert E. Lee's mythos as a brilliant general). While important for the history of this movement, this Article focuses only on the ideas relevant to the Reconciliationist vision.

149. Alan T. Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 30. Southerners claimed that slavery was not that bad, diminishing the horrors of the system and portraying slaves as content in their chains, which were later adopted by fiction writers such as Thomas Nelson Page and Hollywood films made by Walt Disney. *Id.* at 22–23.

150. *Id.* at 21–22 (identifying Lost Cause arguments that the South would have given up slavery in time); Christopher A. Graham, *Lost Cause Myth*, 36 PARKS STEWARDSHIP F. 458, 460–61 (2020).

151. EDWARD A. POLLARD, THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES 50 (1866).

152. *Id.* at 65–66.

153. The stereotype of the happy and content slave is perpetuated in the writings of Lost Cause evangelists, as well as in popular culture. *See, e.g.*, Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 22–23. A famous example of this stereotype is in folklorist Joel Chandler Harris's *Uncle Remus* tales, which would later appear in works like Walt Disney's 1946 film *The Song of the South*. Matthew Christopher Hulbert, *The Nineteenth-Century South in Film*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (2020).

154. Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 22 (quoting KENNETH STAMPP, THE IMPERILED UNION 268 (Oxford University Press, 1980)) (discussing the post-war claims of Confederate leaders like Jefferson Davis and Alexander Stephen that the dispute was not about slavery).

155. *Id.*

defend fundamental liberties.[156] Much like the previous claims, this tenet ultimately rested on the premise that the conflict had been caused by abuses of federal authority over the states.

According to the advocates of the Lost Cause, abolitionists were the instigators of the Civil War,[157] and it was abolitionist fervor that compelled the South to secede. Pollard, for example, argued that Virginia made it clear that "the election of an abolitionist to the Presidency would be a virtual declaration of war against the South."[158] Thus, in the minds of the Lost Cause myth's advocates, the war was simply a just pursuit of freedom, rather than a defense of tyranny. In this sense, Southern secession was seen as reminiscent of the nation's Revolutionary War.

These claims ultimately contributed to the broader narrative that Reconstruction itself, rather than the Southern institution of slavery, was the great evil. Lost Cause promoters depicted Reconstruction as a tyrannical overreaction to blameless Southerners.[159] Major advocates, like Jubal Early, William T. Morgan, and Jefferson Davis, celebrated the end of Reconstruction, lamenting its alleged tyranny against the rights of the states.[160] As such, these advocates argued that the laws enacted by the Reconstruction Congress to interpose the federal government between the people and the states should be ignored.

While the Lost Cause movement initially originated in the South, some of its tenets also expanded to the North. As Frederick Douglass realized in the 1870s, the Southern myths threatened to revive Southern animus and convince the North to abandon the pursuit of equality.[161] He spent the latter years of

156. *Id.* at 15 (citing GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865–1913, at 117–18 (1987)) ("The Lost Cause doctrine endlessly asserted that secession was a constitutional right. . . . The premise of this contention was that because the Constitution was silent on the issue, withdrawal from the Union was permitted.")); Keith Bohannon, *"These Few Gray-Haired, Battle-Scarred Veterans": Confederate Army Reunions in Georgia, 1885–95*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 96 (recounting a reunion of Georgia Confederate veterans who argued that secession was a fundamental right of states and argued that the war began because of Northern abolitionism).

157. Nolan, *The Anatomy of the Myth*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 15–16 ("In the context of the legend, the abolitionist's image is negative. They are seen as troublemakers and provocateurs . . . .").

158. POLLARD, *supra* note 151, at 95.

159. BLIGHT, *supra* note 23, at 264; *see also* GAINES M. FOSTER, THE LIMITS OF THE LOST CAUSE: ESSAYS ON CIVIL WAR MEMORY 198–222 (2024) (discussing the role of Northern acceptance of the Lost Cause tenets).

160. BLIGHT, *supra* note 23, at 264 n.19 (citing Jubal Anderson Early, *Relative Strength of the Armies of Lee and Grant*, 2 S. HIST. SOC'Y PAPERS 1, 21 (1876); John T. Morgan, *Address at the Fifth Annual Meeting of the Southern Historical Society*, 5 S. HIST. SOC'Y PAPERS 1, 10–11, 21–22 (1877); Jefferson Davis, *Address at the Presentation of Army of Tennessee Badge and Certificate of Membership to Ex-President Davis*, 6 S. HIST. SOC'Y PAPERS 163, 169 (1878)).

161. FREDERICK DOUGLASS, FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 625–85 (Philip S. Foner & Yuval Taylor eds., 1999); David W. Blight, *"For Something beyond the*

Reconstruction writing against the Lost Cause and warning Northerners not to accept it for the sake of peace.[162] Unfortunately, Douglass's prediction came true. The Lost Cause became a narrative for Northerners to justify abandoning Reconstruction and leaving the Confederate South to the whims of white Democrats—a process known as Reconciliation.[163] Although Northerners supported Reconstruction in the 1860s, their tolerance waned due to high costs and ongoing conflict.[164] The political discussion shifted from altering the social structure of the South through federal intervention to seeking "peace" and "cordiality" with the Southern states.[165] The merged perception evolved into the Reconciliationist vision.

The Reconciliationist vision presented an alternative narrative of Reconstruction.[166] Reconstruction was characterized as an interruption of normal relations, rather than as a more fundamental shift in the foundations of American federalism.[167] This story is the source of modern federal jurisdictional doctrine's unsupported presumption of parity between state and federal courts as interpreters and enforcers of federal rights. In this sense, the narrative

Battlefield": Frederick Douglass and the Struggle for the Memory of the Civil War, 75 J. AM. HIST. 1156, 1158–60 (1989).

162. Gallagher, *Introduction*, *in* THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY, *supra* note 22, at 2 ("Frederick Douglass labored throughout the postwar decades to combat what he perceived as Northern complicity in spreading Lost Cause arguments.").

163. For discussion of the political and cultural history of reconciliation, see generally PAUL H. BUCK, THE ROAD TO REUNION 1865–1900 (1937); FOSTER, *supra* note 159; CECILIA ELIZABETH O'LEARY, TO DIE FOR: THE PARADOX OF AMERICAN PATRIOTISM (1999); BLIGHT, *supra* note 23; WILLIAM ALAN BLAIR, CITIES OF THE DEAD: CONTESTING THE MEMORY OF THE CIVIL WAR IN THE SOUTH, 1865–1914 (2004); CAROLINE E. JANNEY, REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION (2013).

164. Barreyre, *supra* note 134, at 409–13.

165. *See generally* Robert Cook, *The Quarrel Forgotten?: Toward a Clearer Understanding of Sectional Reconciliation*, 6 J. CIV. WAR ERA 413 (2016) ("Americans had found one another again as brothers and comrades in arms, enemies no longer, generous friends rather, our battles long past, the quarrel forgotten—except that we shall not forget the splendid valour, the manly devotion of the men then arrayed against one another, now grasping hands and smiling into each other's eyes." (quotation omitted)); O'LEARY, *supra* note 167 (detailing the shift from federal efforts to remake Southern social structures toward sectional reconciliation grounded in white supremacy); BLIGHT, *supra* note 23 (arguing that the rigid racial segregation in the South was a relatively recent development that emerged in the late 19th century after Reconstruction, as federal oversight faded and white Southerners imposed white supremacy and Jim Crow laws). Northern leaders convinced themselves that Southern elites would protect Black Americans' rights in the South once Northern soldiers left. This was because of the class division and need for votes to protect elite status in the South from populist movements. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 52–53 (1955) (pointing out that Rutherford B. Hayes's advisors believed that Northern elites would protect the rights of freedmen in the South if Northern soldiers were removed).

166. BLIGHT, *supra* note 23, at 2.

167. WOODWARD, *supra* note 165, at 14; COLUMBIALEARN, *MOOC | The Dunning School | The Civil War and Reconstruction, 1865–1890 | 3.1.2*, at 1:34–4:34 (YouTube, Mar. 30, 2015), https://www.youtube.com/watch?v=2p1_OetQu2w (on file with the North Carolina Law Review).

delegitimized the Reconstruction era Congress while promoting a false narrative of state-federal comity.

