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## *ESSAY*

AT THE FRONTIER OF THE *YOUNGER* DOCTRINE:  
REFLECTIONS ON *GOOGLE V. HOOD*

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### INTRODUCTION

ON December 19, 2014, long-simmering tensions between Mississippi Attorney General Jim Hood and the search engine giant Google boiled over into federal court when Google filed suit against the Attorney General to enjoin him from bringing civil or criminal charges against it for alleged violations of the Mississippi Consumer Protection Act.<sup>1</sup> Hood had been investigating and threatening legal action against Google for over a year for its alleged failure to do enough to prevent its search engine, advertisements, and YouTube website from facilitating public access to illegal, dangerous, or copyright protected goods.<sup>2</sup> The case has garnered a great deal of media attention,<sup>3</sup> and with good reason.

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<sup>1</sup> Complaint at 32, *Google, Inc. v. Hood*, No. 14-CV-981 (S.D. Miss. Dec. 19, 2014).

<sup>2</sup> Jimmie Gates, *Hood: AGs May Battle Web Giant Google*, *Clarion Ledger*, June 6, 2013, available at 2013 WLNR 14011192; Matea Gold & Tom Hamburger, *Google Faces New Pressure From States to Crack Down on Illegal Online Drug Sales*, *Wash. Post*, Apr. 15, 2014, [http://www.washingtonpost.com/politics/google-faces-new-pressure-from-states-to-crack-down-on-illegal-online-drug-sales/2014/04/15/6dfc61fa-be6d-11e3-b195-dd0c1174052c\\_story.html](http://www.washingtonpost.com/politics/google-faces-new-pressure-from-states-to-crack-down-on-illegal-online-drug-sales/2014/04/15/6dfc61fa-be6d-11e3-b195-dd0c1174052c_story.html).

<sup>3</sup> See, e.g., Dana Liebelson, *Google Sues Mississippi Attorney General, Alleging Internet Censorship*, *Huffington Post*, Dec. 19, 2014, <http://www.huffingtonpost.com/2014/12/19/>

It raises important questions about Internet service providers' responsibility for serving as a conduit to potentially dangerous or illegal goods, and it could have significant ramifications for the balance of power between the federal government and the states when it comes to regulating entities like Google.

With the first round of procedural wrangling now in full swing, the case reads like something out of a Federal Courts syllabus. Thus, the parties have joined issue on the question whether the *Younger* doctrine requires the district court to abstain from adjudicating Google's claims; whether there is an implied right of action available to Google under federal law to enjoin enforcement of Mississippi's consumer protection laws; and, relatedly, whether the court has jurisdiction over Google's claims for declaratory relief.<sup>4</sup> There is even some discussion in the briefs of the obscure doctrine of complete preemption,<sup>5</sup> though the doctrine is almost certainly irrelevant to the case, and its appearance in the Attorney General's briefing is rather contrived.

What is not contrived, however, is the *Younger* abstention issue, and it is on that aspect of the case that this Essay will focus. Google filed its federal court lawsuit approximately six weeks after Attorney General Hood served it with a subpoena demanding information pertaining to Google's policies and practices relating to websites, YouTube videos, or advertisements that promote what the subpoena labels "Illegal Content" or "Dangerous Content."<sup>6</sup> *Younger*, of course, prohibits federal courts from interfering with a variety of ongoing state judicial proceedings,<sup>7</sup> and Hood has argued that the issuance of an administrative subpoena,

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google-internet-censorship\_n\_6354518.html; Eric Lipton & Conor Dougherty, Sued by Google, a State Attorney General Retreats, N.Y. Times, Dec. 20, 2014, at B2; Rolfe Winkler, Google Sues Mississippi Over Campaign to Restrict Searches, Wall St. J., Dec. 19, 2014, <http://www.wsj.com/articles/google-sues-mississippi-over-campaign-to-restrict-searches-1419031558>.

<sup>4</sup> See *infra* note 18.

<sup>5</sup> Attorney General Jim Hood's Memorandum in Support of Motion to Dismiss Complaint Based on Jurisdiction and Other Grounds at 20–21, *Google, Inc. v. Hood*, No. 14-CV-981 (S.D. Miss. Jan. 12, 2015) [hereinafter AG Motion to Dismiss].

<sup>6</sup> Administrative Subpoena and Subpoena Duces Tecum at 32–34, *Google, Inc. v. Hood*, No. 14-CV-981 (S.D. Miss. Oct. 21, 2014).

<sup>7</sup> *Younger v. Harris*, 401 U.S. 37, 53–54 (1971) (holding that federal courts must abstain from enjoining ongoing state criminal proceedings); *infra* notes 21–23 (citing cases extending the holding of *Younger* to non-criminal cases).

without more, gives rise to an “ongoing proceeding” sufficient to trigger the *Younger* bar.<sup>8</sup>

This issue—whether *Younger* requires a federal court to abstain from hearing a case if state law enforcement officials have already issued a subpoena running against the federal court plaintiff, but no criminal or civil action is pending—has divided the lower federal courts.<sup>9</sup> It also provides a useful vehicle for thinking about *Younger* more generally by calling attention to an important feature of the doctrine that is immanent in the Supreme Court’s post-*Younger* case law, but is not acknowledged explicitly. The cases signal, specifically, that federal courts must defer to state proceedings that are overseen by an impartial state actor—or, at least, one with a plausible claim to impartiality. Proceedings engineered and supervised exclusively by a prosecutor will not do. And since the issuance of a subpoena (at least the kind of subpoena at issue in this case) represents the unilateral act of prosecutorial authorities, it falls outside the ambit of the *Younger* doctrine.

