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COMMENTS

FEDERAL INJUNCTIVE RELIEF AGAINST STATE COURT CRIMINAL PROCEEDINGS: FROM YOUNG TO YOUNGER

One of the most complicated and sensitive areas of the federal-state relationship involves the power of federal courts to grant injunctive relief against state criminal proceedings. Therefore, the purpose of this Comment is to discuss federal equitable relief through injunctions and declaratory judgments and how these remedies are affected by the principles of federalism and abstention, especially as applied in several recent Supreme Court decisions.¹

The Equitable Remedy of Injunction

Injunction is an equitable remedy which, historically, has been available only where there was no adequate legal remedy. This principle of equity became statutory law in the United States through the Judiciary Act of 1789, wherein it was stated "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."² It was recognized early that the mere existence of a possible remedy at law is not sufficient to deny relief in equity, but rather that the legal remedy must be "as practical and efficient to the ends of justice" as its equitable counterpart.³

Because an appeal to equity involves a bypassing of the courts of law, access to the equity courts has been limited by

1. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Bryne v. Karalexis*, 401 U.S. 216 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971).

2. Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 82. The comment to the Act states that "[t]he equity jurisdiction of the courts of the United States . . . is the same in nature and extent as the equity jurisdiction of England from which it is derived." (The act was declared obsolete in the new Title 28 by the Act of June 25, 1948). See also *Grand Chute v. Winegar*, 82 U.S. (15 Wall.) 373 (1872); *Insurance Co. v. Bailey*, 80 U.S. (13 Wall.) 616 (1871); *Payne v. Hook*, 74 U.S. (7 Wall.) 425 (1868); *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74 (1866).

3. "If the remedy at law is sufficient, equity cannot give relief, 'but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.'" *Watson v. Sutherland*, 72 U.S. (5 Wall.) 74, 78 (1866) (footnote omitted).

the test of irreparable injury (*i.e.*, the present or future possibility of irreparable injury to the party seeking relief.) In two mid-nineteenth century cases the Supreme Court held that "[i]f the . . . injury [be] irreparable . . . the injured party may claim the extraordinary protection of a court of chancery . . ."⁴ and "[a] Court of Equity will interfere when the injury by the wrongful act of the adverse party will be irreparable . . ."⁵ This test has recently been affirmed by the Supreme Court, when it stated that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm . . ."⁶

The limits of the test of irreparable injury, though defined many times, have not always been agreed upon by the courts. The term has been said to mean an injury of "constant and frequent recurrence";⁷ an injury that "cannot be adequately compensated in damages";⁸ and one "which is certain and great."⁹ One of the most famous findings of irreparable injury occurred in *Ex parte Young*.¹⁰ There the railroad commission of Minnesota had enacted a schedule of maximum allowable rates for railroads operating in that state. The railroads believed these rates were so low as to be confiscatory, but the penal provisions of the statute were so severe that the officials were unable to test the validity of the order in the courts.¹¹ These penalties

4. "[I]f the obstruction be unlawful and the injury irreparable . . . the injured party may claim the extraordinary protection of a court of chancery." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564 (1851).

5. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 67 U.S. (2 Black) 545, 551 (1862).

6. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959).

7. "When irreparable injury is spoken of it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in the court of law. [Citations omitted.]" *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 305 (1905).

8. "The general rule in equity is that an injury is deemed irreparable when it cannot be adequately compensated in damages due to the nature of the injury itself, or the nature of the right or property injured, or when there exists no certain pecuniary standard for the measurement of the damages." *Luckenbach S.S. Co. v. Norton*, 21 F. Supp. 707, 709 (E.D. Pa. 1937).

9. *Quon v. Stans*, 309 F. Supp. 604, 607 (N.D. Cal. 1970) (footnotes omitted).

10. 209 U.S. 123 (1908).

