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# Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act

Diane P. Wood\*

## I. INTRODUCTION

The Anti-Injunction Act has been in existence only four years less than the federal judiciary itself, first appearing in the Act of March 2, 1793, as one of several incidental provisions in a law designed to relieve the Supreme Court Justices of some of the burdens of circuit-riding.<sup>1</sup> The language of the Act was straightforward and unambiguous: "nor shall a writ of injunction be granted to stay proceedings in any court of a state."<sup>2</sup> In practice, this codification of the general rule against anti-suit injunctions proved to be too rigid, and the courts developed a variety of exceptions.<sup>3</sup> Since 1948, the Act has therefore incorporated both the general rule forbidding federal court injunctions against state court proceedings and three exceptions to that rule: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>4</sup>

While the codification of the exceptions may have made the statute somewhat more realistic, the courts have continued to

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1. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334. For a detailed examination of the legislative history of the act, see Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930); Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1971).

2. § 5, 1 Stat. 335.

3. See *infra* text accompanying notes 39-117.

4. 28 U.S.C. § 2283 (1982). This language was adopted in connection with the 1948 revision of the Judicial Code. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 321-22 (1969); Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 721-22 (1977).

treat the statutory language somewhat like silly putty, stretching and squashing it in an effort to use anti-suit injunctions against state court proceedings when circumstances seemed to justify them. As described by Telford Taylor and Everett Willis fifty years ago, the Anti-Injunction Act is still an unsatisfactory "thing of threads and patches,"<sup>5</sup> whether measured by the volume of litigation involving the Act, the consistency of results, or the clarity and achievement of its purposes.

Why the Act has been a disappointment is a complex and important question to answer, assuming that its purposes continue to be worthwhile, and that those purposes are best served by giving the courts statutory guidance. In the end, the goal of a bright-line anti-injunction standard may be doomed never to succeed, because it attempts to incorporate two mutually inconsistent imperatives: first, respecting the autonomy of the state courts as adjudicators of equal dignity to the federal courts; and second, protecting superior federal interests, both substantive and procedural. In light of the broader re-examination of both federal and state court systems underway today, it is time to stop assuming that both these aims can fully be realized, and to decide more definitively which one will prevail under what circumstances.

## II. STRUCTURE AND PURPOSE OF THE ACT

### A. *Relationship to General Jurisdictional and Equitable Rules*

#### 1. *Control of jurisdictional allocation*

Placed in context, the Anti-Injunction Act is actually just one of several devices designed to assure the proper allocation of judicial business between the state and federal courts. The Act shares that task most prominently with the abstention doctrines,<sup>6</sup> and to a lesser extent, with a variety of other doctrines, including jurisdiction of the federal courts,<sup>7</sup> the removal power,<sup>8</sup>

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5. Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1172 (1933).

6. See, e.g., *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). See generally 1A pt.2 J. MOORE, W. TAGGERT, A VESTAL, J. WICKER & B. RINGLE, *MOORE'S FEDERAL PRACTICE* ¶ 0.203 (2d ed. 1989 & Supp. 1989) [hereinafter *MOORE'S FEDERAL PRACTICE*].

7. For example, when is federal subject matter jurisdiction exclusive and when is it

the ebbs and flows of pendent and ancillary jurisdiction,<sup>9</sup> with the *Rooker-Feldman* doctrine,<sup>10</sup> and the rules of intersystem preclusion.<sup>11</sup> When the general anti-injunction principle controls, state litigation may proceed unhampered by federal court action.<sup>12</sup> Perhaps the most important goal (if not consequence) of this rule is to discourage litigation over forum selection. In addition, the rule tends to create a system of *ex post* jurisdictional allocation, since normal principles of *res judicata* will operate to give controlling force to the forum that finishes first whenever both a federal and state court are concurrently adjudicating the same controversy between the same parties.<sup>13</sup>

Much of the allocational force of the general rule has been eroded by its persistent exceptions. The exceptions have the effect of rewarding litigation over choice of forum, and when applicable they enable the federal courts forcibly to control the state courts' exercise of power. When one of the exceptions to the anti-injunction principle may be invoked, the federal court is fully equipped to make a decision about jurisdictional allocation *before* the state proceedings are concluded. To the extent that

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concurrent with the state courts? To what extent do the statutes permit the federal courts to entertain claims based on state law, usually through diversity jurisdiction? To what extent must claims of federal law be presented to the state courts, as a result of doctrines such as the well-pleaded complaint rule? See *Louisville & N. R.R. v. Mottley*, 211 U.S. 149 (1908); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, (1986). Recommendations about the Anti-Injunction Act must be coordinated with other changes that may be contemplated in these doctrines.

8. See 28 U.S.C. §§ 1441-1447 (1982).

9. Compare *United States v. Finley*, 109 S. Ct. 2003 (1989) with *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966), and *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

10. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

11. See generally Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981); Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

12. This is true whether the action in which the federal injunction has been sought is a pure anti-suit injunction, filed solely for the purpose of thwarting the state court action, or if it is a concurrent, competing action filed for the resolution of some or all the claims that have been presented to the state court.

13. Intersystem preclusion is, of course, a complex issue in itself, as the articles mentioned in note 11, *supra*, demonstrate. The Supreme Court in several recent decisions has emphasized the importance of the federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982). See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 519-20 (1986) and *Marrese v. American Academy of Ortho. Surgeons*, 470 U.S. 373, 385-86 (1985).

the forum itself makes a difference to litigation, either due to expertise in the applicable law, quality of decision maker, efficiency of available procedural devices, or fundamental fairness to the litigants, the power to allocate jurisdiction *ex ante* is essential. Nonetheless, the fact that only the federal courts have such power<sup>14</sup> necessarily implies an inferior status for the state courts.

## 2. *Relationship to general rules concerning anti-suit injunctions.*

Even without the Anti-Injunction Act, federal courts would not ordinarily enjoin on-going proceedings in state courts. Like all other injunctions, an anti-suit injunction may not issue under general principles of equity unless the target lawsuit threatens irreparable injury and there is no adequate remedy at law. The injury itself might be to the court as in the case of injunctions in aid of the court's jurisdiction, or it may be to one of the parties' interests. In either case, equitable principles have a strong restraining force on anti-suit injunctions.<sup>15</sup> Furthermore, actual practice in state courts, with respect to courts of other states, and among federal courts, indicates that use of the anti-suit injunction actually is rare.<sup>16</sup> Thus, in order to make the case for

14. See *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964) ("While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *personam* actions like the one here.") (footnotes omitted).

15. See Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965). See also *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 915 (D.C. Cir. 1984) ("Ordinarily antisuit injunctions are not properly invoked to preempt parallel proceedings on the same in personam claim in foreign tribunals."). In *Laker Airways*, Judge Wilkey stated: "The equitable circumstances surrounding each request for an [antisuit] injunction must be carefully examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice." *Id.* at 927. The use of an antisuit injunction normally implies that the court issuing the injunction has the power itself to resolve the controversy. Compare *British Airways Bd. v. Laker Airways*, [1984] 3 All E.R. 39 (H.L.) (speech of Lord Diplock). In some circumstances, it may rest on a right not to have any trial proceed anywhere.

16. With respect to the federal courts, see generally *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) (following a first in time rule of preference for overlapping federal court suits); *Semmes Motors v. Ford Motor Co.*, 429 F.2d 1197, 1202-04 (2d Cir. 1970) (same rule). With respect to state courts, see, e.g., *Jacobson v. Jacobson*, 695 S.W.2d 44, 47 (Tex. App. Corpus Christi 1985); *Crawly v. Bauchens*, 57 Ill.2d 360, 312 N.E.2d 236, 239 (Ill. 1974); *E. B. Latham & Co. v. Mayflower Industries*, 278 App. Div. 90, 94, 103 N.Y.S.2d 279, 282 (1951). Cf. *Jam Productions Ltd. v. Dominick's Finer*

having a special anti-injunction act controlling federal court injunctions against state court proceedings, one must be convinced that something special requires that additional measure of protection.

The Supreme Court has consistently found that "something special" in the basic structure of federal/state relations. Its recent language in *Chick Kam Choo v. Exxon Corp.* is typical: "The [Anti-Injunction] Act . . . is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system."<sup>17</sup> In *Parsons Steel, Inc. v. First Alabama Bank*, the Court commented that "inefficient simultaneous litigation in state and federal courts on the same issue" was simply "one of the costs of our dual court system."<sup>18</sup> The plurality in *Vendo Co. v. Lektro-Vend Corp.* stated that the Act's purpose "is to forestall the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court."<sup>19</sup> The obvious assumption behind these statements is that the risk of excessive federal injunctions is unacceptably high in the absence of a statute. The abstention line of cases, however, casts serious doubt on the validity of any such assumption.