## I. *GOOGLE V. HOOD*

### A. *Factual Background*

In December of 2013, twenty-four state Attorneys General signed a letter to Google’s general counsel admonishing Google for using its products to “monetiz[e] dangerous and illegal conduct,” enable the sharing and trafficking of content in violation of intellectual property law, “promot[e] . . . illegal and prescription-free drugs,” and “facilitat[e] . . . payments to and by purveyors of all of the aforementioned content through Google’s payment services.”<sup>10</sup> The Attorneys General requested

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<sup>8</sup> AG Motion to Dismiss, *supra* note 5, at 31–33.

<sup>9</sup> Compare, e.g., *Kaylor v. Fields*, 661 F.2d 1177, 1181–82 (8th Cir. 1981) (holding that the issuance of a subpoena by the state Attorney General is sufficient to require abstention under the *Younger* doctrine), and *Cuomo v. Dreamland Amusements, Inc.*, No. 08 Civ. 6321, 2008 WL 4369270, at \*9 (S.D.N.Y. Sept. 22, 2008) (same), and *J. & W. Seligman & Co. v. Spitzer*, No. 05 Civ. 7781, 2007 WL 2822208, at \*5 (S.D.N.Y. Sept. 27, 2007) (same), with, e.g., *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 518–19 (1st Cir. 2009) (declining to order abstention despite the issuance of subpoenas by the Office of Insurance Commissioners), and *La. Debating and Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995) (similar), and *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1320, 1321 n.2 (N.D. Fla. 2001) (similar).

<sup>10</sup> Letter from State Attorneys General to Kent Walker, General Counsel, Google Inc. (Dec. 10, 2013), available at <http://apps.washingtonpost.com/g/page/politics/correspondence-between-state-attorneys-general-and-google/945/>.

a meeting with Google to discuss these allegations and, more generally, “the abuse and presence of content [online] which represents a clear threat to public health and safety.”<sup>11</sup> Over the ensuing weeks and months, Attorney General Hood would emerge as Google’s most dogged critic, repeatedly making public statements accusing Google of illegal conduct and threatening civil and criminal charges against it.<sup>12</sup>

On October 21, 2014, Hood ratcheted up his investigation of Google by issuing a lengthy subpoena seeking documents and information pertaining to Google’s efforts to police third-party content that users might access through Google’s search engine and its YouTube website.<sup>13</sup> The parties negotiated a return date of January 5, 2015,<sup>14</sup> but before that date arrived, Google shifted to offense. It filed suit in the United States District Court for the Southern District of Mississippi seeking a declaration that Google cannot be held liable under Mississippi law for content created by third parties,<sup>15</sup> as well as an injunction against enforcement of the Attorney General’s subpoena.<sup>16</sup> Judge Wingate promptly stayed enforcement of the subpoena and scheduled a hearing for mid-February.<sup>17</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Gold & Hamburger, *supra* note 2.

<sup>13</sup> See Administrative Subpoena and Subpoena Duces Tuce, *supra* note 6.

<sup>14</sup> AG Motion to Dismiss, *supra* note 5, at 7.

<sup>15</sup> Google’s principal argument is that the Attorney General’s investigation runs headlong into the Communications Decency Act of 1996, which preempts state and local laws that assign liability to Internet service providers for facilitating users’ access to online content produced by third parties. See Memorandum of Law in Support of Plaintiff Google Inc.’s Motion for Temporary Restraining Order and Preliminary Injunction at 15–21, *Google, Inc. v. Hood*, No. 14-CV-981 (S.D. Miss. Dec. 19, 2014) [hereinafter TRO Memo]; see also 47 U.S.C. § 230(c)(1), (e)(3) (providing that an Internet service provider may not be held liable as the “publisher or speaker” of third party content under state or local law). Google also contends that Hood’s investigation violates the First and Fourth Amendments to the United States Constitution and is preempted by the federal Food, Drug, and Cosmetic Act. TRO Memo, *supra*, at 22–26, 28–29, 31–33.

<sup>16</sup> See Complaint, *supra* note 1. Google’s strategic shift appears to have been motivated by its discovery that the Motion Picture Association of America was working behind the scenes to encourage and perhaps even orchestrate state investigations like those pursued by Hood. See Russell Brandom, Project Goliath: Inside Hollywood’s Secret War Against Google, *Verge*, Dec. 12, 2014, <http://www.theverge.com/2014/12/12/7382287/project-goliath> [hereinafter Project Goliath]; Dana Liebelson, Emails Show Hollywood Worked with a State Attorney General to Push Its Anti-Piracy Agenda, *Huffington Post*, Dec. 18, 2014, [http://www.huffingtonpost.com/2014/12/18/movie-piracy\\_n\\_6348256.html](http://www.huffingtonpost.com/2014/12/18/movie-piracy_n_6348256.html); Nick Wingfield & Eric Lipton, Detractors of Google Take Fight to States, *N.Y. Times*, Dec. 17, 2014, at B1.

<sup>17</sup> Hayley Tsukayama, Judge Calls a Time-Out in Fight Between Google and Mississippi Attorney General, *Wash. Post*, Dec. 23, 2014, <http://www.washingtonpost.com/blogs/the->

*B. The Procedural Battle*

The Attorney General has since moved to dismiss Google's lawsuit, pressing a barrage of claims premised in one way or another on the notion that, if Google wishes to fight the Attorney General's subpoena, it must file a motion to quash in state court or wait for Hood to enlist the state courts' help in enforcing the subpoena and challenge its validity then and there.<sup>18</sup> One variation on this argument is premised on the Supreme Court's decision in *Younger v. Harris*.<sup>19</sup> That case disables federal courts from enjoining ongoing state court criminal proceedings,<sup>20</sup> and it has been extended by the Supreme Court to encompass civil enforcement actions,<sup>21</sup> administrative proceedings that are "judicial in nature,"<sup>22</sup> and certain proceedings to protect state court judgments or orders.<sup>23</sup> As Hood has yet to file an action against Google, however, there is no state proceeding pending against it at this time (at least not in the conventional sense), and so the case does not fit straightforwardly into any of the applications of the *Younger* doctrine that have previously been endorsed by the Supreme Court.