11. The statute provided that each and every violation by any railroad officer, agent, or representative could carry a fine of up to five thousand dollars and five years imprisonment. The statute was so worded that every time these rates were exceeded in the sale of passenger tickets, a separate crime would be charged. Further, a similar statute was passed concerning freight rates providing a maximum penalty of ninety days imprisonment for each violation.

made it clear that the legislature was trying to prevent any inquiry into the validity of the statutes. The Supreme Court held that the statutes were unconstitutional because they denied the railroads the equal protection of the laws and ruled that the circuit court could enjoin the state officials from enforcing the rate schedules. The court found irreparable injury in the threatened multiplicity of suits for each violation and the fact that any violation and subsequent trial "would . . . furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid."¹²

Historically, courts of equity would not enjoin state criminal proceedings. The court in *Young* recognized this fact, but cited several exceptions.¹³ Intervention to restrain the operation of criminal statutes has always been rare, even where there has existed the possibility of unconstitutionality. The reason for such hesitation to intervene is twofold: One, the unconstitutionality can be interposed as a defense to the prosecution; and two, it was early thought that any injunction against criminal proceedings was beyond the power of the court of equity to enforce and therefore, the injunction could be disregarded with impunity.¹⁴ In the early Supreme Court case of *In re Sawyer*,¹⁵ the Court held that courts of equity should protect property rights only and that criminal prosecutions were outside the domain of such courts. Hence, plaintiff's attempt to restrain his removal from public office for malfeasance was fruitless.

Around the turn of the century, the Court began to shift

12. 209 U.S. 123, 165 (1908).

13. *Id.* at 161-62: "When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. [Citations omitted.] Where one commences a criminal proceeding who is already a party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings."

14. *Merchants' Exchange of St. Louis v. Knott*, 212 Mo. 616, 111 S.W. 565 (1908); *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 56 S.W. 474 (1900).

15. "The . . . jurisdiction of a court of equity, unless enlarged by express statute is limited to the protection of rights of property. . . . [T]o sustain a bill in equity to restrain or relieve against proceedings for the punishments of offenses . . . is to invade the domain of the courts of common law. . . ." *In re Sawyer*, 124 U.S. 200, 210 (1888).

in its ideas and criminal laws became the proper target of injunctions to protect property rights.¹⁶ The Court began to speak of an exception to the prohibition against enjoining pending state criminal prosecutions, that exception existing when the statutory basis of the prosecution was invalid.¹⁷ Significantly, the unconstitutionality of the statute or ordinance was not enough, by itself, to justify intervention. As stated in *Terrace v. Thompson*,¹⁸ there still had to be a lack of complete relief at law and the strong probability of irreparable injury.

In 1926, the Supreme Court further restricted the possibility of securing injunctive relief in state criminal prosecutions in the case of *Fenner v. Boykin*.¹⁹ There the Court affirmed a lower court decision denying relief against the state of Georgia, which had made illegal certain dealings in the future delivery of commodities. In affirming, the Court held that injunctive relief would not be granted except "where the danger of irreparable injury is both *great* and *immediate*."²⁰ This new dimension of great and immediate injury has subsequently been repeated in Supreme Court decisions.²¹

Another important statement on the availability of injunctive relief in criminal cases was made in 1940 in *Beal v. Missouri*

16. "It is well settled that where property rights will be destroyed unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity." *Dobbins v. Los Angeles*, 195 U.S. 223, 241 (1904).

17. The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 451-52 (1927). See *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 500 (1925), wherein it was held that "[a] court of equity will interfere to prevent criminal prosecutions under an unconstitutional statute when that is necessary to effectually protect property rights." See also *Packard v. Banton*, 264 U.S. 140 (1924).

18. 263 U.S. 197, 214 (1923): "The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford. [Citations omitted.] Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights . . . otherwise irremediable . . ."

19. 271 U.S. 240 (1926).

20. *Id.* at 243. (Emphasis added.)