The Reconciliationist vision's academic and cultural influence reached its peak in the 1880's and 90's through the development of the so-called Dunning School. Made up of historians at Columbia University, this school of thought undertook the first major academic works on the Civil War and Reconstruction. These historians, led by John W. Burgess and William A. Dunning, purported to reexamine Reconstruction from a supposedly objective perspective.[168] Their students, often Southerners migrating north, studied Reconstruction in each of the Confederate states.[169] While claiming an objective and scientific approach to Reconstruction, the Dunning School historians produced scholarly works that supported the historical tenets of the "Reconciliationist" myth—namely, the evils of Reconstruction and the moral and political legitimacy of the post-war South.[170]

While the Dunning School included many scholars, here we focus on two historians whose scholarship typified the Reconciliationist movement: Burgess and Dunning. Burgess, a political theorist and historian, was born into a Kentucky slaveholding Unionist family.[171] Despite opposing Southern secession, Burgess idolized the Antebellum South.[172] In *The Middle Period*, the first of three volumes on the Civil War, Burgess presented a portrait of an idyllic South which reflected the Lost Cause narrative of chivalry and nobility.[173] In his view, the South's primary fault was a strategic one: its decision to secede, which ultimately caused the conflict.

Despite criticizing Southern secession, Burgess heartily criticized Reconstruction in his third volume, *Reconstruction and the Constitution*. While blaming the South for seceding, he claimed that after the war, "not half of the whites of the South entertained, at that moment, disloyal purposes or feelings."[174] From Burgess's perspective, Radical Republicans seized power after Lincoln's death and adopted a tyrannical form of Reconstruction.[175] This

168. Smith, *supra* note 129, at 6 (stating that for most of the first half of the twentieth century, the Dunning School was idolized as proper history and methodology).

169. Smith, *supra* note 129, at 1.

170. *See* BLIGHT, *supra* note 23, at 358 (discussing the work of James Ford Rhodes, a Dunning School historian); Beale, *supra* note 24, at 808–10 (outlining the works of several Dunning School historians).

171. Smith, *supra* note 129, at 1.

172. Shepherd W. McKinley, *John W. Burgess, Godfather of the Dunning School*, *in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 49, 49–50 (John David Smith & J. Vincent Lowery eds., 2013).

173. JOHN WILLIAM BURGESS, THE MIDDLE PERIOD, 1817–1858, at 276–77 (1897) [hereinafter BURGESS, MIDDLE PERIOD].

174. JOHN WILLIAM BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866–1876, at 12 (1902).

175. *Id.* at 89.

military enforcement of civil rights, according to Burgess, only served to antagonize the South and oppress whites.[176]

Burgess also argued that by extending the right to vote to Black Americans through the enactment of the Fifteenth Amendment, the North inflicted such a grave injustice on the South that white Democrats had no choice but to resist.[177] According to Burgess, Reconstruction led to "a punishment so far in excess of the crime that it extinguished every sense of culpability on the part of those whom it sought to convict and convert."[178] The rise of Jim Crow segregation was a consequence of "the great mistakes of the [Radical] Republican party in its choice of means and measures in Reconstruction."[179] Like the ideas in which the *Younger* Court would eventually ground its jurisdictional doctrine of Our Federalism, Burgess described political centralization as the root of unnecessary conflict. Trust in local rule needed to prevail, according to this narrative, or further conflict would arise.

Like Burgess, William A. Dunning, a New Jersey-born political theorist and historian, promoted a narrative of Northern overreaction. Dunning represented a shift in Northern views of the Civil War and Reconstruction.[180] Like Burgess, Dunning viewed the members of the Reconstruction-era Congress as seekers of political power rather than as protectors of civil rights.[181] He contended that the South had been prepared to accept the rights of freedmen, arguing:

> It was, indeed, contended by the more violent radicals in the debates on reconstruction that the actual conditions in the South were intolerable, and that military force was needed for the mere maintenance of peace, apart from political reorganization. But the weight of evidence pointed to the contrary. The reports of the army commanders and of the commissioners of the Freedmen's Bureau for 1866 were almost

176. *Id.* Burgess maintained that the Freedmen's Bureau

> kept the negroes in a state of idleness, beggary and unrest, and made them a constant danger to the life and property of the whites; and their veritable tyranny over the white population did more to destroy Union sentiment among the whites and make them regard the United States Government in a hostile light than anything which had happened during the whole course of the rebellion.

Id.

177. McKinley, *supra* note 172, at 63.

178. BURGESS, MIDDLE PERIOD, *supra* note 173, at 133–34.

179. *Id.* at vii–viii.

180. Smith, *supra* note 129, at 25.

181. James S. Humphreys, *William Archibald Dunning, Flawed Colossus of American Letters*, *in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 77, 86 (John David Smith & J. Vincent Lowery eds., 2013) (explaining that Dunning, in *Reconstruction*, portrayed Republican leaders like Thaddeus Stevens and Edwin Stanton as politicians who capitalized on the unwillingness of the South to ratify the Fourteenth Amendment and using that unwillingness to help them seize power).

> uniformly of a reassuring tone. Abuse of freedmen and Union men was not only becoming less common, but was also receiving adequate attention from the ordinary state courts.[182]

Military reconstruction, according to Dunning, was unnecessary. Hence, Reconstruction merely "created the impression of a very real tyranny."[183] Dunning reasoned that the Ku Klux Klan and other insurgent groups understandably resisted this tyranny.[184] While Dunning condemned such insurgent violence, he placed the blame for its existence on the Radical Republicans, stating that "[t]housands of respectable whites, who viewed the Ku Klux outrages with horror, turned with equal horror from the projects of the governments to quell the disturbances by means of a negro militia."[185]

Dunning also emphasized the incompetence and corruption of the military Reconstruction-era governments in the South. In his book *Reconstruction: Political and Economic, 1865–1877*, he described the Northern Republicans and Black Democrats in the South as an "ever-present source of irritation [that] came as an aggravation of the evils which by 1872 had in many places become intolerable, arising from the inefficiency, extravagance, and corruption of the radical southern state governments."[186]

Dunning reinforced his conclusion that the Reconstruction state governments were a source of the failure to reform the South and protect Black Americans' rights, writing:

> Two years of supremacy in those states which had been restored in 1868 had revealed unmistakable evidences of moral and political weakness in the governments. The personnel of the party was declining in character through the return to the North of the more substantial of the carpet-baggers, who found Southern conditions, both social and industrial, far from what they had anticipated, and through the very frequent instances in which the "scalawags" ran to open disgrace. Along with this deterioration in the white element of the party, the negroes who rose to prominence and leadership were very frequently of a type which acquired and practiced the tricks and knavery rather than the useful arts of politics,

182. WILLIAM ARCHIBALD DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS 139 (1904) [hereinafter DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION].

183. *Id.* at 146.

184. *Id.*

185. *Id.* at 356–57.

186. WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC 1865–1877, at 204 (1907) [hereinafter DUNNING, RECONSTRUCTION].

> and the vicious courses of these negroes strongly confirmed the prejudices of the whites.[187]

Dunning further described the policies of late Reconstruction-era Congress as poorly conceived. In discussing the 1875 Civil Rights Act, he asserted that it "was not regarded by the most thoughtful Republicans as a very judicious piece of legislation."[188] It was this ill-considered policy and radical reaction that Dunning attributed to the failure of Reconstruction. At the end of *Essays on the Civil War and Reconstruction and Related Topics*, Dunning claimed:

> But with all the guarantees that the source of every evil was removed, it became obvious enough that the results were not what had been expected. Gradually there emerged again the idea of Jefferson and Clay and Lincoln, which had been hooted and hissed into obscurity during the prevalence of the abolitionist fever. This was that the ultimate root of the trouble in the South had been, not the institution of slavery, but the coexistence in one society of two races so distinct in characteristics as to render coalescence impossible; that slavery had been a modus vivendi through which social life was possible; and that, after its disappearance, its place must be taken by some set of conditions which, if more humane and beneficent in accidents, must in essence express the same fact of racial inequality. The progress in the acceptance of this idea in the North has measured the progress in the South of the undoing of reconstruction. In view of the questions which have been raised by our lately established relations with other races, it seems most improbable that the historian will soon, or ever, have to record a reversal of the conditions which this process has established.[189]

Like Burgess, Dunning blamed the Jim Crow laws on the extension of voting rights to Black Americans. According to both historians, this act sparked an unwarranted backlash from Southern whites. Dunning, for example, hypothesized that if the vote had not been extended, Southern whites would not have oppressed Black Americans.[190] He criticized that "in the frenzy of the wartime public opinion fell into the train of the emotionalists and accepted the teachings of Garrison and Sumner and Phillips, and Chase, that abolition and negro suffrage would remove the last drag on our national progress."[191] This blatantly racist claim became a common thread in the Reconciliationist myth,

187. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION, *supra* note 182, at 355. Historians like William Dunning asserted that enfranchisement of Black Americans was a mistake, justifying the disenfranchisement movement in the South. Woodward, *supra* note 169, at 105.