Hood insists that issuance of the subpoena against Google nevertheless suffices to animate the *Younger* bar.<sup>24</sup> The subpoena, he argues, is "part of an ongoing state law investigation" and is "judicial in nature."<sup>25</sup> It is "an 'integral part' of a potential proceeding against [the Plaintiff]," and so the policies underlying *Younger* apply with full force.<sup>26</sup> Google

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switch/wp/2014/12/23/judge-calls-a-time-out-in-fight-between-google-and-mississippi-attorney-general.

<sup>18</sup> AG Motion to Dismiss, *supra* note 5, at 3. The Attorney General argues, in particular, that the federal courts lack subject matter jurisdiction over Google's claims, *id.* at 9–23, that Google failed to state a justiciable claim under the First Amendment, *id.* at 23–29, that Google's claims are unripe, *id.* at 39–40, and (as discussed at length here) that Google's claims are barred by the *Younger* doctrine, *id.* at 30–39.

<sup>19</sup> 401 U.S. 37 (1977).

<sup>20</sup> 401 U.S. at 53–54.

<sup>21</sup> See *Trainor v. Hernandez*, 431 U.S. 434, 443–44 (1977); *Huffman v. Pursue*, 420 U.S. 592, 604 (1975).

<sup>22</sup> See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625–29 (1986); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433–34 (1982).

<sup>23</sup> *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12–14 (1987); *Juidice v. Vail*, 430 U.S. 327, 333–36 (1977).

<sup>24</sup> AG Motion to Dismiss, *supra* note 5, at 31–33.

<sup>25</sup> *Id.* at 31.

<sup>26</sup> *Id.* at 32 (quoting *J. & W. Seligman & Co. v. Spitzer*, No. 05 Civ. 7781, 2007 WL 2822208, at \*5 (S.D.N.Y. Sept. 27, 2007)).

rejects this view. It argues that the subpoena is simply a “pre-litigation investigative tool” and not the sort of civil proceeding deemed by the Court to fall within the ambit of *Younger*.<sup>27</sup>

## II. AT THE FRONTIER OF THE *YOUNGER* DOCTRINE

The question presented by *Google v. Hood* is easy enough to state: Does the issuance of an administrative subpoena by a state Attorney General prior to the filing of any enforcement action qualify as an “on-going state proceeding” sufficient to trigger the *Younger* bar? The answer, however, is not so simple. There is some temptation to say that the question is straightforwardly empirical—that, at any given time, we can simply observe whether a state proceeding is up and running, and answer the *Younger* question from there. But of course this requires a working definition of the term “proceeding”—so that we know just what it is we are supposed to be observing—and the term is hardly self-defining. We might say, for example, that a “proceeding” requires the filing of some kind of formal complaint or charge, in which case the mere issuance of an investigative subpoena, without more, would not qualify.<sup>28</sup> But we might also reason, following Attorney General Hood,<sup>29</sup> that investigative work is a crucial part of any enforcement action, and that the issuance of a subpoena should therefore be taken as a sign that a “proceeding” is in fact underway. Both of these accounts are plausible, and so it seems unlikely that we’ll get meaningful traction on the question that concerns us here by way of generalized reflection on what does and does not count as a “proceeding.”

The Supreme Court’s post-*Younger* decisions, meanwhile, do not address the question—at least not directly. There is a long line of cases stretching from *Younger* itself to the recent decision in *Sprint Communi-*

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<sup>27</sup> Consolidated Memorandum Brief in Opposition to Defendant’s Motion to Dismiss and in Rebuttal to Defendant’s Response to Google’s Motion for a Temporary Restraining Order and Preliminary Injunction at 12–15, *Google, Inc. v. Hood*, No. 14-CV-981 (Jan. 22, 2015). Google also argued that *Younger* abstention is not warranted because its claim of preemption under the Communications Decency Act (CDA) is “facially conclusive” and because the case falls within the exception to the *Younger* doctrine for circumstances in which a state prosecutor has acted in bad faith. *Id.* at 15–18. I will not address these arguments here.

<sup>28</sup> Some lower federal courts lean toward this position. See, e.g., *Telco Commc’n, Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989); *Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir. 1986).

<sup>29</sup> See *supra* notes 24–26 and accompanying text.

*cations v. Jacobs*<sup>30</sup> expounding on the contours of the abstention doctrine, but the decisions tend to focus on the question of *what type* of proceedings merit *Younger* deference.<sup>31</sup> The question of *when* such a proceeding begins—of when we can say that it is “ongoing” for *Younger* purposes—has not garnered meaningful attention.

If we examine the cases closely, however, and focus on the policy considerations motivating some of the line-drawing we see, we can identify principles that speak to the question in *Google v. Hood*. Collectively, the cases suggest that only proceedings of a certain sort—those presided over by an impartial state actor—merit deference under the *Younger* doctrine. And if that’s right, then a proceeding is not “ongoing” for *Younger* purposes until such time as it has been turned over to an impartial state official or, at least, an impartial state actor is able to exercise meaningful oversight authority. The administrative subpoena at issue in the Google litigation was issued on the say-so of state prosecutors—without any intervention by a state judge or other neutral officer—and so abstention seems unwarranted.