In the leading comity-based abstention decision, *Younger v. Harris*, the Supreme Court discussed the sources of the policy reflected in section 2283.<sup>20</sup> First, the Court noted the "basic doctrine of equity jurisprudence that courts of equity should not act" unless the moving party will "suffer irreparable injury" and no adequate remedy exists at law.<sup>21</sup> The Court was evidently discussing the pure anti-suit injunction, since it indicated that the *refusal* to enjoin would "avoid a duplication of legal pro-

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Foods, Inc., 75 Ill. Dec. 932, 934 (1983) (standards controlling court staying its proceedings for competing litigation). These rules in the aggregate presumably have the effect of discouraging the filing of the duplicative litigation in the second court.

17. 486 U.S. 140, 146 (1988).

18. 474 U.S. 518, 524-25 (1986).

19. 433 U.S. 623, 630 (1977) (Rehnquist, J.).

20. 401 U.S. 37 (1971). In the final analysis, the Court decided that federal intervention could not be justified as a matter of equity, and thus it left open the question whether the district court had the power in the first place under § 2283 to issue the injunction. *Id.* at 54. The holding one year later in *Mitchum v. Foster*, 407 U.S. 225 (1972), that suits brought under 42 U.S.C. § 1983 fall within one of the exceptions to the Anti-Injunction Act, answered the question about power in the affirmative.

21. 401 U.S. at 43-44.

ceedings and legal sanctions where a single suit would be adequate to protect the rights asserted."<sup>22</sup> Second, the Court noted "an even more vital consideration," the comity between the states and the federal government, which was vaguely described as resting on the belief that the states and their institutions should be left free to perform their separate functions in their separate ways.<sup>23</sup> From this, the Court concluded *without relying on section 2283* that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."<sup>24</sup>

Given the breadth and strength of the *Younger* line of cases, up to and including the Court's 1987 decision in *Pennzoil Co. v. Texaco, Inc.*,<sup>25</sup> one may seriously question how much the statutory prohibition against anti-suit injunctions adds to the judge-made prohibitions. It is tempting to adopt the cynical view that the only suits still governed by the Anti-Injunction Act itself are those in which the state has a minimal interest in the litigation—the very cases in which the avoidance of duplicative proceedings may be most compelling. Still, such a conclusion would seriously undervalue both the symbolic value of a statutory expression of a "hands-off" policy for the federal courts, and the instrumental value of a properly drafted statute.

### 3. *Nature of the Anti-Injunction Act's prohibition*

Whether the Act is "jurisdictional" or merely an expression of equitable restraint has remained unclear through the many years of its existence. Many courts of appeals describe it as essentially equitable.<sup>26</sup> On the other hand, the Supreme Court in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers* described it in quasi-jurisdictional language:

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22. *Id.* at 44.

23. *Id.*

24. *Id.* at 44-45.

25. 481 U.S. 1 (1987). *Younger* abstention is required when "the state's interests in the [pending civil] proceedings are so important that exercise of the federal judicial power would disregard the comity between the states and the National Government." *Id.* at 11. The *Pennzoil* Court found the State's "interests in administering certain aspects of their judicial systems" and ensuring that "orders and judgments are not rendered nugatory" to be important enough to require *Younger* abstention. *Id.* at 12-13.

26. See, e.g., *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1225 (8th Cir. 1987); *Machesky v. Bizzell*, 414 F.2d 283, 287 (5th Cir. 1969); *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964); *T. Smith & Son v. Williams*, 275 F.2d 397, 407 (5th Cir. 1960).

On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically designed exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. . . . We cannot accept any such contention.<sup>27</sup>

The Seventh Circuit suggested a more precise line (avoiding the jurisdictional characterization) in *Hickey v. Duffy*,<sup>28</sup> considering the Act as a prohibition of a certain kind of relief in federal court which, in light of the principles of state-federal relations on which the Act rests, "court[s] should not casually neglect."<sup>29</sup>

Whether the Act is characterized as jurisdictional or not bears directly on the legitimacy of the many judicially crafted exceptions that have persisted even after its 1948 revision.<sup>30</sup> In addition, if the Act is not "jurisdictional" or mandatory, it adds even less support to the general presumptions against anti-suit injunctions than the *Younger* line of cases suggests. Accordingly, and in keeping with the evident intent of the Supreme Court's *Atlantic Coast Line* decision, the remainder of this discussion assumes that the present Act is jurisdictional.

## B. Scope of the Act

### 1. Cases within the general rule

The Supreme Court has interpreted section 2283's prohibition broadly, holding that all doubts should be resolved against issuing injunctions.<sup>31</sup> For example, the fact that the state proceedings are concurrent with the federal proceedings does not justify an injunction; it simply helps to define the statute's coverage. Even the subset of concurrent cases in which serious effi-

27. 398 U.S. 281, 286-87 (1970).

28. 827 F.2d 234 (7th Cir. 1987) (Easterbrook, J.).

29. *Id.* at 240. This approach raises the question of the extent to which Congress may, in the course of defining and limiting the jurisdiction of the lower federal courts, limit the remedies that those courts may give. *See, e.g.,* *Lockerty v. Phillips*, 319 U.S. 182 (1943). *See generally* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 377-80, 395-98 (3d ed. 1988). In the circumstances of the Anti-Injunction Act, where another competent tribunal always exists to adjudicate the basic claim, Congress' power to limit the remedy of a federal court anti-suit injunction seems unobjectionable.

30. *See infra* notes 95-117 and accompanying text.

31. *See, e.g.,* *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145-50 (1988); *Atlantic Coast Line*, 398 U.S. at 297; *Amalgamated Clothing Workers of Am. v. Richmond Bros.*, 348 U.S. 511, 514-16 (1954); *Cf. Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941).



ciency concerns arise fares no better, no matter how dire the need for coordination or consolidation of proceedings.<sup>32</sup> That the prohibition continues to be cast in terms of actions *in personam*, as opposed to *in rem* or *quasi in rem* illustrates the Supreme Court's formal vision of the Act.<sup>33</sup> Injunctions are ordinarily forbidden if either action is *in personam*, but an exception to this rule may apply if both actions are *in rem* and concern the same *res*.<sup>34</sup>

The form of the request does not make any difference. An injunction addressed to the parties, requiring them to cease their state court litigation, is just as offensive to the Act as an injunction directed against a state judge or court.<sup>35</sup> In addition, and somewhat more controversially, most courts have decided that the Act bars the federal courts from issuing declaratory judgments that state court proceedings are invalid or must cease.<sup>36</sup> It is possible to distinguish the declaratory judgment on the grounds of its lesser degree of intrusion into the state judicial process and the absence of traditional equitable constraints upon its issuance. However, in the end, a declaratory judgment

32. See, e.g., *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1271-73 (9th Cir. 1982); *Jennings v. Boenning & Co.*, 482 F.2d 1128, 1132 (3rd Cir. 1973) ("Both courts are free to proceed, each in its own way and in its own time, without reference to the proceedings in the other court."), *cert denied*, 414 U.S. 1025 (1973); *St. Paul Fire & Marine Ins. Co. v. Lack*, 443 F.2d 404, 407 (4th Cir. 1971); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508-09 (10th Cir. 1968). See also *Donovan v. City of Dallas*, 377 U.S. 408, 412-14 (1964); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922).

33. See, e.g., *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977) (Rehnquist, J.); *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (court strains to characterize multi-district case as analogous to *in rem* proceeding); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir. 1982); *Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1137 (5th Cir. 1973). See also cases cited *supra* note 32.

34. See cases cited *supra* notes 32-33. See also *infra* notes 62-64 and accompanying text.

35. See, e.g., *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng.*, 398 U.S. 281, 287 (1970); *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940); *Los Angeles Mem. Coliseum Comm'n v. City of Oakland*, 717 F.2d 470, 473 (9th Cir. 1983).