188. DUNNING, RECONSTRUCTION, *supra* note 186, at 365–66.

189. DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION, *supra* note 182, at 384–85.

190. *Id*.

191. *Id*. at 384.

as historians emphasized the overexpansion of federal power and the rights granted to Black Americans as the source of discord.

Behind Burgess's and Dunning's historical accounts lies a broader socio-political agenda. Burgess and Dunning viewed their works as promoting "national cordiality."[192] In the Author's Preface to his first volume, *The Middle Period, 1817–1858*, Burgess asserted that the "continued misunderstanding between the North and the South is an ever-present menace to the welfare of both sections and of the entire nation."[193] Later, in his third volume, *Reconstruction and the Constitution*, Burgess reiterated the purpose behind his retelling of Reconstruction:

> In my preface to 'The Middle Period' I wrote that the re-establishment of a real national brotherhood between the North and the South could be attained only on the basis of a sincere and genuine acknowledgment by the South that secession was an error as well as a failure. I come now to supplement this contention with the proposition that a corresponding acknowledgment on the part of the North in regard to Reconstruction between 1866 and 1876 is equally necessary. In making this demand, I must not be understood as questioning in the slightest degree the sincerity of the North in the main purpose of the Reconstruction policy of that period. On the other hand, I maintain that that purpose was entirely praiseworthy. It was simply to secure the civil rights of the newly emancipated race, and to re-establish loyal Commonwealths in the South. But there is now little question that erroneous means were chosen.[194]

In Burgess's view, the nation needed to return to a state of peace and respect for local rule. These claims of local court adequacy closely resemble the modern presumption of parity.

Dunning made similar assertions. In *Reconstruction, Political and Economic 1865–1877*, he stated that "few episodes of recorded history more urgently invite thorough analysis and extended reflection than the struggle through which the southern whites, subjugated by adversaries of their own race, thwarted the scheme that threatened permanent subjection to another race."[195] According to Dunning, the Reconstruction-era Congress upset the natural order in the South. Dunning explained, "Grant in 1868 had cried peace, but in his time, with the radicals and carpetbaggers in the saddle, there was no peace; with Hayes peace

192. McKinley, *supra* note 172, at 53, 59.

193. BURGESS, MIDDLE PERIOD, *supra* note 173, at vii.

194. BURGESS, MIDDLE PERIOD, *supra* note 173, at vii.

195. DUNNING, RECONSTRUCTION, *supra* note 186, at xv. For discussion on the role of demonization in history, see Ted Tunnell, *Creating "The Propaganda of History": Southern Editors and the Origins of "Carpetbagger and Scalawag*,*"* 72 J. S. HIST. 789, 808–12 (2006).

came."[196] While he acknowledged that the federal government reigned supreme constitutionally, Dunning highlighted the dangers of such overreach.[197]

Dunning and Burgess both wanted their readers to leave with the firm conviction that national reconciliation and peace were vital to the future of the United States.[198] By crafting a history that blurred the lines between Southern secession and Northern reconstruction, Burgess and Dunning promoted a theory of political comity.[199]

The Reconciliationist vision, represented by the works of Burgess and Dunning, influenced a generation of scholars.[200] Dunning's impact was particularly notable because he promoted the study of history and political science. He led multiple academic organizations, and his students carried forward the mantle of post-Reconstruction scholarship and the Reconciliationist vision.[201] As a result, the Reconciliationist vision shaped both cultural and academic perspectives on the history of the Civil War and Reconstruction. Throughout the late nineteenth and early twentieth centuries, academics and laypeople alike praised the Dunning School and perpetuated the Reconciliationist vision.[202] For example, columnist and author Claude Bowers saw the Dunning School as inspiration for his popular 1929 history of Reconstruction, *The Tragic Era*.[203] This popular book praised the Southern Redeemers while demonizing the Reconstruction Congress.[204] When describing the end of Reconstruction, Bowers proclaimed that the "reign of the carpetbagger was over. . . . South Carolinians resumed the possession of their government and the direction of their destiny."[205]

196. DUNNING, RECONSTRUCTION, *supra* note 186, at 341.

197. Humphreys, *supra* note 181, at 84.

198. McKinley, *supra* note 172, at 61–62 (stating that Burgess saw national reconciliation as essential and radical reconstruction as tearing apart the nation).

199. Foner, *The Supreme Court and Reconstruction*, *supra* note 19, at 1591–94.

200. *See, e.g.*, Smith, *supra* note 129, at 6.

201. For examples of Dunning's students who wrote dissertations on Reconstruction in specific states in the South, see generally James Wilford Garner, *Reconstruction in Mississippi* (1901); Walter Lynwood Fleming, *Civil War and Reconstruction in Alabama* (1905); Joseph Grégoire de Roulhac Hamilton, *Civil War and Reconstruction in North Carolina* (1914); Clara Mildred Thompson, *Reconstruction in Georgia: Economic, Social, Political*, 1865–72 (1915); Humphreys, *supra* note 181, at 91.

202. Smith, *supra* note 129, at 6 (claiming that for most of the first half of the 20th century, the Dunning school was idolized as proper history and methodology).

203. Bowers claimed the government engaged in a "reign of terror, with wholesale arrests, businesses all but suspended, and every citizen at the mercy of a dishonest enemy with a private grudge." CLAUDE G. BOWERS, THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN 345 (The Literary Guild of America, 1929).

204. *Id.* at v–vi, 371; Beale, *supra* note 24, at 807–08. Bowers claimed that "[t]he trials were mockeries of justice, the United States Circuit Court at Columbia a shambles that would have shamed Jeffreys or Lord Clare. The juries were defiantly packed with partisans, and an astonishing number of Radical politicians became jurors." BOWERS, *supra* note 203, at 345.

205. BOWERS, *supra* note 203, at 540.

Bowers is notable because his book reached a broad audience and shaped many Americans' views of Reconstruction.[206] However, the Dunning School narrative also influenced popular films such as *Birth of a Nation* and *Gone with the Wind*.[207] Both films depicted the Antebellum South in a positive light and applauded the violent resistance to Reconstruction as a noble return to peace.[208] It was not until the 1930s and 1940s that a genuine historical counternarrative to the Dunning School gained traction, with W.E.B. Du Bois's book, *Black Reconstruction*.[209] Despite this counternarrative, the Dunning School's impact persisted in the minds of society throughout much of the twentieth century. It was during the years in which the Myth of the Lost Cause dominated both scholarly and popular thought that all of the now-controversial statues of Confederate generals and political figures were built throughout the South.[210]

C. *Solving the Puzzle*

At this point, a reader might respond, "this is all well and good, but what does the national attitude towards the South, the Civil War, and Reconstruction have to do with the esoteric law of federal jurisdiction?" Once we examine the foundational Supreme Court precedents upon which the *Younger* Court relied in shaping the jurisdictional doctrine of Our Federalism—all decided during the height of the Reconciliationist vision—the answer to that question becomes all too clear.

The simple explanation is this: (1) The precedents from the early twentieth century relied upon in *Younger* had all been decided in an historical ether of the Lost Cause myth; (2) that myth falsely exonerated the South for its role in the horrors of slavery and the Civil War; (3) the myth promoted the idea of abandoning the principle of strong federal power embodied in the now-condemned Reconstruction era in favor of a return to states' rights and local rule; (4) any return to states' rights and local rule would logically lead to a dramatic reduction in the role of all federal institutions—including, primarily, the federal courts—in policing state actions; and finally (5) essential to acceptance of this idea was the corresponding assumption—whether or not

206. Smith, *supra* note 129, at 2.

207. *Id.*

208. *Id.*

209. W. E. BURGHARDT DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1935); Claire Parfait, *Rewriting History: The Publication of W.E.B. Du Bois's* Black Reconstruction in America (1935), 12 BOOK HIST. 266, 270–72 (2009); Smith, *supra* note 133, at 30–31 (stating that Du Bois was the most important early writer, but not the first). Subsequently, in the 1940s and 1950s, historians like Howard Beale, Kenneth Stampp, and C. Vann Woodward published significant books and articles that refuted the prevailing narrative surrounding Reconstruction. *See, e.g.*, Beale, *supra* note 24, at 808; FOSTER, *supra* note 159, at 180–91; STAMPP, *supra* note 158, at 268–69; WOODWARD, *supra* note 169, at 13–15.