21. *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95 (1935); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

*Pacific Railroad Co.*²² There a railroad company brought suit to restrain state officers from prosecuting under a state "full train crew" law where the company alleged that there was a threat of multiple prosecutions. The court held that even though there may be a possibility that a statute is illegal, no one is immune from a prosecution brought in good faith. However, prosecution undertaken in bad faith can be suitable justification for federal injunctive relief, provided the other necessary requisites are present.²³

There is one last aspect of equitable relief which needs mention. For years the courts of equity seemed intent upon granting relief only where injury to property was involved.²⁴ The rule that equity protects only property rights has been traced to dicta by Lord Chancellor Eldon in *Gee v. Pritchard*,²⁵ an early nineteenth century case. Although many courts repeatedly paid lip service to this unfortunate utterance, the Supreme Court refused to follow it in *Hague v. C. I. O.*,²⁶ a strong decision concerning the protection of civil rights. In the nearest thing to a landmark case on the state level, the Supreme Judicial Court of Massachusetts, in *Kenyon v. Chicopee*, said "[w]e

22. 312 U.S. 45 (1941).

23. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be authorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid." *Id.* at 49. See also *Douglas v. Jeannette*, 319 U.S. 157 (1943).

24. *Bonifaci v. Thompson*, 252 F. 878 (W.D. Wash. 1917); *Angelus v. Sullivan*, 246 F. 54 (2d Cir. 1917); *Bank v. Bank*, 180 Md. 254, 23 A.2d 700 (1942); *Chappell v. Stewart*, 82 Md. 323, 33 A. 542 (1896); *Hutchinson v. Goshorn*, 256 Pa. 69, 100 A. 586 (1917).

25. "I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refused to forbid it." The view expressed here was that the jurisdiction of the court was based solely on property rights. 36 Eng. Rep. 670, 678 (Ch. 1918).

26. 307 U.S. 496 (1938). This was a suit to enjoin municipal officers from enforcing ordinances forbidding the distribution of printed matter and the holding of public meetings without permits. The court held the ordinance void and enjoined officials to prevent improper interference with the rights of plaintiffs and their agents to properly communicate their views. The court said "[t]he conclusion seems inescapable that the right . . . to maintain suit in equity in the federal courts to protect the suitor against a deprivation of rights . . . secured by the Constitution, has been preserved, and that whenever the right . . . is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court. . . ." *Id.* at 531.

believe the true rule to be that equity will protect personal rights by injunction upon the same condition upon which it will protect property rights by injunction."²⁷

Thus, by the 1960's, the rules concerning federal injunctive relief against state criminal prosecutions had developed to the following point: No injunctive relief could be obtained unless there was the possibility of irreparable injury; the threat of irreparable injury had to be both great and immediate; the statute upon which the criminal prosecution was based had to be invalid; and the courts of equity would only enjoin threatened, not pending, state proceedings.

Federalism and Pending Proceedings

The Anti-Injunction Act: Judicial Exceptions

The traditional grounds for equitable relief presents but one aspect of the barrier faced by the petitioner who seeks federal injunctive relief. Just as equitable criteria in the United States courts took shape over the years, the doctrines of comity and abstention and the Anti-Injunction Act²⁸ likewise developed and expanded. Comity describes that respect shown state courts by their federal counterparts. With the dual sovereignty concept present in this country,²⁹ some friction and conflict obviously develops between the two court systems. Federalism demands, however, that needless conflict be avoided; that the courts extend

27. "In reading the decisions holding or stating that equity will protect only property rights, one is struck by the absence of any convincing reasons for such a sweeping generalization. We are by no means satisfied that property rights and personal rights are always as distinct and readily separable as much of the public discussion in recent years would have them. But in so far as the distinction exists we cannot believe that personal rights recognized by law are in general less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford than are property rights We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. 320 Mass. 528, 533, 70 N.E.2d 241, 244 (1946).

28. 28 U.S.C.A. § 2283 (1948) provides: "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."

29. "Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871).

to each other all possible consideration to effectuate smoother functioning of both systems; and that any interference between the two come only when absolutely necessary. From this respect stems also the doctrine of abstention, to be discussed at a point later in this paper.