36. See, e.g., *Samuels v. Mackell*, 401 U.S. 66, 69-72 (1971); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 496, 504-08 (5th Cir. 1988) (en banc, overturning panel decision to the contrary reported at 820 F.2d 1406); *Thiokol Chem. Corp. v. Burlington Indus.*, 448 F.2d 1328, 1332 (3d Cir. 1971) (implying, however, that the rule against declaratory judgments is not absolute, and that there may be circumstances in which a declaratory judgment may issue on a common federal question) *cert denied*, 404 U.S. 1019 (1972). Cf. *California v. Grace Brethren Church*, 457 U.S. 393, 407-11 (1982) (treating declaratory and injunctive relief the same for purposes of the Tax Injunction Act, 28 U.S.C. § 1341 (1982)). See generally C. WRIGHT, FEDERAL COURTS § 47, at 285 & n.53 (4th ed. 1983).

that has the same practical effect as an injunction (and that would be enforced with an injunction if necessary) surely falls within the Act's general prohibition.<sup>37</sup>

## 2. *The three statutory exceptions*

When section 2283 was revised in 1948, the drafters wanted it to restore the law as it had been prior to the Supreme Court's restrictive decision in *Toucey v. New York Life Insurance Co.*,<sup>38</sup> and to acknowledge the exceptions to the Act that Congress wished to recognize.<sup>39</sup> Three such exceptions were identified: (1) injunctions "expressly authorized" by Congress, (2) injunctions "in aid of [the court's] jurisdiction," and (3) injunctions "to protect or effectuate [the court's] judgment."<sup>40</sup> Contrary to the hopes and undoubted intentions of the 1948 Congress, these three are not the only exceptions to the Act. However, their statutory status gives them the right of first consideration.

a. "*Expressly authorized.*" Many commentators have noted (with glee or despair) that the words "expressly authorized" actually mean "implicitly authorized."<sup>41</sup> This is a result of the interpretation of the statute established in *Mitchum v. Foster*,<sup>42</sup> which presented the question whether state court proceedings that allegedly violated the Civil Rights Act<sup>43</sup> could be enjoined. In *Mitchum*, the Court eliminated several possible criteria that might have defined "expressly authorized."<sup>44</sup> Another act of Congress need *not* contain a specific statement that it is authorizing injunctions that section 1983 would otherwise bar.<sup>45</sup> Going further, the Court said that "a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception."<sup>46</sup> Instead, it stated two more practical tests:

[A]n Act of Congress must have created a specific and uniquely

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37. See 28 U.S.C. § 2202 (1982).

38. 314 U.S. 118, 119-20 (1941) (rejecting a relitigation exception to the anti-injunction principle).

39. 28 U.S.C. § 2283 (1982) (Reviser's Note).

40. 28 U.S.C. § 2283 (1982).

41. See, e.g., Currie, *supra* note 4, at 322; Redish, *supra*, note 4, at 733-39.

42. 407 U.S. 225 (1972).

43. 42 U.S.C. § 1983 (1982).

44. 407 U.S. 225, 234 (1972).

45. *Id.* at 237. See also *Amalgamated Clothing Workers of Am. v. Richman Bros.*, 348 U.S. 511, 516 (1954).

46. 407 U.S. at 237.

federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. . . .

The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.<sup>47</sup>

The leap from a requirement of some kind of express (*i.e.* textual) recognition of an exception to the policy-oriented "frustration or intended scope" test is a long one. On the one hand, it is hard to answer the charge that *Mitchum* represents the anti-injunction policy that many believe ought to obtain, not the one Congress actually adopted in 28 U.S.C. section 2283.<sup>48</sup> On the other hand, it is a fact that state court proceedings themselves can sometimes violate federal law. The Civil Rights Act is one example; another is the antitrust laws, which condemn the use of baseless, frivolous, non-cost-justified state court proceedings as an anticompetitive device.<sup>49</sup>

The vagueness of the Court's approach to the first exception did not begin with *Mitchum*. In fact, it predated even the 1948 codification, which recognized this exception for the first time. "Expressly authorized" injunctions actually seem to issue in three distinct circumstances: first, when an Act of Congress is designed to confer the procedural right of one and only one proceeding on the litigants; second, when state litigation itself constitutes a violation of the substantive federal law; and third (and most broadly), when the results of a state proceeding will "frustrate" or negate the intended scope of the federal statute, as the court understands that scope through the benefit of the usual tools of statutory interpretation.

The rules expressed in *Mitchum* are least objectionable in the first of these categories, where the federal right relates to the

47. *Id.* at 237-38.

48. Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 641-42 and 672-75 (1975); Redish, *supra* note 4, at 726f. See also Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 350-51 (1928).

49. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 643-54 (1977) (Blackmun, J., concurring); *id.* at 645 (Stevens, J., dissenting). See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379-80 (1973); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513-15 (1972). For a collection of cases on the anticompetitive use of litigation, see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (1984, First Supp. 1983-1986 & Second Supp. 1983-1988).

elimination of duplicative proceedings. Several examples illustrate this kind of right. Statutory interpleader and limitation of shipowners' liability are two of the oldest exceptions to the anti-injunction policy, and both rest on this rationale.<sup>50</sup> A third is the bankruptcy exception, the only one to be recognized in the statute before the 1948 revision.<sup>51</sup> The entire purpose of all those federal devices is to consolidate the litigation in one forum. One may easily ask why the "in aid of jurisdiction" exception is not better suited to these proceedings, since express language about state court suits does not appear in the statutes. However, tradition places this type of case in the "expressly authorized" category. The broader point, which is discussed more fully in Part III below, is that the categories obscure, rather than clarify, the problem of which injunctions should and should not issue.

It is difficult to place the removal cases within the first category, although they do not fit elsewhere any better. Courts have generally treated removal as another area where injunctions against concurrent state court proceedings are proper.<sup>52</sup> This result cannot be because Congress wanted one proceeding for the entire transaction, since the removal statutes themselves authorize partial remands.<sup>53</sup> On the other hand, most of the value of removal would be lost if the state court could continue adjudicating the case after an attempted removal, both because this would cause a waste of litigation resources and because the state result would be binding if the state court won the race to the

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50. For cases holding that statutory interpleader is an exception, see, e.g., *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75, 79-80 (10th Cir. 1955), *cert denied*, 350 U.S. 986 (1956). Compare *Jos. L. Muscarelle, Inc. v. Central Iron Mfg. Co.*, 328 F.2d 791, 794 (3d Cir. 1964) (risk of double liability does not allow a federal court to enjoin state proceedings unless the party invokes "federal interpleader, with [its] attendant statutory authority to enjoin state actions. For those dealing with shipowners' liability, see e.g., *Providence & N.Y. Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883); *Beal v. Waltz*, 309 F.2d 721, 724 (5th Cir. 1962).

51. Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1087, 1162 (codified at 28 U.S.C. § 379 (1940)).

52. See, e.g., *French v. Hay*, 89 U.S. 250 (1875); *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988); *Lowe v. Jacobs*, 243 F.2d 432 (5th Cir. 1957). Cf. *Chandler v. O'Bryan*, 445 F.2d 1045, 1057-58 (10th Cir. 1971) (if a federal court properly remands the case for further proceedings in the state court, an injunction against state proceedings is not available "since [the] order of remand is *res judicata* as to any further litigation of this subject matter in the federal court . . ."). In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 133 (1941), Justice Frankfurter suggested that "the Removal Acts qualify *pro tanto* the [anti-injunction] Act of 1793."

53. See 28 U.S.C. § 1441(c) (1982). See also *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988).

finish line. Thus, injunctions in removed cases protect the procedural integrity of the federal proceeding in a manner similar to, even if not identical with, that seen in the interpleader, limitation of shipowner's liability, and bankruptcy cases.

The second category, when state litigation itself violates federal law, is best illustrated by the antitrust suits, where the mere pendency of state court proceedings can affect a competitor's ability to survive in the market.<sup>54</sup> More controversially, the Seventh Circuit has interpreted *Mitchum* as holding only that state court proceedings themselves can occasionally violate the Civil Rights Act, when the state court system is fundamentally biased against certain litigants.<sup>55</sup> Most other courts have not interpreted *Mitchum* so strictly, and have assumed that any section 1983 case falls within the exception to the Anti-Injunction Act.<sup>56</sup> This does not mean, of course, that they routinely issue injunctions in section 1983 cases; to the contrary, it usually means that they engage in a *Younger* abstention analysis and a general equitable inquiry. The Anti-Injunction Act, however, drops out of the picture.

The variety of statutes that have been included in the third category—when results of a state proceeding will frustrate the scope of a federal statute—is so great that it is hard to distinguish these “expressly authorized” exceptions from other cases in which federal policy is especially strong. On the one hand, section 21(e) of the Securities Exchange Act of 1934,<sup>57</sup> section 1(20) of the Interstate Commerce Act,<sup>58</sup> the Employee Retirement Income Security Act (ERISA),<sup>59</sup> and section 102 of the Na-

54. *Vendo Co. v. Lektro-Vend. Corp.*, 433 U.S. 623 (1977). See also, *Los Angeles Memorial Coliseum Comm'n v. City of Oakland*, 717 F.2d 470 (9th Cir. 1983); *Kurek v. Pleasure Driveway & Park Dist.*, 574 F.2d 892 (7th Cir. 1978).