210. William Lees, *The Problem with "Confederate" Monuments on Our Heritage Landscape*, 102 SOC. SCI. Q. 1002, 1005–06 (2021).

actually grounded in reality—that state courts were to be deemed the equal of the federal courts, thereby rendering unnecessary the intrusion of federal courts into state socio-political affairs. Thus, by accepting the Dunning School's claims regarding the illegitimacy of the Reconstruction Era Congress, judicial doctrines interpreted federal laws narrowly in favor of reconciliation and comity, aligning with the arguments of Burgess and Dunning.[211]

In Part IV, we explain this logical intersection in some detail. But at that point, a further question may arise: why is that a problem? The nation's attitude changed, so the attitude of the Supreme Court changed simultaneously. We will also explore that issue in some detail in a later discussion.[212] But briefly, the response to this second question is twofold. First, the reason that it is called "the Myth of the Lost Cause"[213] is that it is just that—a myth. To suggest that the empirical foundations of the Reconciliationist position are questionable would be a gross understatement. To be sure, one can reasonably raise questions as to whether Reconstruction was plagued by excesses. But it certainly does not follow that the South's behavior was anything less than immoral and reprehensible in its maintenance and militant defense of the institution of slavery, its treatment of slaves, and its repression of Black Americans well into the twentieth century.

Nor does it follow that the very state courts that had been the subject of serious federal mistrust since the nation's beginning[214] had magically been transformed into the equal of federal courts in either their enthusiasm for or expertise in implementing federal policies or enforcing federal rights. At the very least, the burden of proof would logically have to be placed on the party positing such a dramatic transformation. But since those who adopted the position of parity never acknowledged the historical reality of federal conflicts with state courts, they never even attempted to empirically establish that a change had taken place.

Moreover, it is necessary to view this change in attitude towards state courts through the lens of separation of powers. Jurisdictional law is fashioned, in the first instance, by Congress.[215] This is particularly true when Congress fashions federal jurisdiction as a means of implementing policy decisions embodied in substantive legislation. And in that vein, it is vitally important to keep in mind one key fact: the current legislative jurisdictional scheme over the

211. Foner, *The Supreme Court and Reconstruction*, *supra* note 19, at 1589–90.

212. *See* discussion *infra* Part V.

213. *See* sources cited in *supra* Part III.

214. *See supra* Section II.D.

215. U.S. CONST. art. III, § 1; R.R. Co. v. Mississippi, 102 U.S. 135, 141 (1880) ("[T]he judicial power of the United States is to be exercised . . . as the wisdom of Congress may direct . . . ."); *see also* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1524 (2020); Bowles v. Russell, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

judicial enforcement of federal rights was fashioned by the Congress of 1871;[216] no Congress since that time has made any effort to alter the jurisdictional choices of that Congress. Thus, in shaping modern doctrines of federal jurisdiction, the Supreme Court is obligated, as a foundational matter of constitutional democracy, to interpret and enforce the legislative choices made by that Congress. And no one—not even the Supreme Court itself—has ever questioned the purposes and goals of that Congress in the enactment of the 1871 legislation. The driving force of that statute was congressional mistrust of state courts.[217] Thus, it is not the Supreme Court's role in our democratic system to categorically reject that choice.

IV. THE RECONCILIATIONIST VISION BECOMES OUR FEDERALISM

Leading historians have long recognized that the Supreme Court dramatically altered its interpretation of substantive federal rights in light of the transformation of American history by widespread acceptance of the Lost Cause myth.[218] However, this process of integrating the precepts of the Lost Cause myth into what eventually became the doctrine of Our Federalism took decades to develop. Oftentimes, judges tried to ground Our Federalism in the traditional precepts of equitable jurisdiction, but over time, the Court increasingly ignored Congress's unambiguous assumptions in favor of an unsupported assumption of state-federal judicial parity.

This Part will detail the slow adoption of the Reconciliationist vision, which ultimately led the Supreme Court to invent Our Federalism. Then, it will refute the claim that Our Federalism is rooted in traditional precepts of equitable jurisdiction, illustrating that such a doctrine is justified only by the adoption of the Reconciliationist vision.

A. *Inventing Our Federalism*

The first instance of the influence of the Lost Cause myth's false narrative on federal jurisdiction came well before the scholarship of the Dunning School. In its 1876 decision, *Claflin v. Houseman*,[219] the Court held that in the absence

216. *See* discussion *supra* Part II.

217. *See* discussion *supra* Part II.

218. Historian Eric Foner points out in *The Supreme Court and The History of Reconstruction—and Vice Versa* that the Supreme Court's jurisprudence embraced the delegitimized perception of the Reconstruction era when adjudicating substantive rights established during that time. Foner, *The Supreme Court and Reconstruction*, *supra* note 19, at 1593–94; *see also* Ryan D. Shaffer, *Jurisprudence of Retreat: The Supreme Court's (Continued) Misreading of Reconstruction*, 99 N.Y.U. L. REV. 1856, 1858 (2024).

219. Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction.").

of either an express direction by Congress or a showing of extreme circumstances, state courts would be deemed to possess concurrent jurisdiction over federal claims.[220] The result of this presumption of concurrent jurisdiction was that the scales were tilted in favor of state court jurisdiction over federal claims.

One might find this conclusion to be surprising, in light of its seeming inconsistency with the extreme dual federalism approach adopted only a few years earlier in *Tarble's Case*, growing out of a surrounding ether of significant distrust of state courts.[221] On the other hand, we should keep in mind that the only impact of *Claflin* would be that a party seeking to enforce a federal right would have *the option* of going to either state or federal court. In that sense, the case in no way justifies the further step, embodied in *Younger*'s shaping of Our Federalism, of *prohibiting* would-be federal court plaintiffs from exercising the option to have their constitutional claims adjudicated in the federal courts rather than in the state courts.

Although *Claflin* represented a shift in the Court's position on the issue of parity between state and federal courts, it was not until the twentieth century that the Court and constitutional scholars began to write as if the long history of federal mistrust of state courts had never existed. In the early twentieth century, constitutional scholars and jurists were receiving their training at the height of the Dunning School's academic dominance. For example, prominent constitutional scholars such as Felix Frankfurter began to write about federal overreach.[222] Likewise, *Younger*'s author, Justice Hugo Black, hailed from Alabama politics defined by the Lost Cause myth.[223] He was even a member of the Ku Klux Klan,[224] though later he became a strong advocate of civil rights. The thoughts promoted by the Dunning School, Claude Bowers, and others who produced sanitized versions of Southern behavior began to appear in Supreme Court decisions.

220. Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 359–60 (1976).

221. *See* discussion *supra* Section II.D.

222. *See, e.g.*, FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927) (analyzing how procedural law has shaped substantive judicial power and the American legal system, and the unique power of the United States Supreme Court); FELIX FRANKFURTER & WILBER G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (1931) (examining the boundaries and importance of federal jurisdiction in the American legal system). For further discussion on Frankfurter's influence in shaping federal abstention, see Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737, 1745–55 (2020); Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 701–02 (1993).

223. *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 143 (1994) (discussing the appeal of Claude Bowers's *Tragic Era* and Justice Black's acceptance of the Dunning School political perspective).

224. *Id.* at 96–97.

The doctrine of Our Federalism, as fashioned in *Younger*, builds squarely on precedents from the 1920s through the 1940s. The Court employed these cases to establish that a state criminal defendant does not suffer irreparable injury by being relegated to raising his constitutional defense in state court because the state court offers an adequate remedy at law.