It has been suggested by at least one author that comity concepts, which restrict federal injunctive relief, apply to threatened state prosecutions, while the Anti-Injunction Act applies only to pending state proceedings.³⁰ This statute, enacted nearly one hundred and eighty years ago, has been a constant source of controversy. Originally passed as an early addition to the Judiciary Act of 1789, the Act clearly forbade federal court injunctions against pending state proceedings.³¹ Unfortunately, the lack of records has made an accurate determination of the legislative purpose impossible, an insufficiency which has led to much subsequent litigation. One noted author has suggested that Attorney General Randolph's report recommending that "no injunction in equity shall be granted by a district court to a judgment at law of a state court" prompted Congress to act.³² However, such explanation has not received widespread acceptance and, in fact, was rejected by the Supreme Court.³³

According to a later Supreme Court case, the first opportunity to construe the Anti-Injunction Act came in an 1807 suit concerning the non-payment of promissory notes. In *Diggs & Keith v. Wolcott*,³⁴ the attempt to obtain a federal injunction against the state court action on the notes was unsuccessful,

30. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535 (1970).

31. "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . ." Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

32. Randolph further stated: "This clause will debar the district court from interfering with judgments at law in the State courts; for if the plaintiff and defendant rely upon the State courts as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and the other in equity, without adding a further separation, by throwing the common law side of the question into the State courts, and the equity side into the federal courts." American State Papers, 1 Misc. No. 34, n.8. See Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347 (1930).

33. "This [proposition] seems doubtful, in view of the narrow purpose of Randolph's proposal, namely, that federal courts of equity should not interfere with the enforcement of judgments at law rendered in state courts." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 131 (1941).

34. 8 U.S. (4 Cran.) 178, 179 (1807). No injunction was granted because "a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court."

the Court holding that it had no such power of relief. It is questionable whether the Court actually considered the Act, because no mention of it is found in the opinion. However, forty years later the Court noted in another case that its earlier decision in *Diggs* was indeed based on the Anti-Injunction Statute.³⁵

It was not until 1871 that the Supreme Court cited the Act in another opinion. In *Watson v. Jones*,³⁶ the court was asked to rule on a dispute between two factions in a church congregation, both claiming the right to possess the church property. The opinion contains a brief notation of the Act's express prohibition of injunctive relief against pending state court proceedings. The barrier presented by the Act's prohibition has not, however, proved insurmountable. Through the years, exceptions, both legislative and judicial, have attached themselves to the Act. By specific amendment to the Act, Congress gave the federal courts the power to enjoin any state court actions once bankruptcy proceedings were brought in the federal courts.³⁷ Another specific congressional exception was the Insurance Interpleader Act of 1926.³⁸ As interpreted by the Supreme Court, this act allows the Court to enjoin multiple state actions brought against a single insurer when the claimants' actions arise out of the same claim, and further provides that all such claims will be tried together.³⁹ Other legislative exceptions include the Re-

35. "The Act of Congress of the 2d of March 1793, ch. 66, § 5, declares that a writ of injunction shall not be granted 'to stay proceedings in any court of a state.' In the case of *Diggs v. Wolcott* . . . the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a State court." *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849).

36. 80 U.S. (13 Wall.) 679, 719 (1871): "And the [Anti-Injunction Statute] as construed in the cases of *Diggs v. Wolcott* . . . and *Peck v. Jenness* . . . are equally conclusive against any injunction from the Circuit Court . . ."

37. In the Judicial Code of 1911, the statute reads: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

38. "Notwithstanding any provision of the Judicial Code to the contrary, said [federal district] court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court . . ." Act of Jan. 10, 1936, ch. 13, § 1, 49, Stat. 1096.

39. In *Dugas v. American Surety Co.*, 300 U.S. 414 (1937), the Supreme Court held that defendant surety company could obtain an injunction against various claimants in state court, and that such injunction could be issued by a federal district court in order to allow the claims to be interpleaded before federal court in order to decide them all at one time.

moval Acts,⁴⁰ the Frazier-Lemke Act,⁴¹ and the Act of 1851 limiting shipowners' liability.⁴²

The most controversial aspect of the Anti-Injunction Act has been in the area of judicial exceptions. In an early case, the Supreme Court recognized the federal court's right to protect its judgment by enjoining those state court proceedings which arose after a federal court had rendered its judgment.⁴³