55. *Hickey v. Duffy*, 827 F.2d 234, 240-43 (7th Cir. 1987). This opinion also restricted the right to injunctive relief to cases raising civil rights claims under the Constitution, rejecting the argument that statutory violations redressable under § 1983 fell within the *Mitchum* rule. *Id.* at 243.

56. See, e.g., *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562-63 (6th Cir. 1982); *Henry v. First Nat. Bank*, 595 F.2d 291, 300 (5th Cir. 1979). See also *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Juidice v. Vail*, 430 U.S. 327, 339 (1977) (Stevens, J., concurring).

57. 15 U.S.C. § 78n(e) (1982). See *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 696-698 (2d Cir. 1966).

58. 49 U.S.C. § 1(20) (1982). See *Tampa Phosphate R.R. v. Seaboard Coast Line R.R. Co.*, 418 F.2d 387, 392-94 (5th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

59. 29 U.S.C. §§ 1001-1453 (1982). See *General Motors Corp. v. Buha*, 623 F.2d 455, 458-59 (6th Cir. 1980).

tional Environmental Policy Act,<sup>60</sup> have all been found to be "expressly authorized" exceptions.<sup>61</sup> On the other hand, other aspects of the 1934 Securities Exchange Act have been found not to deserve this treatment,<sup>62</sup> nor does the Longshoremen & Harbor Workers' Compensation Act,<sup>63</sup> nor in general the acts of Congress that preempt conflicting state laws or confer exclusive jurisdiction on the federal courts.<sup>64</sup> Unless and until the language of the statute is changed, it is hard to resist the conclusion that this last group of cases have gone too far. To the extent that judges have attempted to strike the correct balance between federal court power and state court power, and the correct allocation of litigation between the court systems, one can understand what happened. However, the entire enterprise smacks of ends justifying means, which is always problematic.

*b. "Necessary in aid of its jurisdiction."* Unlike the first exception, this one has often been construed with the greatest nineteenth century rigor the courts can muster. The paradigmatic area in which this exception applies is to concurrent proceedings concerning the same tangible property when both the federal and state actions are *in rem*. For these cases, little has changed since the Supreme Court's 1943 decision in *Mandeville v. Canterbury*, which described the exception under the predecessor to section 2283 as follows:

[I]f two suits pending, one in a state and the other in a federal court, are *in rem* or quasi *in rem*, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other.

[A] federal court may protect its jurisdiction thus acquired by restraining the parties from prosecuting a like suit in a state court notwithstanding the prohibition of § 265. . . . But where

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60. 42 U.S.C. § 4332 (1982). See *Stockslager v. Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951-53 (8th Cir. 1976).

61. For additional citations, see 17 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4224, at 526 n.20 (2d ed. 1988).

62. See, e.g., *Jennings v. Boening & Co.*, 482 F.2d 1128, 1130-32 (3d Cir. 1973) *cert denied*, 414 U.S. 1025 (1973); *Vernitron Corp. v. Benjamin*, 440 F.2d 105, 108 (2d Cir. 1971) *cert. denied*, 402 U.S. 987 (1971).

63. 33 U.S.C. §§ 901-950 (1982). See *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 499, 501 (5th Cir. 1988) (en banc).

64. See *infra* notes 118-121 and accompanying text.

the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as *res judicata* in the other.<sup>65</sup>

In spite of developments in other areas of procedural law exposing the artificiality of the "*in rem/in personam*" distinction,<sup>66</sup> the lower federal courts still struggle to make sense of the distinction for purposes of this exception to the Anti-Injunction Act.<sup>67</sup>

The Supreme Court's 1970 decision in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers* offered the possibility of a broader reading of the "in aid of jurisdiction" exception than the old *in rem* cases had implied.<sup>68</sup> Under circumstances in which pending state court injunctions prohibiting picketing by union members appeared to threaten the federal court's ability to enforce federally protected workers' rights, the Court found that a federal injunction against the state court injunction was improper. The union had argued that the federal court could act either pursuant to the "in aid of jurisdiction" exception or the "protection of judgments" exception. The Court, however, saw this as merely a case of concurrent jurisdiction and said that both exceptions to the Anti-Injunction Act "impl[ie]d that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>69</sup> Most lower federal courts have followed the clear implication of this decision, and have kept the "aid of jurisdiction" standard high.<sup>70</sup>

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65. 318 U.S. 47, 48-49 (1943). See also *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135 (1941).

66. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

67. See, e.g., *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir. 1982); *Jett v. Zink*, 474 F.2d 149, 156 (5th Cir. 1973); *Signal Properties, Inc. v. Farha*, 482 F.2d 1136 (5th Cir. 1973); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508-09 (10th Cir. 1968).

68. 398 U.S. 281 (1970).

69. *Id.* at 295.

70. But see *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981) (applying the *Atlantic Coast* test to protect a massive multi-district class action that had been proceeding in one federal district court). This and other cases are in some

In a few cases, more adventuresome courts have nonetheless turned to the "aid of jurisdiction" exception for help in managing complex litigation. For example, in one phase of the *Swann v. Charlotte-Mecklenburg Board of Education* school desegregation litigation, the district court had enjoined certain parties from prosecuting an action in the North Carolina state courts.<sup>71</sup> The state suit dealt with the assignment of exceptionally talented students to a certain program, and was likely to affect the federal court's continuing jurisdiction over the assignment process. Since the federal court's supervision was continuous, the court of appeals appeared confident in placing the injunction in the "aid of jurisdiction" category.<sup>72</sup> Similarly, in the Eleventh Circuit's recent decision in *Battle v. Liberty National Life Insurance Co.*, the court used the "aid of jurisdiction" exception to justify an injunction against state court proceedings to protect a complex settlement agreement in three antitrust class actions.<sup>73</sup> Interestingly, the court also commented that "it makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a *res* to be administered."<sup>74</sup>

Cases like *Swann* and *Battle* are the exception, however, and not the rule.<sup>75</sup> This could be explained by the simple fact that the federal courts share jurisdiction over most subjects with the state courts, and thus they have no proprietary interest in their jurisdiction to protect. On the other hand, it is unclear why the federal courts could not use a straightforward "first in time" rule when concurrent litigation is proceeding in the state courts, just as they normally do when the concurrent litigation is in other federal courts. If the federal court acquired its jurisdiction first, then it may (assuming other equitable requirements are satisfied) enjoin competing state court litigation, to avoid having its own proceedings eviscerated by the heavy hand of state *res judicata*.<sup>76</sup> Even if this approach seems like the *Mitchum* of ex-

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conflict with the decisions that hold, rather routinely, that FED. R. CIV. P. 23 is not an exception to the Anti-Injunction Act. See generally *infra* text accompanying notes 123-24.

71. 501 F.2d 383 (4th Cir. 1974).

72. *Id.* at 384.

73. 877 F.2d 877 (11th Cir. 1989).

74. *Id.* at 882.

75. See also *James v. Bellotti*, 733 F.2d 989, 993-94 (1st Cir. 1984); *United States v. Ford Motor Co.*, 522 F.2d 962, 965 (6th Cir. 1975) (no injunction to help antitrust case).

76. The Supreme Court in recent years has consistently given a strong reading to the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982). See, e.g., *Parsons Steel, Inc.*



ception two (insofar as it cuts the statute loose from its historical moorings), injunctions in aid of special federal court devices for handling complex litigation might be appropriate.<sup>77</sup> At present, however, no consensus for this kind of liberalized approach exists at either the Supreme Court level or in the lower courts.

c. "To protect or effectuate its judgments." This is often known as the "relitigation" exception to the Anti-Injunction Act. From a comity standpoint, it may be the most difficult to justify, yet it is invoked frequently, and Congress went to some trouble to preserve it after the 1941 decision in *Toucey v. New York Life Insurance Co.*<sup>78</sup> If one could be sure that the state courts would always apply the proper principles of *res judicata* to federal court judgments, then it is hard to see why the federal courts have any stronger need to police their own judgments than the Illinois courts have to police their judgments in Texas. Nevertheless, as recently as 1988 the Supreme Court explained that "[t]he relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court."<sup>79</sup> The question is therefore when should a federal court turn to an injunction to protect or effectuate its judgments, rather than rely on the state courts to handle that task appropriately.