The oldest case *Younger* cites, *Fenner v. Boykin*, begins to echo the historical myths in its conclusions, if not its words.[225] In *Fenner*, two plaintiffs sued for injunctive relief against a Georgia law prohibiting the "purchase or sale, for future delivery, of designated commodities."[226] The plaintiffs claimed that the law interfered with interstate commerce and therefore violated their constitutional rights.[227] A three-judge panel in federal district court found that the law did not violate the Constitution and that a preliminary injunction was not warranted.[228] While the Supreme Court agreed with the panel's finding that the law was constitutional, it held that the plaintiffs should "first set up and rely upon their defense in the state courts, even though this involves a challenge to the validity of some statute, unless . . . this course would not afford adequate protection."[229] The *Fenner* Court held that permitting federal judicial challenges to state criminal prosecutions would give rise to an "intolerable condition."[230] While not explicitly pointing to the Reconciliationist vision, the *Fenner* Court, at least implicitly, operated under an assumption of state and federal judicial parity—the very assumption that the Congress which enacted the substantive and jurisdictional laws in question had expressly rejected. The only conceivable support for such a dramatic move away from the well-known mistrust of state courts of the eighteenth and early nineteenth centuries derived from the false conclusions of the scholars of the Reconciliationist vision and the Dunning School.

The next case *Younger* cited was the 1935 decision in *Spielman Motor Sales Co. v. Dodge*.[231] In that case, a car dealer in New York City sought an injunction to prevent the District Attorney from enforcing a federal fair competition law

225. For earlier cases, which the cases cited by *Younger* build on, see Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500 (1925) (assuming that equity will not interfere with a state law criminalizing the sale of meat falsely represented as Kosher); Packard v. Banton, 264 U.S. 140, 143 (1924) (asserting that equity will not restrain criminal prosecutions absent an infringement on property rights under the Fourteenth Amendment); Davis & Farnum Mfg. Co. v. City of L.A., 189 U.S. 207, 217, 220–21 (1903) (rejecting an injunction sought by a gas company on the grounds that suits in state court sufficed to protect these rights); *In re* Sawyer, 124 U.S. 200, 209–11 (1888) (positing that the courts of equity can only enjoin criminal proceedings to protect property rights unless expanded by express statute).

226. 271 U.S. 240, 242–43 (1926).

227. *Id.* at 243.

228. *Id.*

229. *Id.* at 244.

230. *Id.*

231. 295 U.S. 89 (1935).

enacted during the New Deal.[232] The plaintiff claimed that the action constituted an unconstitutional delegation of legislative power.[233] The Court rejected these claims as a justification for an injunction.[234] Restating the general test for equity, it found no irreparable injury from the contemplated prosecution.[235] The Court concluded that "the case presented by the bill was the ordinary one of a criminal prosecution which would afford an appropriate opportunity for the assertion of appellant's rights."[236]

The *Spielman* Court further built on *Fenner.* It assumed that state courts will provide an adequate remedy to adjudicate constitutionality. If that remedy fails, the possibility of Supreme Court review provides sufficient protection, unless the injury is great and immediate. As a result, the focus of enjoining a state court prosecution is on irreparable harm, but not on the adequacy of the state forum in adjudicating the original act. The Court thus proceeds on the assumption that presuming parity is the norm, rather than an individualized, fact-based inquiry.

Further reinforcing the presumption of parity is the 1941 case, *Beal v. Missouri Pacific Railroad Corp*.[237] In *Beal*, the plaintiffs challenged a Nebraska law that imposed requirements on passenger train crews.[238] Nebraska prosecutors threatened the plaintiffs, who subsequently sued in federal court, arguing that the state law was inapplicable.[239] Unlike other cases, the plaintiffs did not allege constitutional violations, and jurisdiction was asserted on the basis of diversity.[240] The Court determined there was no basis to grant an injunction under the traditional tests of equity, such as irreparable harm.[241]

While presenting a fact pattern different from *Younger*, the *Beal* Court still adopted the Reconciliationist vision to justify limiting equitable relief. Specifically, the Court stated that in the "exercise of sound discretion . . . scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld."[242]

The final decision relied upon in *Younger* was *Douglas v. City of Jeannette*,[243] where the Court adopted an even more explicit Reconciliationist version of

232. *Id.* at 91.
233. *Id.*
234. *Id.* at 95–96.
235. *Id.*
236. *Id.* at 96.
237. 312 U.S. 45 (1941).
238. *Id.* at 46.
239. *Id.* at 47–48.
240. *Id.* at 47.
241. *Id.* at 51.
242. *Id.* at 50.
243. 319 U.S. 157 (1943).

history. A group of Jehovah's Witnesses challenged the constitutionality of an ordinance of the City of Jeannette prohibiting house-to-house solicitation.[244] The City had previously prosecuted the plaintiffs for violating the ordinance.[245] The Court held that the federal courts were not entitled to issue injunctive relief.[246] In reaching this conclusion, the Court merged the inquiries of equity and federalism: state courts prosecute most crimes, and "courts of equity in exercise of their discretionary powers should conform to this policy."[247] The Court, then, was holding that the only lower court in which the plaintiffs could obtain equitable relief was the state courts.[248]

To this point, we have been able to infer the Court's adoption of Reconciliationist vision principles indirectly: The Reconciliationist vision, in clear contradiction to the findings of the Congress of 1871, posited that local rule was preferable to national rule, and therefore, state courts must be trusted to protect federal rights. The Court, by categorically—if implicitly—assuming the adequacy of the state courts as enforcers of federal rights, despite the clear conclusion to the contrary made by the Congress which enacted the Civil Rights Act of 1871, was inescapably accepting the false narrative of the Dunning School and the myth of the Lost Cause.

As persuasive as this logic is, it is concededly not a "smoking gun." However, in a slightly later decision, we find that missing element. The most explicit importation of the Reconciliationist vision concerning the presumption of judicial parity is found in the Court's decision in *Stefanelli v. Minard*.[249] Although *Younger* does not cite this case directly, *Mitchum* recognized its role in supporting *Younger*'s principles of equity, comity, and federalism.[250]

In *Stefanelli*, petitioners sought a federal injunction under Section 1983 to prevent the introduction of evidence in state court allegedly gathered through an unreasonable search or seizure.[251] The Court denied relief.[252] Writing for the majority, Justice Frankfurter reasoned:

> [E]ven if the power to grant the relief here sought may fairly and constitutionally be derived from . . . the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion

244. *Id.* at 159.
245. *Id.* at 160.
246. *Id.* at 164–66 (citing Hague v. C.I.O., 307 U.S. 496 (1939)).
247. *Id.* at 162–63.
248. *See id.*
249. 342 U.S. 117 (1951).
250. *See* Mitchum v. Foster, 407 U.S. 225, 243 (1972).
251. *Stefanelli*, 342 U.S. at 117–18.
252. *Id.* at 120.

when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power.[253]

The majority emphasized that "considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States."[254] In even more explicit terms than the prior cases, Frankfurter recognized that Congress permitted equitable relief against the state court, but refused to provide such relief on the grounds of state interests.[255]

Unlike in the previous cases, the majority acknowledged Congress's intent in enacting the Civil Rights Act of 1871 but openly disregarded it.[256] Justice Frankfurter claimed that the balance between "federal equitable power and State administration of its own law, has been a[] historic concern of congressional enactment."[257] However, Justice Frankfurter found that this balance was not governed by "explicit congressional requirement," but was "reflected in decisions" of the Supreme Court.[258] Frankfurter thus claimed that the Civil Rights Act of 1871 "was not to be used to centralize power so as to upset the federal system."[259]

The Court rejected Congress's extension of jurisdiction because the Reconstruction Congress had "loosely and blindly drafted" the Civil Rights Act of 1871.[260] In support of his assertion, Justice Frankfurter pointed to two earlier decisions, *United States v. Williams*[261] and *Collins v. Hardyman*.[262] These cases, which interpreted other Reconstruction-era legislation, cited directly to Dunning School authors to support the conclusion that Congress was driven by political fervor rather than rational decision-making.[263] Justice Jackson, writing for the majority in *Collins*, described the Civil Rights Act of 1871 as "among the last of the reconstruction legislation to be based on the 'conquered province' theory which prevailed in Congress for a period following the Civil War."[264]

253. *Id*.

254. *Id.*

255. *See id.*

256. *Id.* at 121.

257. *Id.* at 120.

258. *Id.* at 121.

259. *Id.* (quoting Collins v. Hardyman, 341 U.S. 651, 658 (1951)).

260. *Id.*

261. 341 U.S. 70, 74 (1951).

262. *Stefanelli*, 342 U.S. at 121 n.3 (citing United States v. Williams, 341 U.S. 70, 74 (1951); *Collins*, 341 U.S. at 657).