#### A. Investigative Activity and Available State Court Proceedings

Before delving into Supreme Court decisions focused generally on the matter of *Younger* deference, it is worth examining lower federal court decisions addressed to the specific question that concerns us here: whether *Younger* kicks in upon the issuance of an administrative subpoena by state prosecutorial authorities. As noted above,<sup>32</sup> the federal courts are divided on the issue. Some reason that the issuance of a sub-

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<sup>30</sup> 134 S. Ct. 584, 588 (2013).

<sup>31</sup> See *id.* (declining to extend *Younger* to cases involving pending civil actions between private parties); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (refusing to extend *Younger* to cases involving pending state proceedings to review the legitimacy of state legislative or executive action); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12–14 (1987) (applying *Younger* to prevent federal interference with a state court judgment); *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625–29 (1986) (administrative proceedings); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432–34 (1982) (same); *Juidice v. Vail*, 430 U.S. 327, 333–36 (1977) (civil contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 443–44 (1977) (civil enforcement proceedings); *Huffman v. Pursue*, 420 U.S. 592, 603–05 (1975) (same); *Steffel v. Thompson*, 415 U.S. 452, 460–62 (1974) (abstention not required when there is no prosecution pending against the federal plaintiff).

<sup>32</sup> See *supra* note 9.

poena “suffice[s] to initiate an ongoing state proceeding,”<sup>33</sup> while others insist that investigation of this sort is “too preliminary . . . to constitute a ‘proceeding’ triggering *Younger*.”<sup>34</sup> Regardless of which side they take, however, the cases tend simply to assert that the issuance of a subpoena by prosecutors (or some other investigative move) either does or does not count as an ongoing proceeding. Sometimes they take the added step of reasoning by analogy to the array of Supreme Court decisions extending *Younger* outside the criminal realm. But what they do not do is explain *why* it might make sense (or not) to treat the issuance of a subpoena as sufficient to trigger *Younger*.

One opinion from the Southern District of New York, which concludes that *Younger* does apply in these circumstances (and on which Attorney General Hood relies extensively),<sup>35</sup> makes a partial attempt at explanation:

Although the contested subpoenas are not part of a criminal proceeding, they were issued by the Attorney General pursuant to an investigation of Plaintiffs’ allegedly illegal activities, and the information sought may be used to initiate civil or criminal proceedings against Plaintiffs. . . . They are an integral part of a potential proceeding against Plaintiffs, and without such subpoenas, the Attorney General

<sup>33</sup> *Cuomo v. Dreamland Amusements, Inc.*, No. 08 Civ. 6321, 2008 WL 4369270, at \*9 (S.D.N.Y. Sept. 22, 2008); see also *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (finding that “[t]he issuance of [a] subpoena[] . . . is part of a state proceeding”); *J. & W. Seligman & Co. v. Spitzer*, No. 05 Civ. 7781, 2007 WL 2822208, at \*6 (S.D.N.Y. Sept. 27, 2007) (finding that “*Younger*’s ‘ongoing proceeding’ requirement was clearly satisfied when a state agency . . . issued subpoenas, even though no formal charges had been filed” (internal quotations omitted)); *Hip-Hop Summit Action Network v. N.Y. Temp. State Comm’n on Lobbying*, No. 03 Civ. 5553, 2003 WL 22832569, at \*3 (S.D.N.Y. Nov. 25, 2003) (same). There are also a handful of cases holding that the initiation of investigative work by a grand jury or the issuance of a search warrant suffice to trigger the *Younger* bar. See, e.g., *Tex. Ass’n of Bus. v. Earle*, 388 F.3d 515, 520–21 (5th Cir. 2004); *Kingston v. Utah Cnty.*, No. 97-4000, 1998 WL 614462, at \*4 (10th Cir. 1998); *Craig v. Barney*, 678 F.2d 1200, 1201–02 (4th Cir. 1982); *Mirka United, Inc. v. Cuomo*, No. 06 Civ. 14292, 2007 WL 4225487, at \*4 (S.D.N.Y. Nov. 27, 2007); *Nick v. Abrams*, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989).

<sup>34</sup> *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519 (1st Cir. 2009); see also *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1320 (N.D. Fla. 2001) (finding that “no state criminal or civil proceeding [was] pending” despite the fact that the state Attorney General had issued civil investigative demands to plaintiffs prior to their filing in federal court). Some lower federal courts insist that some formal enforcement action beyond mere investigation—such as the filing of a formal complaint or charge—is necessary for *Younger* to apply. See, e.g., *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 140 (3d Cir. 2014); cases cited *supra* note 28.

<sup>35</sup> AG Motion to Dismiss, *supra* note 5, at 32–33.



seldom could amass the evidence necessary to commence fraud actions.<sup>36</sup>

The difficulty with this analysis is that nearly *all* investigative activity by attorneys general could be characterized as “an integral part of a potential proceeding;” and it is routinely the case that information sought by state officials in the course of an investigation could be used to initiate a civil or criminal action. Yet it is clear that if a state prosecutor launches an investigation into possibly unlawful conduct, but restricts that investigation to things like conversations with the target, interviews with third parties, and informal requests for documents and information, *Younger* will not come into play.

This is evident from the Supreme Court’s decision in the foundational case of *Steffel v. Thompson*.<sup>37</sup> That case holds that *Younger* poses no obstacle to a federal court plaintiff securing a declaration as to the constitutionality of state law so long as there is no prosecution pending against the plaintiff in state court.<sup>38</sup> In *Steffel* itself, the plaintiff was permitted to proceed with his federal court action for declaratory relief despite the fact that police officers had repeatedly investigated his allegedly unlawful conduct (distributing leaflets on a sidewalk outside a shopping center) and, indeed, threatened him with arrest.<sup>39</sup> In fact, plaintiffs filing *Steffel*-style actions for declaratory relief routinely call attention to investigative activity by state law enforcement officials in order to demonstrate that their cases satisfy the constraints of the ripeness doctrine.<sup>40</sup> And courts are hardly in the habit of dismissing these cases on the ground that such investigation is “an integral part of a potential proceeding” sufficient to trigger the *Younger* bar.<sup>41</sup>

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<sup>36</sup> *J. & W. Seligman & Co.*, 2007 WL 2822208, at \*5 (internal quotations omitted).