One simple rule might be that exception three to the Anti-Injunction Act always gives federal courts the power to enforce their judgments by means of an injunction, but that they must exercise that power sparingly in the light of the usual equitable restraints. However, the excerpt from *Atlantic Coast Line* quoted above in connection with the "in aid of jurisdiction" exception casts serious doubt on such a reading.<sup>80</sup> Instead, it appears that the authority exists only when there is something special about the federal proceeding, or perhaps something flawed

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v. *First Alabama Bank*, 474 U.S. 518 (1986); *Marrese v. American Academy of Ortho. Surgeons*, 470 U.S. 373 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

77. For example, injunctions in aid of pretrial consolidation orders under 28 U.S.C. § 1407 could be "in aid of jurisdiction," as could injunctions for properly certified mandatory class actions under FED. R. Civ. P. 23(b)(1).

78. 314 U.S. 118 (1941) (rejecting a relitigation exception). The sparse legislative history of the 1948 version of § 2283 indicates that Congress intended to overrule the decision in *Toucey*, at least insofar as it did not recognize relitigation as grounds for an injunction. See 28 U.S.C. § 2283 (1982) (Reviser's Note); Currie, *supra* note 4, at 321-24; Redish, *supra* note 4, at 720-26.

79. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

80. See *supra* text accompanying note 68.

about the state proceeding — and as before, those conditions are ill-defined.

One curiosity about the relitigation exception is that there seems to be no exhaustion of state remedies requirement attached to it. In fact, the contrary appears to be true, in light of the Supreme Court's decision in *Parsons Steel, Inc. v. First Alabama Bank*.<sup>81</sup> In *Parsons*, the bank had obtained a judgment in federal court exonerating it from charges of fraudulent conduct. In a concurrent state court action, *after* the entry of the federal judgment, the plaintiffs continued to complain about essentially the same actions of the bank. The bank then pleaded res judicata and collateral estoppel in the state court, but its arguments were rejected.<sup>82</sup> Frustrated, the bank turned to federal court for an injunction protecting the bank's victory, which the federal court granted and the court of appeals affirmed. In the Supreme Court, the principal focus of the opinion was on the reconciliation of the Full Faith and Credit Statute<sup>83</sup> and the Anti-Injunction Act. The Court, in a somewhat Solomonic decision, held that the reconciliation would be accomplished

simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.<sup>84</sup>

The Court apparently gave little thought to the incentive effects of its decision. If a party presents the affirmative defense of res judicata or collateral estoppel to a state court and the state court rejects the defense, that party under *Parsons* is foreclosed from a de novo federal court determination of the issue. If, on the other hand, the party evades the state court proceeding and goes straight to the federal court for a "protection or effectuation" injunction against the state court proceedings, then the federal court is free to decide without regard to state

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81. 474 U.S. 518 (1986).

82. Or so the Supreme Court thought. On remand, the Court of Appeals for the Eleventh Circuit exercised considerable ingenuity in finding that the state court's decision was insufficiently "final" for purposes of res judicata under Alabama law. See *First Alabama Bank v. Parsons Steel, Inc.*, 825 F.2d 1475, 1481 (11th Cir. 1987).

83. 28 U.S.C. § 1738 (1982).

84. 474 U.S. at 524.

preclusion rules. Finally, if the party presents its affirmative defense to the state court and the state court rejects it, then the federal court will be free to issue an injunction as long as the request is presented before the state court's judgment is sufficiently final for preclusion purposes under the state's own law of judgments.

Two consequences of these rules are to encourage evasion of state proceedings and to place the federal courts in the position of second-guessing state court determinations about the effect of federal court judgments. The first consequence totally ignores the comity and federalism basis of the Anti-Injunction Act, and the second comes close to violating the principles underlying the *Rooker-Feldman* doctrine.<sup>85</sup> In sum, the narrow holding of *Parsons*, that a final state court determination of the effect of a federal judgment must be judged under the Full Faith and Credit Statute, is unobjectionable standing alone. Nevertheless, if analysis under section 1738 indicates that the state court judgment seriously interferes with a prior federal court judgment, it is hard to see why the federal court should lack power to take action as long as the Anti-Injunction Act reads as it does.

Aside from the full faith and credit problem, courts have used the relitigation exception without much regard to the adequacy of state *res judicata* remedies. It is true that some courts will refuse to enjoin a pending state court proceeding if the remedy of raising the federal court judgment as a defense appears to be adequate.<sup>86</sup> However, many others do not attempt to establish the adequacy of the state remedy first, although they are careful to follow the federal rules concerning the binding effect of prior judgments.<sup>87</sup> As the Second Circuit indicated in *Amalgamated Sugar Co. v. NL Industries*, an injunction under this exception "applies when the state court proceeding would other-

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85. See *supra* note 10.

86. *Eg.* *Bechtel Petroleum v. Webster*, 796 F.2d 252, 253 (9th Cir. 1986); *Delta Air Lines v. McCoy Restaurants*, 708 F.2d 582, 585 (11th Cir. 1983); *Southern Cal. Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960) ("complainant must make a strong and unequivocal showing of relitigation").

87. *See, e.g.*, *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177, 1180 (7th Cir. 1987) (following conventional rules of preclusion to decide whether injunction could issue); *Bluefield Community Hosp. v. Anziulewicz*, 737 F.2d 405, 408 (4th Cir. 1984); *Harper Plastics, Inc. v. Amoco Chem. Corp.*, 657 F.2d 939, 946-48 (7th Cir. 1981) (rule against "claim splitting" supports injunction against relitigation, especially in light of broad joinder provisions of Federal Rules of Civil Procedure); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 510 (10th Cir. 1968) (no injunction, because federal order was interlocutory).

wise be barred by *res judicata*.”<sup>88</sup> In a sense, that makes section 2283 itself an exception to the general rule that a court does not determine the *res judicata* effects of its own judgments.<sup>89</sup> To the extent section 2283 disregards this rule, it also disregards the purpose behind the rule, which may value the added perspective that a later court has upon reviewing a closed record. Nonetheless, one sees very little (if any) discussion of this trade-off in the case law.

One final issue that has arisen frequently in recent years is the extent to which relitigation injunctions may issue to protect consent decrees or settlement agreements, as opposed to formal judgments. A number of courts have extended the logic of the relitigation exception to these cases.<sup>90</sup> The Seventh Circuit, however, refused to find the authority in the Act to issue such an injunction, stating that “[c]onsent decrees are contracts,” and that “decrees as judgments do not have the same effect for purposes of [section] 2283 on third parties as do fully litigated judgments.”<sup>91</sup> It seems fruitless to try to classify consent decrees as “really” contracts or “really” judgments in this area, as in many others.<sup>92</sup> When a complex, negotiated decree that terminates federal court litigation can be undercut or frustrated by competing state court litigation (often brought by unnamed class representatives or others affected by the first case) it seems reasonable to read the Act to permit protective injunctions.<sup>93</sup> Whether these exceptions are called “in aid of jurisdiction,” or “to protect

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88. 825 F.2d 634, 639 (2d Cir. 1987).

89. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1983).

90. *See, e.g.*, *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144 (10th Cir. 1986); *United States v. District of Columbia*, 654 F.2d 802 (D.C. Cir. 1981); *United States v. ASCAP*, 442 F.2d 601, 602-03 (2d Cir. 1971). *Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958). *Compare In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 869 F.2d 760 (3d Cir.) (no injunction to protect settlement, because no personal jurisdiction over the defendants in multi-state action), *cert. denied*, *Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 110 S. Ct. 77 (1989).

91. *Dunn v. Carey*, 808 F.2d 555, 559 (7th Cir. 1986). Judge Swygert dissented on this point, stating, “I do not believe, as the majority does, that the applicability of the ‘protect or effectuate’ language contained in section 2283 depends upon whether the federal action ended in a consent decree.” *Id.* at 561. As indicated in the text, Judge Swygert’s view appears to be shared by a number of other circuits.

92. *See Kramer, Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1980).

93. The injunction probably should be sought from the federal court that entered the decree, as the Ninth Circuit held in *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1272-73 (9th Cir. 1982), in the interest of sensible judicial administration.

or effectuate judgments," is fairly unimportant in the end. The result will be that the disaffected parties will be compelled to bring their complaints to the federal court with authority over the suit, instead of inefficiently scattering the litigation all over the country.<sup>94</sup>

### 3. *Non-statutory exceptions to section 2283*

In spite of the efforts of the 1948 revisers, the three acknowledged exceptions to the anti-injunction principle are not the only ones courts recognize. Five additional situations, none of which fits neatly into the three statutory exceptions discussed above, can be identified in which federal courts may enjoin pending state proceedings.