263. *Collins*, 341 U.S. at 657; *Williams*, 341 U.S. at 74–75; *see also* Screws v. United States, 325 U.S. 91, 140–41 (1945) (Roberts, J., dissenting) (citing Civil Rights Cases, 109 U.S. 3, as an illustration of the illegitimacy of the Reconstruction era laws).

264. *Collins*, 341 U.S. at 656. Jackson further dismissed the Act because it "was passed by a partisan vote in a highly inflamed atmosphere" and "[i]t was preceded by spirited debate which pointed out its

Similarly, in *Williams*, the Court asserted that "[s]trong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues."[265]

These two decisions thus stand as explicit adoptions of the Reconciliationist vision, apparently leading the Court to believe that it somehow possessed the constitutional authority simply to disregard the controlling congressional legislation. The Court appeared to be saying that while the Congress of 1871 did not trust state courts, it was wrong in doing so. Ignoring the long history of federal mistrust of state courts, the Court depicted the 1871 Congress as a politically driven outlier. However, the outlier was the Court, adopting for the first time a wholly unsupported view of state and federal court parity, on the basis of the highly questionable writings of the scholars of the Dunning School and in direct contradiction of congressional purpose and directive.

These cases illustrate the Court's increasing acceptance of the Reconciliationist vision in the years prior to *Younger*'s formal adoption of the doctrine of Our Federalism. The Court began with unsupported assertions of equitable principles, but ultimately explicitly disregarded Congress's directive.[266] This logic echoes Burgess's and Dunning's claims that the Reconstruction Era Congress overstepped its traditional authority.[267] In each case cited, the Court adheres to the original concepts of equity dating back to the English Court of Chancery, even though that law was shaped in the absence of a federal system, making its use the equivalent of inserting a square peg into

grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction." *Id.* at 657. If this rhetoric does not reflect the Dunning School's Reconciliationist vision, Jackson supports this assertion by citing Claude Bowers's *The Tragic Era*. *Id.* at 657 n.8.

265. *Williams*, 341 U.S. at 74–75 ("The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues. The sections before us are no exception. Although enacted together, they were proposed by different sponsors and hastily adopted. They received little attention in debate. While the discussion of the bill as a whole fills about 100 pages of the Congressional Globe, only two or three related to § 6, and these are in good part a record of complaint that the section was inadequately considered or understood.").

266. The arguments of *Younger* are rooted in a pre-merger conception of courts of equity and their limited jurisdiction. But as Professor Kellen Funk's article, *Equity's Federalism*, explains, the Reconstruction Congress rejected the separation of courts of law and equity. *See* Funk, *Equity's Federalism*, *supra* note 11, at 2073–77. According to Professor Funk, the Reconstruction-era Congress intentionally merged law and equity still through acts like Civil Rights Removal and the Civil Rights Act of 1871 (Section 1983) to give federal courts greater authority to protect federal rights. *Id.* at 2073–75. Afterwards, a federal court could both hear a legal claim and issue injunctive relief, hence its jurisdiction to hear legal claims seeking equitable relief did not rely on traditional equitable jurisdiction. *Id.* at 2075–76.

267. *See supra* Section III.C.

a round hole.[268] This revival of English historical practice was in accord with what Burgess and Dunning advocated: a return to the pre-Reconstruction Era's minimal federal power.[269]

B. *History, Lies, and Logic: The Transparent Flaws of Our Federalism*

The foundational problem with the doctrine of Our Federalism is its magical erasure of the very history that had led Congress to enact the key federal civil rights statute in the first place. It was the false narrative of the Reconciliationist vision that, one way or another, led to the doctrine's creation.

Indeed, the Court's implicit reliance on the false premises of the Reconciliationist vision led it to adopt a form of logically incoherent reasoning. In support of the creation of the doctrine of Our Federalism, Justice Black reasoned as follows:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[270]

Adding to this reasoning the Court's assumption that state courts must be deemed the equal of federal courts as protectors of federal rights, the logical inconsistency becomes obvious. If it is true that state courts are fungible with federal courts, then why would federal court abdication in favor of state court adjudication lead to any different result in the resolution of the constitutional issue? Presumably, the very essence of parity is that the two judicial systems would reach the very same conclusion on the constitutional issue. But if that is true, then how does federal court abdication in favor of state court resolution allow "the States and their institutions . . . to perform their separate functions in their separate ways"?[271]

The Court's assumption appears to be that the state court will *not* enforce federal constitutional rights with the same vigor as federal courts; only in that way will the doctrine achieve its goal of enabling states to "perform their separate functions in their separate ways."[272] If both the federal and state courts

268. *See* Funk, *Equity's Federalism*, *supra* note 11, at 2079–80 (noting the distinctions between the role of courts of equity in England and the United States).

269. *See* discussion *supra* Section III.B.

270. Younger v. Harris, 401 U.S. 37, 44 (1970).

271. *Id.*

272. *Id.*

reach the same conclusion about the constitutionality of state action, then there is no reason to believe that having federal courts abdicate in favor of state courts will enable the states to exercise any more freedom of action than they would have had if the suit raising the federal constitutional issue had remained in federal court. However, if—as the Court seems necessarily to imply—having the federal constitutional issue resolved in state rather than federal court will result in a decision providing the states more freedom of operation, then the Court is necessarily conceding that the two judicial systems are not in parity.

The result of this Alice-in-Wonderland reasoning amounts to simple nonsense: Both premises cannot logically coexist. It is this kind of incoherence that characterizes the Reconciliationist vision because the myth requires one to accept a factual premise that even the myth's creators must have known was inaccurate—namely, that state courts can be counted on to provide a forum for the enforcement of federal rights equal to the one provided by the federal courts. The inescapable conclusion is that the Reconciliationist vision was built on a lie about the reality of judicial parity. Thus, the *Younger* Court's concept of "comity" was nothing more than a historical myth.

As we demonstrated early in this Article,[273] the history of our nation was never characterized by "comity" between the state courts and the federal government. Rather, it was characterized by tensions, mistrust, and hostility.[274] These tensions were quite probably inevitable as a political matter, but they also may well have been consistent with the Framers' goals of protecting democracy against the onset of tyranny. Only by a means of the maintenance of a mutual mistrust between governmental entities—whether within the federal government itself or within the broader federal system—can we prevent any single "faction" from assuming power.[275]

V. OUR FEDERALISM'S INCONSISTENCY AND SEPARATION OF POWERS: JURISDICTION AS STATUTORY INTERPRETATION

To this point, we have steadfastly maintained that the doctrine of Our Federalism is inconsistent with both the text and unambiguous purpose of the Civil Rights Act of 1871. The doctrine cannot be justified as merely an interpretation of the statute's provision of equitable relief, for four reasons.

First, the doctrine of Our Federalism represents virtually the antithesis of the concept of equitable relief as it has been traditionally understood. While the concept of equity is traditionally characterized by case-by-case flexibility, the doctrine of Our Federalism effectively ties the hands of the judge in the

273. *See* discussion *supra* Part II.

274. *Id.*

275. *See generally* THE FEDERALIST NO. 10 (James Madison) (arguing that the best way to deal with the danger of factions is the creation of more factions).

individual suit by imposing a virtually rigid prohibition against the issuance of equitable relief, regardless of the specific facts.

Second, the doctrine seeks to weaponize the concept of equity as a means of categorically rejecting the foundational legislative choice made by the Congress that enacted the statute: Congress's springboard for taking legislative action was its judgment that state courts could not be trusted to protect federal rights. In contrast, the supposed equitable underpinning of Our Federalism is that state courts provide an adequate remedy, regardless of the circumstances of the individual case or the predominance of the federal constitutional issue involved.[276]

Third, the *Younger* Court anachronistically modified traditional concepts of equity with considerations of judicial federalism, in what amounted to a pure historical non sequitur. England, where equity developed, had no federal system.[277] Therefore, it is ahistorical to limit equity because of concerns regarding federalism.

Finally, and most importantly, an unrepresentative court cannot, under the guise of equity, categorically reject the fundamental factual premise that led Congress to enact the law in the first place. It is, in a constitutional democracy, a court's role to *interpret*, not to argue with or reject the foundational tenets of the very statute it is supposedly interpreting.