<sup>37</sup> 415 U.S. 452 (1974).

<sup>38</sup> *Id.* at 462.

<sup>39</sup> *Id.* at 455. A companion of *Steffel* had in fact been arrested and charged with violating state law for the same leafleting activity *Steffel* wished to engage in. *Id.* at 455–56.

<sup>40</sup> See, e.g., *Kiser v. Reitz*, 765 F.3d 601, 605–06, 609–10 (6th Cir. 2014); *Cooksey v. Futrell*, 721 F.3d 226, 231–32, 239–41 (4th Cir. 2013).

<sup>41</sup> And how could they be? If investigations of this sort sufficed to animate the *Younger* bar, *Steffel* would be reduced to a virtual dead letter. In many cases, it will be difficult to show ripeness without showing some evidence of prosecutorial interest (which is to say, without providing evidence of some “investigation”), and it would be impossible, then, to avoid dismissal under *Younger*.

In *Morales v. Trans World Airlines, Inc.*, the Court suggested that *Younger* applies not only to pending prosecutions, but to prosecutions that are “about-to-be-pending.” 504 U.S. 374, 381–82 n.1 (1992). And some lower federal courts have called attention to this language.

Given *Steffel*, the argument for abstaining in a case like *Google v. Hood* seems weak. It is clear that routine investigative activity by state law enforcement officials will not cause the *Younger* bar to kick in, and it is difficult to see why application of the doctrine should be contingent on whether an investigation happens to entail use of the subpoena power. It is no answer to say that, with the issuance of a subpoena, the target of an investigation has access to a state court proceeding—initiated by a motion to quash—through which objections to the investigation might be ventilated.<sup>42</sup> For it is equally true, at least in most cases, that the target of an investigation that does *not* include use of the subpoena power has access to a state court proceeding—an action for declaratory or injunctive relief—through which she might raise objections to the investigation.<sup>43</sup>

Here too, *Steffel* is telling. The Court in that case did not stop to inquire whether the federal plaintiff might have pressed his constitutional

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See, e.g., *Kingston v. Utah Cnty.*, No. 97-4000, 1998 WL 614462, at \*4 (10th Cir. 1998); *Mirka United, Inc. v. Cuomo*, No. 06 Civ. 14292, 2007 WL 4225487, at \*3 (S.D.N.Y. Nov. 27, 2007). This is noteworthy because it suggests that one can have an “ongoing” proceeding prior to the formal initiation of an enforcement action, and that, in turn, suggests that investigation alone might suffice to trigger the *Younger* bar. But the key passage from *Morales* is footnote dictum, and it finds no support in prior or subsequent decisions of the Supreme Court. Certainly the Court has never ordered abstention under the *Younger* doctrine in a case that did not involve an action formally pending before some state court or administrative body. Second, even if the imminence of a state court prosecution sufficed to trigger *Younger*, the question would remain whether *Younger* applies to cases in which state prosecutors have issued subpoenas but still no prosecution is imminent.

<sup>42</sup> *Hood* leans heavily on this point in his Motion to Dismiss, AG Motion to Dismiss, *supra* note 5, at 5, 34–35, and lower federal court decisions ordering abstention in light of the issuance of administrative subpoenas focus intently on the availability of state court proceedings to challenge the investigation. See, e.g., *Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981) (“The issuance of the subpoenas, under Arkansas law, is part of a state proceeding in which the plaintiffs to this action had an opportunity to present their claims. Challenges to such subpoenas can be made by a motion to quash in the state circuit courts . . . .”); *Hip-Hop Summit Action Network v. N.Y. Temp. State Comm’n on Lobbying*, No. 03 Civ. 5553, 2003 WL 22832569, at \*5 (S.D.N.Y. Nov. 25, 2003) (similar). The heavy emphasis on the availability of state court proceedings is a reaction to the Supreme Court’s decision in *Middlesex County Ethics Committee v. Garden State Bar Ass’n*, which treats the issue as an essential part of the inquiry into whether *Younger* abstention is required. 457 U.S. 423, 432 (1982). The Supreme Court’s recent decision in *Sprint Communications v. Jacobs*, however, admonishes lower courts not to treat the conditions identified in the *Middlesex* case as dispositive. 134 S. Ct. 584, 593 (2013).

<sup>43</sup> See, e.g., *Miss. R. Civ. P. 57(a)* (“Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed.”).

claims in some state court action for declaratory or injunctive relief. It was enough to refuse abstention that the federal court plaintiff was not party to an *ongoing* state court action in which those claims might have been raised.<sup>44</sup> Nor, in the decades since *Steffel* was decided, have the lower federal courts endorsed the view that the availability of declaratory or injunctive relief in some yet-to-be-initiated state court action suffices to render abstention appropriate. The cases reflect the contrary view that it is one thing to say that a state court proceeding is *available* and another to say, as the *Younger* doctrine requires, that such a proceeding is *ongoing*.