*a. The United States as plaintiff.* The first non-statutory exception occurs when the United States is suing to protect its own interests. The leading decision recognizing this exception, *Leiter Minerals, Inc. v. United States*, came nearly a decade after the 1948 revision of the Judicial Code.<sup>95</sup> In the end, the Court's reason for refusing to apply section 2283 to the United States was that it just did not make sense to do so. Phrased more elegantly, Justice Frankfurter explained:

The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.<sup>96</sup>

Although nothing in the statute compels this result, the lower courts have not only followed it, but have extended it. In one case, in which the government was suing on behalf of a class of individuals, the opposing party argued unsuccessfully that the logic of *Leiter Minerals* should not control.<sup>97</sup> The rule appears

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94. Kramer, *supra* note 92.

95. 352 U.S. 220 (1957).

96. *Id.* at 225-26.

97. See *United States v. Wood*, 295 F.2d 772, 779 (5th Cir. 1961). See also *Henry v.*

to reflect the idea that, when the government itself is the plaintiff, the superiority of the federal interest is so clear that other secondary ways of testing the comity equation are unnecessary. This rule is so well established that it generally occasions little or no discussion.<sup>98</sup>

*b. United States agencies.* Although the *Leiter Minerals* rule was not extended immediately to suits brought by federal agencies, the Supreme Court anticipated the first step in that direction in its brief opinion a few years prior to *Leiter in Capital Service, Inc. v. NLRB*.<sup>99</sup> *Capital Service*, however, relied on the "in aid of jurisdiction" exception to sustain an injunction requested by the NLRB, thereby avoiding the central question of special treatment for the government.<sup>100</sup> In 1971, squarely faced with the issue again in *NLRB v. Nash-Finch Co.*, the Court held that the agency was entitled to the same status as the United States.<sup>101</sup> The Ninth Circuit followed the *Nash-Finch* approach on behalf of the Securities Exchange Commission in *SEC v. Wencke*.<sup>102</sup>

Critics of the *Nash-Finch* rule point out that the interests of the United States and those of particular agencies will not necessarily be congruent, especially if one is talking about agencies that enjoy independent litigating authority. Allowing injunctions in every suit brought by an executive branch entity or an independent agency vastly expands the scope of the judge-made exception of *Leiter Minerals*—arguably an even greater expansion than the one *Mitchum* created for "expressly authorized" injunctions. On the other hand, it may be unduly formalistic to extend the exception, if there is to be one at all, only to suits actually brought by the United States in its own name. The superiority of the federal interest is just as strong when Congress entrusts enforcement to an agency as when Congress leaves enforcement authority in the Department of Justice.

*c. Private attorneys general.* The next step down this slippery slope would be an exception for private individuals empow-

First Nat'l Bank 595 F.2d 291, 308 (5th Cir. 1979) (United States as intervenor).

98. *E.g.*, *United States v. Composite State Bd. of Medical Examiners*, 656 F.2d 131, 134 (5th Cir. 1981).

99. 347 U.S. 501, 504-05 (1954).

100. *Id.* at 505.

101. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) (relying heavily on *Bowles v. Willingham*, 321 U.S. 503 (1944)).

102. 577 F.2d 619, 623 (9th Cir. 1978) (reaffirmed in later decision in same case, 622 F.2d 1363 (1980)).

ered to sue under statutes regulating public rights. Private attorneys general enforce the antitrust laws, securities laws, environmental laws, employment discrimination laws, and many others.<sup>103</sup> The Second Circuit initially embraced the idea that what was good for an agency must also be good for the private suitor and found that this kind of private attorney general could obtain an injunction against state court proceedings in a suit under section 21(c) of the Securities Exchange Act of 1934.<sup>104</sup> However, in later decisions the court distinguished its own ruling, and most other courts have been slow to push the Securities Exchange Act this far.<sup>105</sup> Indeed, it is hard to see how the statute could cover this last group of cases and still remain true to its own language.

*d. Different parties.* The last two non-statutory exceptions to section 2283 are more in the nature of soft points that can be manipulated. The first concerns the parties to the two suits. Even though a party to a federal court action may not seek an injunction against a state officer's pursuit of a concurrent state court action against him or her, this prohibition does not prevent the party from seeking an injunction against the state officer's institution of new proceedings against other parties.<sup>106</sup> Groups interested in test litigation can therefore evade the barrier of the Act as long as different members of the group are willing to come forward to sue in the different courts.

In recent years, quite in keeping with broader developments in the law of privity and adequacy of representation, the Supreme Court has signalled a greater willingness to examine the real interests behind related litigation. In *County of Imperial, California v. Munoz*, the Court reviewed a case where a county had filed suit against one party (McDougal) seeking to prohibit him from selling water for consumption outside the county.<sup>107</sup> The county prevailed against the seller in the California Su-

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103. See generally Sunstein, *Standing and the Privatization of Public Law* 88 COLUM. L. REV. 1432 (1988).

104. *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 697-99 (2d Cir. 1966).

105. See, e.g., *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1348-49 (2d Cir. 1974); *Vernitron v. Benjamin*, 440 F.2d 105, 108 (2d Cir. 1971). Compare *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (antitrust case; availability of the private attorneys general exception would have rendered moot the "expressly authorized" disagreement).

106. *Hale v. Bimco Trading*, 306 U.S. 375, 377-78 (1939). See generally *Ex parte Young*, 209 U.S. 123 (1908).

107. 449 U.S. 54 (1980).

preme Court, despite the participation of the buyers as amicus curiae. Twelve days after the state supreme court issued its decision, the buyers sued in federal court to enjoin the county from enforcing its judgment. Rather than assume that the buyers were "strangers" under the *Hale* rule, the United States Supreme Court remanded for a determination of that question.<sup>108</sup> Justice Powell, concurring, expressed an interest in re-examining *Hale*.<sup>109</sup>

Thus, at least in the past, litigants could affect the allocation of cases between the state and federal courts by taking advantage of formal rights to participate in litigation. To the extent, however, that the Supreme Court moves to a more realistic assessment of actual representation, this non-statutory exception is likely to disappear.

*e. Restrictions on meaning of "proceedings."* This may not be a "non-statutory" exception at all, since one must understand which proceedings fall within the scope of the Act before it can be applied. However, the Supreme Court has never said that "all" proceedings fall under the Anti-Injunction Act. As before, the situation is more complicated.

To the extent state courts engage in non-judicial activities, the Anti-Injunction Act provides no protection for their proceedings. Thus, statutory vote count procedures are subject to injunction,<sup>110</sup> as are certain proceedings such as statutory garnishment, which are ancillary to court proceedings, but are accomplished without the participation of the state courts.<sup>111</sup> The same is true of state court participation in administrative ratemaking.<sup>112</sup> Comity and respect for different sovereigns cannot explain these decisions, because they flatly disregard the fact that the states as sovereigns have assigned different tasks to their courts, which the federal courts are choosing to brand as undeserving of protection. Nonetheless, without something like this judicial/non-judicial distinction, the federal courts would find themselves in the uncomfortable position (from their perspective) of being unable to touch a wide variety of state admin-

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108. *Id.* at 59-60.

109. *Id.* at 60-61 (Powell, J., Concurring).

110. *Roudebush v. Hartke*, 405 U.S. 15 (1972).

111. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 553-54 (1972).

112. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). *See also* *American Motors Sales Corp. v. Runke*, 708 F.2d 202, 204-05 (6th Cir. 1983).



istrative activities. This result would go well beyond the likely intention of the 1793 Act and its successors.

The Seventh Circuit at one time tried to expand its ability to issue injunctions by cleverly interpreting the timing of the state court action. It has always been the case that threatened state court proceedings were not affected by the Act.<sup>113</sup> In *Barancik v. Investors Funding Corp.*, the Seventh Circuit read this to mean that the state court proceedings could not be pending when the injunction was requested from the federal court, even if they had been commenced by the time the injunction was issued.<sup>114</sup> Although the Eighth Circuit followed *Barancik* in one decision,<sup>115</sup> the Sixth Circuit declined to do so.<sup>116</sup> The Sixth Circuit's result seems much more in line with the statute, since any federal court wishing to preserve the status quo pending its decision can always issue a temporary restraining order or a preliminary injunction. The Act would become too easy to evade in many cases if the timing of the request for the injunction became the dispositive factor.