Scholars might push back, however, by arguing that our approach is far too restrictive of the Court's proper role in construing statutes in general, or at least jurisdictional statutes. These arguments may be grouped into three categories. One is called the "dialogic" approach, which posits that, at least regarding jurisdictional statutes,[278] it is appropriate for the interpreting court to view its role as functioning in an ongoing dialogue with the enacting legislative body. The other is called the "dynamic" approach, which authorizes an interpreting court to account for important changes impacting the factual premises employed by the legislative body when it enacted the statute. Lastly,

276. The *Younger* Court did recognize very limited exceptions: (1) where the challenged statute was clearly unconstitutional in every sentence and every word; and (2) where the state suits were brought for purposes of harassment or in bad faith. 401 U.S. at 53–54. Neither of these exceptions turns on any judgment of the adequacy of the state court remedy. Indeed, one might imagine that the one occasion where Congress might actually be willing to trust the state court's judgment is where the unconstitutionality of the challenged law is beyond question. While exceptions recognized later on are not nearly as illogical, they apply only in very narrow areas. At no point did the Court provide lower federal courts with the freedom of case-by-case judgment traditionally associated with equitable principles.

277. *See* Owen Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1232 (2023).

278. The creator of this model, Professor Barry Friedman, originally employed it solely in the context of jurisdictional statutes. *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 48–49 (1990) [hereinafter Friedman, *A Different Dialogue*]. But later he applied it to the broader issue of general statutory interpretation. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81 (1993).

many argue that *Younger* is merely the application of the principles of the Anti-Injunction Act.

We consider each approach to be not only wrong-headed and unworkable, but also very dangerous to the foundations of American democracy. It is therefore to a critical examination of these claims that we now turn.

A. *The Dialogic Model and Separation of Powers*

Professor Barry Friedman, noting the scholarly debate over congressional power to control federal court jurisdiction, has argued that the controversy should be resolved by recognition of a dialogic approach, in which Congress and the Supreme Court, viewed as partners in shaping federal jurisdiction, engage in a dialogue about the best way to shape federal court jurisdictional authority.[279] In his words,

> [t]he premise of the dialogic approach is that the constitutional text is broad enough to leave unresolved questions of how far Congress may go in controlling federal jurisdiction and, conversely, to what extent the federal courts may resist such control, or assert themselves in defining the scope of federal jurisdiction.[280]

Other scholars have made similar arguments.[281]

If we were to accept Professor Friedman's approach, one might reasonably argue that the doctrine of Our Federalism, while inconsistent with congressional directives, simply represents an application of his dialogic model. Under this model, if Congress disagreed with Our Federalism, then it could pass new legislation to overturn the Court's current doctrine. But acceptance of this model would represent a disastrous and unworkable alteration of well-established practice—a practice that is clearly dictated by core principles of American democracy.

Although it is true that there exists scholarly debate over the scope of congressional power to control federal jurisdiction, as a doctrinal matter there exists no doubt that federal jurisdiction is determined by congressional statute, which, absent a finding of unconstitutionality, the Supreme Court has no power to ignore. But equally as troubling is the practical incoherence that infects the very premise of the dialogic model.

The concept of a *dialogue* necessarily assumes some sort of give and take between the participants. But that is certainly not what happens between Congress and the Court. The Court never reaches the issue of its belief in the

279. Friedman, *A Different Dialogue*, *supra* note 278, at 3.

280. *Id.* at 48.

281. *See, e.g.*, Jack M. Beerman, *Federal Court Self-Preservation and Terri Schiavo*, 54 BUFF. L. REV. 553, 564–65 (2006); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1519–22 (1987).

need for modification until Congress has gone through a detailed and demanding process of review, debate, and vote. Once the statute is enacted, *there is no dialogue*. Were Congress to disagree with the Court's modification of its legislative choice, it would have to overcome the substantial inertia to legislative action and enact an entirely new law—one that could once again be "modified" by the Court as part of the so-called "dialogic" process. What Professor Friedman calls a dialogue is in reality an exercise by an unrepresentative, unaccountable Supreme Court of a veto power over legislative choices made by the most democratic branch of the federal government.[282]

It is in the context of civil rights jurisdiction, however, that the dialogic model is most pathological to American democracy. Unlike more traditional categories of federal jurisdiction, such as diversity and federal question, civil rights jurisdiction is inherently intertwined with the substantive congressional policy choice to have federal courts protect specific federal rights. Congress is elected to make fundamental social policy choices that fall within its constitutional powers. But Congress, of course, has no way—either practically or constitutionally—to enforce its own substantive policy decisions. If the unelected Supreme Court is empowered to overrule those congressional decisions, not because those choices are unconstitutional but rather because the Court simply disagrees with them, then we no longer have a representative democracy.

That is exactly what the doctrine of Our Federalism represents: The Congress which enacted the Civil Rights Act of 1871 made the decision that federal courts should be available to enforce federal rights because state courts cannot be trusted to do so.[283] Indeed, in *Mitchum*, the Court itself made clear that it recognized that fact.[284] The 1871 legislation was enacted at the height of the mistrust of state courts, though as we have demonstrated, that mistrust existed from the nation's start. The fact that the false narrative of the Lost Cause myth and the Dunning School later dominated does not alter the 1871 Congress's legislative goals. And it is only a future Congress, not the unaccountable Court, that can modify or reject that view.

282. For a more detailed critique of Friedman's dialogic model, see Martin H. Redish, Andrew F. Rodheim & Nicholas Roosevelt, *Federal Jurisdiction as Statutory Interpretation: A Majordomo Purposivist Perspective*, 74 SMU L. REV. 303, 315–21 (2021).

283. *See supra* Section II.C.

284. *See supra* Section I.B.

B. *The Relevance of "Dynamic" Statutory Interpretation*

The "dynamic" theory of statutory interpretation, advocated by several leading scholars,[285] might be relied upon to support Our Federalism's categorical rejection of the factual premises underlying enactment of the Civil Rights Act of 1871. While at times scholars have proposed different versions of the dynamic model, in its essence it has one foundational tenet: Judges should be permitted to look beyond the premises of the Congress which originally drafted the law to determine whether those premises have changed in modern times.[286] Dynamic scholars would have interpreting judges consider "the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."[287]

Advocates of the dynamic model might argue that the Supreme Court, in employing this approach, could reasonably conclude that assumptions about state court inadequacies made by Congress in 1871 are no longer true, and therefore the Court should today supersede those assumptions as a matter of statutory interpretation. But there are serious problems with this approach, even if one assumes, solely for purposes of argument, the validity of the dynamic model in the abstract.

First, we should not forget that at no point did the Court, in establishing the doctrine of Our Federalism on an assumption of judicial parity, provide the slightest bit of evidence demonstrating that the state courts were now the equal of federal courts in enforcing federal rights. At the very least, the burden of proof would be on the Court to overcome the inertia of the factual assumptions driving the 1871 legislation.[288] Indeed, that the Court could make such a cavalier assumption in 1971, only a few years after the travesty of some Southern state courts' treatment of civil rights advocates,[289] is truly amazing. Moreover, the fact that state courts are invariably more subject to local pressures than the

285. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345–54 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*]; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*].

286. *See* Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 832–33 (1994).

287. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 285, at 1483–84 ("The dynamic model . . . views the evolutive perspective as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law.").

288. *See supra* Section II.C.

289. *See generally* Schmidt, *supra* note 12 (discussing the history of litigation reform and sit-in protests during the Civil Rights Movement).

constitutionally protected federal judges at the very least gives rise to a certain level of doubt about any unsupported claim of state court parity.[290]

Even if we were to assume—again, solely for purposes of argument—that the Court could make a convincing showing, regardless of the situation in 1871, that today state courts are in parity with federal courts in enforcing citizens' constitutional rights, serious doubts can be raised about the validity of the dynamic model in general. At its foundation, the dynamic model constitutes a significant threat to core principles of American democratic theory. When no question of constitutionality has been raised, legislative decisions are to be made by the branches of the federal government most accountable to the electorate—namely, Congress and the President. In exercising the power to overrule those legislative judgments, the Court threatens the fundamental elements of democracy.[291]

C. *The Problem of the Anti-Injunction Act*

We have saved perhaps the strongest response to our historical argument for last—that Our Federalism is merely the application of the principles of the Anti-Injunction Act. The argument is likely the strongest because it is two-pronged. On the one hand, it raises legitimate doubts about the statutory validity of a federal court's power to enjoin an ongoing state judicial proceeding. On the other hand, it also raises doubts about the accuracy of our foundational historical claim of federal hostility towards state courts since the nation's inception. This latter argument is also grounded in the Anti-Injunction Statute, which, subject to three specific exceptions, prohibits the federal courts from issuing such injunctions.[292]

In Section 5 of the Act of March 2, 1793, Congress provided that "writs of ne exeat and of injunction may be granted by any judge of the supreme court . . . but no . . . writ of injunction [may] be granted to stay proceedings in any court of a state."[293] The purpose behind the enactment of this provision is not entirely clear. Commentators have pointed out that "[t]he anti-injunction provision was but one sentence in one section of a two-page statute."[294] While it has been suggested that one of the purposes may have been "to prevent unhampered

290. For further discussion on statutory interpretation in federal jurisdiction, see Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 55–57 (2007); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1948 (2008).