*B. Investigative Proceedings That Are “Judicial in Nature”*

Despite all of this, federal courts *are* sometimes required to abstain in light of the pendency of state proceedings that include a significant investigative component. Thus, in *Middlesex County Ethics Committee v. Garden State Bar Association*, the Court held that a federal court challenge to the constitutionality of New Jersey’s attorney disciplinary rules was barred because the plaintiff was the subject of a pending disciplinary hearing before the state Ethics Committee.<sup>45</sup> And in *Ohio Civil Rights Commission v. Dayton Christian Schools*, the Court ordered abstention in light of the pendency of proceedings before the Ohio Civil Rights Commission.<sup>46</sup> In each of these cases, the administrative proceeding in question involved investigative work similar to the sort a prosecutor might perform prior to initiating a criminal or civil enforcement action;<sup>47</sup> yet the Court resolved to lump these processes—part investigative, part adjudicative—along with criminal and civil enforcement actions subject to the *Younger* bar, rather than depositing them in the *Steffel* category and exempting them from the abstention requirement.

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<sup>44</sup> *Steffel*, 415 U.S. at 462.

<sup>45</sup> 457 U.S. at 425, 437.

<sup>46</sup> 477 U.S. 619, 621–22, 629 (1986).

<sup>47</sup> See *Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm’n*, 766 F.2d 932, 935 (6th Cir. 1985) (describing investigative work performed by the Civil Rights Commission), *rev’d*, 477 U.S. 619 (1986); *Garden State Bar Ass’n v. Middlesex Cnty. Ethics Comm.*, 643 F.2d 119, 123 (3d Cir. 1981) (noting that the administrative body in question was “authorized to receive information relating to allegedly unethical conduct by a member of the bar” and to “inquire into the facts to decide whether a formal complaint should be filed”), *rev’d*, 457 U.S. 423 (1982).

*Middlesex* and *Dayton* have come to stand for the proposition that a federal court must abstain not only in deference to state criminal and civil enforcement proceedings, but also in light of the pendency of state administrative proceedings that are “judicial in nature.”<sup>48</sup> Yet neither case explains why, exactly, the administrative proceedings at issue were best regarded as “judicial,” rather than “administrative” or “investigative;”<sup>49</sup> and, more important for present purposes, neither explains why “judicial in nature” is the barometer of whether *Younger* applies to an administrative proceeding. This is unfortunate because it makes it difficult to see exactly what drives the doctrinal move embodied in the two cases, and that, in turn, makes it more difficult to understand the policies underlying *Younger* more generally. As it turns out, moreover, understanding just why it matters that the proceedings in those two cases were “judicial in nature” can help us get traction on the problem in *Google v. Hood*.

*Younger* famously explained federal courts’ duty to abstain from interfering with ongoing state criminal proceedings by reference to considerations of equity, comity, and federalism.<sup>50</sup> Over time, the first of these considerations (equity) has receded to the background of the Court’s *Younger* jurisprudence,<sup>51</sup> while the “more vital consideration[s]”<sup>52</sup> of comity and federalism have assumed center stage.<sup>53</sup> In

<sup>48</sup> The phrase appears first in the *Middlesex* decision, wherein the Court took note of how the State of New Jersey classified the bar disciplinary proceedings at issue. 457 U.S. at 433. *Dayton Christian Schools* flags the point as doctrinally crucial. See 477 U.S. at 627 (“Because we found that the administrative proceedings in *Middlesex* were ‘judicial in nature’ from the outset, it was not essential . . . [for purposes of the *Younger* inquiry] that they had progressed to state-court review by the time we heard the federal injunction case.”(citation omitted)).

<sup>49</sup> In *Middlesex*, the Court emphasized that the New Jersey Supreme Court treats the relevant administrative body “as the arm of the court” and “considers its bar disciplinary proceedings as ‘judicial in nature.’” 457 U.S. at 433–34. This suggests that the Court was willing, at least to some extent, to outsource the question whether a proceeding is “judicial in nature” to the states. It seems entirely sensible to treat states’ views on this question as probative. But the question whether a proceeding is “judicial” within the meaning of the *Younger* doctrine must ultimately be one of federal law. And my point here is simply that *Middlesex* and *Dayton* provide little guidance on this score.

<sup>50</sup> *Younger*, 401 U.S. at 43–44.

<sup>51</sup> See, e.g., *Middlesex*, 457 U.S. at 431–32 (treating comity and federalism as “the policies underlying *Younger*”); *Huffman v. Pursue*, 420 U.S. 592, 604 (1975) (acknowledging that “the traditional reluctance of courts of equity . . . to interfere with a criminal prosecution . . . is not available to mandate federal restraint in civil cases”).

<sup>52</sup> *Younger*, 401 U.S. at 44.

fleshing out these principles of comity and federalism, the Court placed particular emphasis on the interests in avoiding duplicative litigation and in refraining from casting aspersions on state institutions' willingness or capacity to deal fairly with litigants pressing federal constitutional claims. Thus, in *Huffman v. Pursue*, the majority emphasized that federal court interference with a pending state civil enforcement action "results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'"<sup>54</sup> And, in *Juidice v. Vail*, the Court insisted that federal interference with state contempt proceedings "reflect[s] negatively upon the state court[s]."<sup>55</sup> Lower federal courts now routinely flag these considerations as the primary forces motivating the *Younger* doctrine.<sup>56</sup>

The key thing to observe at this point is that the Court has not extended this logic to ordinary investigative activities by state law enforcement officials. Again, we are back to *Steffel*. The Court in that case might have ordered abstention on the ground that when a litigant runs to federal court in the hope of bringing some state investigation to a halt, it "reflects negatively" on state institutions—to wit, the officials pursuing the investigation (why presume that they will ignore constitutional constraints and bring a prohibited enforcement action?) and the state judiciary as well (why not look to *state* courts to test the permissibility of state laws or official action?).<sup>57</sup> But it didn't. Instead, the Court insisted that "considerations of equity, comity, and federalism have little vitality"

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<sup>53</sup> The steady marginalization of the equity-based justification for the *Younger* rule is linked to the expansion of the doctrine to cover noncriminal state proceedings. See cases cited *supra* note 31. The venerable maxim that equity will not enjoin a criminal prosecution could, of course, do no work in cases involving civil or administrative proceedings, and so it was necessary—if the results in the cases were to be persuasively defended—for the Court to lean heavily on the comity and federalism rationales.