Finally, even though wholesale injunctions against state court proceedings are forbidden, federal courts may be able to enjoin aspects of the state proceeding without being constrained by the Act. This need occasionally arises when disputes over discovery orders and protective orders arise.<sup>117</sup> In terms of interference, these injunctions can be almost as serious as a prohibition against the entire suit. On the other hand, some degree of cross-injunctions and conflicting orders is almost inevitable when complex cases concerning the same transaction are pending in both federal and state court, overlapping class actions have been certified, or other complicating factors are present.

#### 4. Rejected exceptions

In a number of cases, the courts have refused to permit injunctions against state court proceedings, obeying the statutory

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113. See generally, 1A pt.2 J. MOORE, W. TAGGERT, A. VESTAL, J. WICKER & B. RINGLE, MOORE'S FEDERAL PRACTICE, P.O.208c (2d ed. 1989); Currie, *supra* note 4 at 325; WRIGHT, FEDERAL COURTS § 47 at 279 & note 15 (4th ed. 1983).

114. 489 F.2d 933 (7th Cir. 1973) See generally *Ex parte Young*, 209 U.S. 123 (1908).

115. *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127-28 (8th Cir. 1982).

116. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 532-33 (6th Cir. 1978).

117. See, e.g., *Miofsky v. Superior Court*, 703 F.2d 332 (9th Cir. 1983); *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961).

command with some regret. The examples that follow illustrate instances where policy concerns might, on appropriate facts, justify an anti-suit injunction. In such cases, the existing statute forces an undesirably rigid outcome.

*a. Lack of state court jurisdiction.* Nothing in the Anti-Injunction Act permits a federal court to enjoin a state court suit that is proceeding in disregard of basic jurisdictional statutes, such as when the state court is attempting to usurp exclusive federal jurisdiction. The federal courts have not authorized such injunctions "in aid of" their jurisdiction.<sup>118</sup> Nonetheless, this is an area where Congress itself has expressed a clear policy with respect to the proper forum for adjudication. The rule in this area is in serious tension with the rule followed in the removal cases, which, as noted above, rely on the same kind of implicit, policy-driven analysis as this would require.

*b. Federal preemption cases.* Closely related to the exclusive federal jurisdiction cases are those in which federal law preempts state law as a substantive matter. Again, in spite of the strong federal interest in such cases, federal courts are powerless to effectuate the best *ex ante* jurisdictional allocation. Although in some areas a federal court can achieve much of the same allocational benefit by staying its own hand, this is obviously not such a case. Instead, the litigant must present his or her federal defense of preemption to the state court and hope that the state court will understand it and give proper weight to it.<sup>119</sup>

Judge Rubin, of the Fifth Circuit, expressed great frustration with this state of affairs in his separate opinion in the en banc decision in *Texas Employers' Insurance Association v. Jackson*.<sup>120</sup> The question there concerned the federal court's ability to enjoin a worker's compensation suit in state court that was clearly preempted by federal law; the court agreed that an injunction was barred by section 2283. Judge Rubin wrote:

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118. See, e.g., *Piambino v. Bailey*, 610 F.2d 1306, 1333 (5th Cir. 1980).

119. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). The only exception to this rule exists for cases in which federal law so completely preempts the field that the state court action actually arises under federal law, and thus removal to the federal court is an option. *Avco Corp. v. Aero Lodge No. 375*, 390 U.S. 557 (1968); *Metropolitan Life v. Taylor*, 481 U.S. 58 (1987). Finally, if complete preemption exists and the federal courts have exclusive jurisdiction, the state court would have to dismiss unless the defendant sought removal. It is no longer objectionable to remove a case in which the state court lacked jurisdiction due to exclusive federal jurisdiction. See 28 U.S.C. § 1441(e) (1982).

120. 862 F.2d 491, 509 (5th Cir. 1988) (en banc).

It is time . . . for Congress to reconsider the statute that we are obliged to follow, for it is no longer adequate to assure the protection of federal rights.

There can be little doubt that the [Longshoremen's and Harbor Workers' Compensation Act] preempts state jurisdiction over suits involving failure to pay compensation under the Act. Yet we rely on state courts to enforce the employer's federal right not to have this claim litigated in state court, stating that, if state courts do not protect that right, the employer may seek relief from the United States Supreme Court. While the state courts once had exclusive original jurisdiction over claims arising under federal law, federal-question jurisdiction is now vested in the federal district courts with appeal to the circuit courts of appeal. State trial and appellate courts are therefore no longer as familiar with these questions as they were a century ago. The state court judgments in such cases are subject to final review by the Supreme Court, but this remedy is no longer available by appeal, for as a result of recent legislation virtually eliminating the Court's mandatory appellate jurisdiction, litigants must seek relief by application to the Court for a writ. Such writs are only sparingly granted. . . . Thus both in cases governed by the Anti-Injunction Act and in those controlled by rules requiring federal abstention, the promised ultimate review by the Supreme Court is apt to be illusory. The remedy, of course, lies with Congress . . .<sup>121</sup>

The point Judge Rubin makes about the unlikelihood of Supreme Court review is a critical one. As a practical matter, under the Supreme Court's almost fully discretionary docket, ordinary cases presenting questions of federal law of interest to "only" the litigants will never see a federal forum if they proceed in the state courts. Such cases will not qualify for certiorari under the Court's Rule 10 criteria.<sup>122</sup> Whatever the wisdom of the Anti-Injunction Act was in 1793, or even in 1948, it is troublesome to continue the same policy under such drastically changed circumstances.

*c. Efficiency.* This rejected exception, along with the other three still to be raised, does not implicate specifically federal interests that are as strong as the first two. Nevertheless, given the

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121. *Id.* at 509-10 (footnotes omitted).

122. Rules of the Supreme Court of the United States, Rule 10 (effective Jan. 1, 1990), 110 S. Ct. LXXXIV (1989). Like its predecessors, Rule 10 requires "special and important" reasons for a grant of certiorari, such as a conflict in the lower courts, an unresolved, important question of federal law, or a gross departure from "accepted and usual" judicial proceedings.

often enormous transactional costs that accompany litigation, one must ask whether the old rule tolerating duplicative concurrent *in personam* litigation in state and federal courts must be discarded.<sup>123</sup> If federal courts were empowered to issue injunctions to prevent such duplicative litigation in the same way, and under the same constraints, that they already observe with respect to concurrent federal court actions (*i.e.* a “first in time” rule, modified only when *forum non conveniens*-type considerations counsel a stay in favor of the other court), this problem would be largely solved without undue harm to comity interests.

*d. Rule 23 class actions.* Some courts and commentators have suggested that at least some Rule 23 class actions should give rise to the ability to obtain injunctions against conflicting state court proceedings.<sup>124</sup> Efforts to shoe-horn Rule 23 into the “in aid of jurisdiction” exception have been generally unsuccessful. This is probably the correct result, because Rule 83 commands that the Federal Rules of Civil Procedure are not to affect basic jurisdictional statutes, and the “jurisdiction” to be protected in these class actions is actually made possible by Rule 23 itself. However, injunction policy in the class action area needs reviewing, since in some cases injunctions against competing lawsuits are clearly warranted.

One strong case for an anti-suit injunction would arise if a member of an opt-out style class action (Rule 23(b)(3)) decided *not* to opt out, but later regretted that decision and filed an independent state court action. Another strong case arises in structural class litigation, usually under Rule 23(b)(2), when complex settlements and institutional arrangements can be thrown into chaos by side-litigation. Even if an injunction is possible after the decree is entered, under the “protect or effectuate judgments” exception, an injunction may be needed just as

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123. See *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267 (9th Cir. 1982) (complex multi-district case; no injunction may issue to protect some other federal court's judgment); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982); *Roth v. Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978); *Pacific Indem. Co. v. Acel Delivery Service, Inc.*, 432 F.2d 952 (5th Cir. 1970); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501 (10th Cir. 1968).

124. *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *rev'd*, 680 F.2d 1175 (8th Cir. 1982); Larimore, *Exploring the Interface Between Rule 23 Class Actions and The Anti-Injunction Act*, 18 GA. L. REV. 259 (1984). See also Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L. J. 507, 528-36, 548-59 (1987); Note, *Federal Class Actions versus the Anti-Injunction Act—In re: Federal Skywalk Cases*, 31 U. KAN. L. REV. 467 (1983).

badly before that time. Finally, a properly certified mandatory class action, under Rule 23(b)(1), rests on the fundamental premise that litigation must proceed in only one forum. Even though adventuresome courts might try to use one of the present exceptions for this situation, their availability is unclear at best.