291. Indeed, some of the leading scholars who have promoted adoption of the dynamic model have grounded their argument in favor of it on the belief that a well-accepted premise of interpretive theory is that "statutory construction should combat characteristic pathologies in regulatory legislation." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476 (1989).

292. 28 U.S.C. § 2283.

293. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334–35 (codified at 28 U.S.C. § 2283).

294. John Daniel Reaves & David S. Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294, 296 (1971) (footnote omitted).

intrusions by the new federal courts into the then well-established state court domain," the same commentator argued that its purpose may also have been "to codify the then prevailing prejudices against any extension of equity jurisdiction and power."[295] The former justification, of course, might be thought to undermine our claim of historic hostility between the federal government and the state courts. To the extent the statute's original enactment was grounded in the latter justification, however, the Anti-Injunction Act is explained by a general opposition to courts of equity as opposed to a concern over state court freedom.

We need not quibble over these contrasting narratives, however, for we can readily acknowledge the existence of a congressional concern over the possibility of widespread federal judicial interference with state court proceedings, most of which, quite naturally, would have no implications for federal law. It is true that even a portion of cases not implicating federal law might involve parties from different states, possibly raising concerns about state court hostility to out-of-state residents. But the options for out-of-state plaintiffs to file their diversity suits in federal court and out-of-state defendants to remove the suits to federal court would render the need for a collateral federal injunction unnecessary to protect against state court hostility towards out-of-state citizens.

Although some version of the Anti-Injunction Act has existed since its original adoption, it has been construed in a variety of ways. Notwithstanding the statute's usually all-encompassing text, over the years, the Supreme Court developed a variety of judge-made exceptions designed to protect federal interests.[296] The current version of the law was enacted as part of the sweeping recodification of the judicial code in 1948.[297] That version includes three exceptions to the statute's ban on federal court injunctions against ongoing state proceedings: (1) for injunctions expressly authorized by act of Congress, (2) for injunctions to protect or effectuate federal court judgments, and (3) for injunctions in aid of the federal court's jurisdiction.[298] Depending on how these exceptions are construed, they have the potential to provide significant flexibility for the protection of federal interests.

Of course, unless the injunctions limited by the *Younger* doctrine fall within one of these three exceptions, the wisdom or validity of Our Federalism

295. *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 480 (1965) (footnote omitted).

296. *See* James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 10–11 (2013); *see also* Telford Taylor & Everett I. Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1177–80 (1933).

297. James E. Pfander & Nassim Nazemi, Morris v. Allen *and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187, 240 (2014).

298. 28 U.S.C. § 2283.

becomes purely academic. The *Younger* Court avoided deciding that question because it proceeded on the assumption that even if such injunctions did fall within one of the statutory exceptions, it would prohibit such injunctions as a matter of judge-made law.[299] As we have already seen, one year later, in *Mitchum*, the Court did find that Section 1983 fell within the expressly authorized exception to the Anti-Injunction Act.[300] But it reached this conclusion, even though at no point does Section 1983 include such an express exception, because it reasoned that the very purpose of Section 1983 was to interpose the federal courts between the states and the citizens seeking to assert their constitutional rights.[301] In effect, the Court in *Mitchum* established the concept of an "implied express exception"—something that is linguistically and conceptually incoherent.

If we were to reject the dubious reasoning of *Mitchum* in its interpretation of the "expressly authorized" exception,[302] we would be forced to conclude that Section 1983 does not fall within the expressly authorized exception. However, such suits can much more easily be grounded in the "in aid of jurisdiction" exception.[303] If the state court defendant files an action in federal court asserting that his behavior, which is subject to state criminal prosecution, is protected by the Constitution or federal law, the exercise of the federal court's jurisdiction would effectively be rendered meaningless were the state prosecution to be resolved first. For then the federal court would be bound to provide collateral estoppel to the findings of the state court. Thus, to protect its jurisdiction, the federal court would have the discretionary authority to enjoin the ongoing state prosecution. To be sure, the federal judge would make such a decision within the framework of traditional equitable principles, allowing the judge to consider the specific facts of the surrounding circumstances. At the very least, however, the federal judge would have discretionary authority under the in-aid-of-jurisdiction exception to make that decision.[304]

299. *See* Younger v. Harris, 401 U.S. 37, 53–54 (1971).

300. Mitchum v. Foster, 407 U.S. 225, 242–43 (1972).

301. *Id.* at 241–43.

302. We should emphasize that while the *Mitchum* Court's interpretation of the expressly authorized exception is highly dubious, no one has ever questioned the historical accuracy of its characterization of the 1871 Congress's view of state courts' ability or willingness to enforce federal rights.

303. REDISH, FEDERAL JURISDICTION, *supra* note 124, at 324–36.

304. We readily concede that our reading of the in-aid-of-jurisdiction exception is, for the most part, not consistent with current doctrine, which has mostly confined the exception to *in rem* cases. *See* REDISH, FEDERAL JURISDICTION, *supra* note 124, at 324–36. However, we firmly believe such an antiquated construction is not dictated by plain text and is seriously misguided.

CONCLUSION

This Article began with a puzzle: How, in one year, the Supreme Court could create a pathbreaking jurisdictional doctrine grounded in the assumption that state and federal courts are equal protectors of constitutional rights, yet, only one year later, conclude that Congress permitted federal jurisdiction in those same cases because those state courts could not be trusted to protect constitutional rights? Even more puzzling is another question: How, in subsequent years, could the Court proceed on the unquestioned assumption that state courts were fungible with federal courts, completely ignoring its decision finding that Congress seriously mistrusted state courts?

We have sought to solve this puzzle by engaging in an interdisciplinary inquiry, intertwining complex aspects of American political history and American political theory on the one hand with the law of federal jurisdiction on the other hand. This interdisciplinary inquiry reveals a long history—since the nation's inception—of hostility and mistrust on the part of the federal government towards state courts. This hostility reached its height in the post-Civil War years, when Congress enacted the Civil Rights Act of 1871, primarily for the purpose of inserting the federal courts between the state courts and citizens whose constitutional rights were in jeopardy.[305]

In the years that followed, however, historians and politicians sympathetic to the Southern cause rewrote the accepted history as to both the causes of the Civil War and the pressing need to return power from the federal government to state and local rule where, in the view of these spokespeople, it could be exercised most responsibly.[306] Essential to these arguments was the assumption that state courts could be trusted to protect federal rights. These historical arguments took on even greater force late in the nineteenth century when scholars at Columbia—all part of what came to be known as the Dunning School—took up the cause.

Modern historians have made clear that these historical arguments were a historical myth and logically incoherent.[307] But the myth nevertheless shaped Supreme Court decisions of the early-to-mid-twentieth century upon which the Supreme Court, in the important case of *Younger v. Harris*, expressly relied in holding that federal courts could not, purely as a matter of judge-made doctrine, enjoin ongoing state criminal proceedings. In subsequent years, the Court expanded the reach of the doctrine, and all of the decisions—some explicitly and others implicitly—relied on or assumed judicial parity between state and federal courts as protectors and enforcers of federal rights against state action. Yet the controlling statute sought to be enforced in these suits, Section 1983,

305. *See supra* Part II.
306. *See supra* Section III.C.
307. *See supra* Part III.

represents the modern codification of the Civil Rights Act of 1871, the statute enacted for the very reason that state courts could not be trusted to protect federal rights.

Separation of powers binds the Court to adhere to congressional directives, and Congress, not the Court, is the only branch that can alter those legislative directives. The doctrine of Our Federalism, shaped in *Younger*, is built on a house of cards, both as a matter of American political history and political theory. Careful analysis demonstrates why that house of cards should come tumbling down.