<sup>54</sup> *Huffman*, 420 U.S. at 604 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)).

<sup>55</sup> *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (quoting *Huffman*, 420 U.S. at 604); see also *Middlesex*, 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

<sup>56</sup> See, e.g., *Moore v. City of Asheville*, 396 F.3d 385, 394–95 (4th Cir. 2005); *Coruzzi v. New Jersey*, 705 F.2d 688, 691 (3d Cir. 1983).

<sup>57</sup> See, e.g., *Moore v. Sims*, 442 U.S. 415, 437 (1979) (Stevens, J., dissenting) ("[I]t can be argued that whenever a federal court rules on the constitutionality of a state statute, it is making a decision that interferes with the operation of important state mechanisms, and performing a task that could equally be performed by a state court."). To be clear, Justice Stevens was not endorsing the view that abstention is appropriate under such conditions. To the contrary, he insisted that, under such circumstances, the affront to principles of comity and federalism is "lesser." *Id.*

when no prosecution is pending against the federal plaintiff.<sup>58</sup> “When no state criminal proceeding is pending,” the Court explained, “federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court’s ability to enforce constitutional principles.”<sup>59</sup>

These arguments are unpersuasive. To begin with, the Court’s claim that the species of litigation authorized by its decision “does not result in . . . disruption of the state criminal justice system” is obviously false. Indeed, the whole point of the exercise (at least from the plaintiff’s perspective) is to disrupt the state’s criminal justice system. The disruption may or may not be warranted, but it is disruption either way.<sup>60</sup> The same goes for the claim that the lawsuits authorized by *Steffel* do not reflect negatively on state courts’ ability to enforce constitutional principles. Of course they do. Indeed, the very existence of federal court jurisdiction in cases of this sort is an expression of uncertainty as to state courts’ willingness to vindicate federal claims.<sup>61</sup> The point is not that *Steffel* got the balance wrong; it’s just that the Court’s justifications are overstated and oversimplified.

Despite the Justices’ reasoning, then, *Steffel* is best read not to support the conclusion that federal court challenges targeted at investigative activity by state prosecutors cast no aspersions on state officials or institutions, but that the casting of such aspersions is not always inconsistent with our federalism. Cases like *Middlesex* and *Dayton Christian*

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<sup>58</sup> *Steffel*, 415 U.S. at 462.

<sup>59</sup> *Id.*

<sup>60</sup> See Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 356 (2d ed. 1990) (“[*Steffel*] appears to contradict two of the . . . recognized bases of *Younger* deference—the desire to avoid interference with state substantive legislative policies and with state prosecutorial discretion. For whether or not a prosecution has been filed, federal relief tells the prosecutor ‘when and how’—and indeed if—he or she is to bring a prosecution.” (internal citation omitted)).

<sup>61</sup> See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“Congress . . . was concerned that state instrumentalities could not protect [federal] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights . . . and it believed that these failings extended to the state courts.”); see also, e.g., *The Federalist* No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (Hamilton justified the channeling of federal question cases to the federal courts on the ground that “the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws”).

*Schools*, meanwhile, can help us to see why this is so. The Court's emphasis in those cases on the question whether state administrative proceedings are "judicial in nature," together with its refusal in *Steffel* to bar declaratory actions targeted at routine investigative activities by state law enforcement officials, suggests that application of the *Younger* doctrine is contingent on the formal participation of some impartial state actor in the enforcement and application of state law. Cases like *Steffel* just do not fit the bill; nor do administrative proceedings that lack what one federal court has labeled "trial-like trappings."<sup>62</sup> Though it is true, of course, that state prosecutors are officers of the court—duty-bound to uphold applicable state and federal laws—few would classify them as impartial actors in the mold of state judges or even in the mold of the officials who perform adjudicative functions for administrative bodies like those at issue in *Middlesex* and *Dayton Christian Schools*. The fact is, we expect that prosecutors will sometimes press charges and file complaints (and certainly they will investigate) when the law says they should not; they operate in an institutional setting that conduces to that result. And so it is no great insult to state prosecutors to cast aspersions on the evenhandedness of their investigative efforts.

This intuition fully explains the manner in which the cases sort. *Younger*, *Huffman*, *Middlesex*, and *Dayton Christian Schools* all involve state proceedings pending before a state body with a legitimate claim to impartiality.<sup>63</sup> *Steffel* does not. The analysis here also suggests that it was essential to the holdings in *Middlesex* and *Dayton Christian Schools* that the plaintiffs did not file in federal court until after formal proceedings before the state administrative bodies had begun.<sup>64</sup> With the filing of formal charges in each of those cases, the work of the administrative

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<sup>62</sup> *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1228 (4th Cir. 1989) (explaining when the *Middlesex/Dayton* rule takes hold).

<sup>63</sup> The same holds for *Juidice v. Vail* and *Pennzoil v. Texaco* which, as noted earlier, see supra note 23 and accompanying text, extend the *Younger* doctrine to proceedings to enforce state court judgments or orders. In some cases, it will be difficult to determine whether hearing officers presiding over administrative proceedings meet criteria of evenhandedness sufficient to trigger *Younger*. These tribunals do not come labeled "neutral and evenhanded," on the one hand, or "run by flunkies and hacks," on the other. No doubt this is why some courts, like the Fourth Circuit in *Telco Communications*, inquire whether the proceedings in question have "trial-like trappings." 885 F.2d at 1228.