*e. Multi-district litigation under section 1407.* For many of the same reasons that the power to issue injunctions is needed for class action management, it is also needed for cases that the Judicial Panel on Multi-District Litigation assigns to one district court for comprehensive pre-trial management. This does not mean that the multi-district court would indiscriminately issue anti-suit injunctions in all such cases; it means only that proper case coordination and management will occasionally require the ability to enjoin a competing state court proceeding.

*f. Arbitration.* The Eleventh Circuit's opinion in *Ultracashmere House, Ltd. v. Meyer* raises the question of the availability of injunctions to protect federally-sanctioned arbitration proceedings.<sup>125</sup> Private arbitration agreements affecting interstate commerce must be recognized and enforced, even if a state's policy is hostile to arbitration.<sup>126</sup> If the party seeking to compel arbitration had gone to a federal court and secured an order to that effect, then a later state court proceeding in derogation of the arbitration agreement could probably be enjoined under the "protect or effectuate judgments" rationale. If, however, the party resisting arbitration commenced a state court proceeding on the controversy before any federal court order was issued, the question would arise whether the federal court could then enjoin the pending state proceeding to protect the arbitral tribunal. If the state law is hostile to arbitration, and the state court rejects a request for a stay pending arbitration, the case for a federal injunction is strong. Court-annexed arbitration in the federal courts is a different matter. It could be protected to the same extent as any other aspect of the federal court proceeding.

*g. Fraud* The last exception, which may or may not be "rejected," concerns state proceedings tainted by fraud. In some instances, the losers turn to the federal courts both to relitigate and to enjoin the enforcement of the state judgment. In general,

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125. 664 F.2d 1176 (11th Cir. 1981).

126. *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

injunctions against enforcement are prohibited just the same as injunctions directed to any other phase of the state court proceedings.<sup>127</sup> However, two early cases indicated that if fraud was shown, injunctions could issue on the theory that fraudulent proceedings did not deserve to be called "proceedings" at all.<sup>128</sup> Modern commentators have expressed some doubt about this exception, and about its rationale.<sup>129</sup> It is true that refusing to permit injunctions against fraudulent state court proceedings forces parties to present these claims to the state courts themselves. On the other hand, this is one case where the need for an objective review of the earlier proceeding by a court outside the system may be especially great.

### III. FUTURE OF THE ACT

The preceding discussion has shown that all of the criticism about the obscurity, whimsy, and unpredictability of the Anti-Injunction Act remains well taken. The question now is what to do? Four options exist. First, we could leave the Act alone. Second, following the approach the American Law Institute advanced in 1969, Congress could amend the Act by creating a more perfect list of exceptions. Third, Congress could repeal the Act altogether and allow the federal courts to rely on general equitable principles alone. Finally, Congress could amend the Act by eliminating the exceptions and attempting to state the general principles that should guide the federal courts, perhaps with a statutory list of illustrative, but definitely not exclusive, examples.

#### A. *The "Do Nothing" Approach*

In order to justify adopting the "do nothing" option, one would have to be able to say confidently that the 1948 version of section 2283 struck the correct balance between protection of federal interests and respect for the capacity of the state courts,

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127. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). *Cf. Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 136 (1941). The rationale for this is the "constitutional independence of the states and their courts" ("exceptions should not be enlarged by loose statutory construction").

128. *See Marshall v. Holmes*, 141 U.S. 589 (1891); *Simon v. Southern Ry.*, 236 U.S. 115 (1915).

129. C. WRIGHT, *FEDERAL COURTS* § 47, at 285-86 (4th ed. 1983). *See also* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1322, 1329 (3d ed. 1988).

both in its general rule and its statutory exceptions. One would also need to accept the "common law" of section 2283, knowing that the non-statutory exceptions would continue to exist and evolve. Finally, acquiescence in the status quo would condone the continued unavailability of injunctions for all the rejected exceptions.

Simply enumerating the implications of the "do nothing" option reveals it to be the worst of all possible worlds. None of the exceptions means what it says. The courts' efforts to expand the exceptions and to create others is powerful testimony to their substantive inadequacy. Even for cases now seen as falling within the statute, courts waste a great deal of time trying to figure out whether the general rule or an exception applies, and if an exception, which one. Inconsistency is the order of the day. It is clear, therefore, that the Act must be amended or repealed.

### B. *Creating a Better List of Exceptions*

The second possibility—that of improving the list of exceptions—was the approach taken by the American Law Institute in its 1969 Study.<sup>130</sup> That document remains the best source for evaluating both the general approach of enumerated exceptions to a general anti-injunction principle and the specific content such a revised statute might have.<sup>131</sup> The problem with this type of improvement, however, is structural. Any list of exceptions is doomed to failure, if the exceptions actually outline the cases in which the federal court's injunctive power will exist. Circumstances will inevitably arise when an injunction seems clearly warranted, but the list contains no obvious authority for one. As is the case now, the court will either stretch an exception or do injustice in the particular case. Even when the power to enjoin seems clear, the list approach also has the wasteful effect of creating litigation over which part of the list to use.

### C. *Outright Repeal*

Repeal of the Act without creating any substitute is the solution most diametrically opposed to the "do nothing" approach. There are undoubtedly some positive things to say in defense of repeal. It would restore discretion to the federal courts to issue

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130. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1372, at 51-52 (1969).

131. *Id.* See also Currie, *supra* note 4, at 320-335.

injunctions when they are needed, and it would eliminate the pointless litigation over which exception, statutory or non-statutory, applies to the particular case. On the other hand, this benefit is minor in comparison to the costs of repeal. For the first time since 1793, the federal courts would no longer be bound by a formal statement of respect for the state courts and the integrity of their proceedings. Given the vital position that the state courts hold in the federal system, and the number of federal law issues they deal with on a daily basis, this price is too high to pay.

*D. Rewrite the Act to Reflect General Principles*

The approach that best captures the flexibility of injunctive proceedings, the competing policy goals that constrain the coordination of federal and state court proceedings, and the important principles of federalism embodied in the Anti-Injunction Act is one that emphasizes these broad principles. A statute rewritten to codify the general policies that have always governed federal court injunctions against state court proceedings avoids the specificity problems of the list option and the status quo problems of the "do nothing" option, while at the same time giving formal expression to the values that have underlain the Act for nearly two centuries. The worst one could say about this approach is that it would increase the discretion of the federal district courts at the margins. However, as the cases discussed above illustrate, this marginal impact is likely to be minimal. For the occasional abuse of discretion in the issuance or denial of an injunction, appellate review under 28 U.S.C. section 1292(a)(1) would still be available.

Several suggestions for this kind of statute exist. In 1969, Professor Currie advocated the following language:

The federal courts shall not enjoin pending or threatened proceedings in state courts unless there is no other effective means of avoiding grave and irreparable harm.<sup>132</sup>

A more complete statement of principles would read as follows:

A court of the United States may enjoin pending state court proceedings only when necessary to prevent irreparable harm to the parties or to federal interests, giving due regard to the

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132. Currie, *supra* note 4, at 329.



interests of the state and the adequacy of the remedies in the state courts.

Circumstances in which an injunction may be appropriate include, but are not limited to, the following:

- (1) when expressly authorized by, or necessary to effectuate the purpose of, an Act of Congress;
- (2) when requested by the United States or by one of its officers or agencies;
- (3) when necessary to protect the jurisdiction of the court over property formally in its control or subject to its custody;
- (4) when necessary to ensure the effectiveness of a judgment or consent decree entered by the court, but only if relief has first been sought and finally denied in the state court;
- (5) when necessary to ensure the effectiveness of a class action certified under federal statutes or rules, or multidistrict litigation ordered pursuant to 28 U.S.C. § 1407, or court-ordered arbitration, or in aid of a claim for interpleader.

A statute such as this would make clear that state courts must be respected for the age-old reasons of comity and federalism, but that a sufficiently strong federal interest must and will permit an anti-suit injunction.

#### IV. CONCLUSION

The Anti-Injunction Act is badly in need of attention. Most of what Professor Currie wrote about it twenty years ago not only remains true, but has become more acute with the passage of time. The Act still suffers from "dense clouds of ambiguity," and still might fairly be called the "most obscure of jurisdictional statutes."<sup>133</sup> As Currie suggested in 1969, it would be best to abandon the effort to spell out the circumstances under which state proceedings may be enjoined, and to rewrite the statute to express the general policies on which it rests. It will never be possible or desirable to treat the state courts as wholly separate sovereign entities, like the courts of Great Britain or Japan, for the simple reason that they are not. The statutory policy will always contain two mutually inconsistent imperatives: respect state sovereignty, but give full effect to superior federal interests when essential. This is all an Anti-Injunction Act can do, and all that it should say.

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133. *Id.* at 322.