<sup>64</sup> *Dayton Christian Sch.*, 477 U.S. at 624; *Middlesex*, 457 U.S. at 428–29; see also supra notes 28, 34 (identifying cases taking the position that the initiation of formal administrative proceedings, as opposed to more informal investigative ones, is essential to the application of the *Middlesex/Dayton* rule).

body shifted from strictly investigative pursuits to a hybrid of investigation and impartial adjudication. And with that shift, one of the central policy justifications underlying *Younger*—avoiding casting aspersions on impartial state decisionmakers—sprung to life.<sup>65</sup>

Finally, this understanding of the *Middlesex/Dayton* rule finds support in decisions of the lower federal courts expounding on what it means for a state administrative proceeding to be “judicial in nature.” The Fourth Circuit’s decision in *Telco Communications v. Carbaugh* is illustrative.<sup>66</sup> The court there explained that for an administrative proceeding to be “judicial in nature,” it must have “trial-like trappings.”<sup>67</sup> And it focused on the questions whether the administrative body at issue initiated a formal hearing or requested a formal prosecution;<sup>68</sup> whether meetings

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<sup>65</sup> The analysis here might also help to explain—though it cannot justify—an interesting nuance in the lower court case law wrestling with the question of whether pre-filing investigative activity suffices to trigger the *Younger* bar. If we focus only on cases involving the issuance of subpoenas by grand juries, or efforts to secure information by way of a search warrant, the decisions lean heavily toward the view that later-filed federal court challenges are barred by *Younger*. See *supra* note 33. If we focus, instead, on cases involving subpoenas issued by state law enforcement officials, but neither search warrants nor grand juries, the cases are fairly evenly split. See *supra* notes 33–34. There is language in the cases from the former category suggesting that they swing the way they do because there is at least the patina of judicial oversight in the mix. See, e.g., *Texas Ass’n of Bus. v. Earle*, 388 F.3d 515, 521 (5th Cir. 2004) (“The grand jury is said to be ‘an arm of the court by which it is appointed.’ The district court impanels the grand jury after testing the qualifications of its members, administers the jurors’ oath, and instructs them as to their duties as grand jurors. The grand jury can seek advice from the district court on any matter it is considering.” (citations omitted)). No such argument is available in the context of an ordinary administrative subpoena. Whether this pattern in the lower court case law is defensible would seem to depend on the extent of judicial oversight over the subpoena- and search-warrant-issuing processes. Only if the relevant state judicial officer can truly pass judgment on, and perhaps prevent, the relevant species of investigation does it make sense to say that federal judicial intervention casts aspersions on an impartial state official.

<sup>66</sup> 885 F.2d 1225 (4th Cir. 1989).

<sup>67</sup> *Id.* at 1228.

<sup>68</sup> As noted earlier, see *supra* note 28 and accompanying text, some courts treat the initiation of formal proceedings as the crucial barometer of when the *Younger* bar kicks in. This metric, too, could be used to sort the major Supreme Court cases extending *Younger* outside the criminal realm. In many cases, of course, this inquiry and the one I focus on here will amount to much the same thing. That is, an impartial officer will become involved just as formal proceedings are initiated. I lean toward the “impartiality” formulation precisely because it seems to yield the sounder result in a case like *Google v. Hood*. The issuance of a subpoena would seem to qualify as a relatively formal investigative move. But it is difficult to see why *Younger* should attach to such proceedings simply by virtue of their formality. If it is permissible to “cast aspersions” on state prosecutorial authorities—and *Steffel* suggests that it is—why should it become impermissible to do so when the prosecutor has used the subpoena power?



held as part of the investigation involved sworn testimony and whether a record was maintained; whether the target of the investigation was permitted to issue subpoenas and cross examine witnesses; and, crucially, whether an impartial hearing officer presided over the proceeding.<sup>69</sup>

If all this is right, then Hood's bid for abstention in the Google litigation ought to fail. The administrative subpoena under dispute in that case was issued at the direction of the Attorney General, without intervention or screening by a judicial officer or any other arguably neutral state actor. Attorney General Hood is exactly right to argue that Google's federal court action threatens to "interfere with . . . on-going state . . . proceedings" and "presum[es] that the state courts will not safeguard federal constitutional rights."<sup>70</sup> But he is wrong to think this poses any kind of problem from the perspective of the *Younger* doctrine. To the contrary, the cases seem to suggest that this is just what federal courts are for.

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<sup>69</sup> *Telco*, 885 F.2d at 1228; see also, e.g., *Int'l Fidelity Ins. Co. v. Sanchez-Ramos*, 397 F. Supp. 2d 327, 332 (D.P.R. 2005) ("The administrative proceedings that *Younger* is meant to protect must provide the parties involved with an opportunity to be heard and to present their version of the facts before a final determination is made; a neutral fact-finding process."). To be clear, fixating on the neutrality of the process cannot help to explain all of the features of the *Younger* doctrine flagged earlier. Most notably, it cannot support an account of why the law eschews any requirement that federal claimants exhaust state judicial remedies nor, relatedly, can it help us to understand the Justices' repeated insistence that even the pendency of state court proceedings will sometimes not be enough to motivate abstention under the *Younger* doctrine. See *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) ("Abstention is not in order simply because a pending state-court proceeding involves the same subject matter."); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 373 (1989) ("[T]here is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts."). Those features of the *Younger* doctrine are best explained by reference to the potency of the federal interest in providing a forum for the vindication of federal claims, see *supra* note 61, and the relative weakness of states' interest in litigation falling outside the categories of criminal proceedings, civil enforcement proceedings, and civil proceedings to enforce state court judgments or orders.

<sup>70</sup> AG Motion to Dismiss, *supra* note 5, at 30, 35.