Because judgments fraudulently obtained from state courts were offensive to the federal court's sense of fairness, another exception to the Anti-Injunction Act was created. In *Simon v. Southern Railway Co.*,⁴⁴ an action was brought to enjoin the plaintiff from enforcing a judgment alleged to be fraudulently obtained in state court. The Supreme Court held that such state judgment was a nullity and a proper object of federal injunction.⁴⁵ Another example of judicial exception is found in *Kline v. Burke Construction Co.*⁴⁶ In that case the Court found the Anti-Injunction Act to be no bar to a federal injunction issued to protect its own properly acquired jurisdiction in an in rem action.⁴⁷ One final exception combines both a legislative and a judicial exception. In *Local Loan Co. v. Hunt*,⁴⁸ the Court

40. Act of September 24, 1789, ch. 20, § 12, 1 Stat. 79.

41. Act of March 3, 1933, ch. 204, § 75(o), 47 Stat. 1473.

42. Act of March 3, 1951, ch. 43, § 4, 9 Stat. 635, 636.

43. "[I]t has been held that, in aid of its jurisdiction properly acquired, and in order to render its judgments and decrees effectual, a Federal court may restrain proceedings in a state court which would have the effect of defeating or impairing such jurisdiction." *Hull v. Burr*, 234 U.S. 712, 723 (1914). See also *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *French v. Hay*, 89 U.S. (22 Wall.) 238 (1874).

44. 236 U.S. 115 (1915).

45. *Id.* at 128: "[W]hile . . . [the Anti-Injunction Act] prohibits United States courts from 'staying proceedings in a state court,' it does not prevent them from depriving a party of the fruits of a fraudulent judgment nor prevent the Federal courts from enjoining a party from using that which he calls a judgment but which is, in fact and in law, a mere nullity." Actually, the case was not a clear-cut exception to the Anti-Injunction Act. The Court raised the question whether a judgment, once rendered, was still a proceeding within the meaning of the statute. Although the Court posed this question, it was never actually answered.

46. 260 U.S. 226 (1922).

47. "[T]his section [Anti-Injunction Act] is to be construed in connection with § 262 [all writs statute] which authorized the United States Courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law' It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court." *Id.* at 229.

48. 292 U.S. 234 (1934).

held that injunctive relief was available to prevent the relitigation in state courts of a federal discharge in bankruptcy, thereby combining the legislative bankruptcy exception and the judicial exception allowing injunctive relief to protect a federal judgment.

These exceptions had no small effect on the Anti-Injunction Act. What had once been an express prohibition became a less than absolute pronouncement as new interpretations were added by the courts. In fact, the authors of an article appearing in the 1930's in a leading law review contended that the Act was, and had been for sometime, dead.⁴⁹

In the midst of this confusion, a simple insurance claim brought some sorely needed, albeit short-lived, clarity from the Supreme Court. In the case of *Toucey v. New York Life Insurance Co.*,⁵⁰ the plaintiff claimed monthly benefits under an insurance policy. Originally brought in a Missouri court, the suit was removed to federal court on the grounds of diversity. The district court found for the insurer after trial on the merits and dismissed the suit, but later an alleged assignee of the plaintiff brought another suit based on the plaintiff's disability. Defendant sought federal injunctive relief against this new action, claiming it was a relitigation of matters decided in the earlier suit. An injunction was granted, notwithstanding the Anti-Injunction Act.⁵¹ In an extremely thorough opinion, Justice Frankfurter traced the history of the Anti-Injunction Act and its exceptions, both legislative and judicial, and reached the conclusion that only one judicial exception should be recognized. That exception would allow a federal court to enjoin a state court proceeding if the federal court had first acquired jurisdiction over the *res* in an *in rem* action.⁵² In voiding the injunction,

49. "We venture, however, the wild surmise that, if Congress should repeal the statute and so furnish us a laboratory for comparative study of the practice [of federal injunctions against state court proceedings] with and without that legislation, we would find that, except for the prohibition, in some cases, of injunction before judgment, the statute has long since been dead." Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1169 (1932).

50. 314 U.S. 118 (1941).

51. 102 F.2d 16 (8th Cir. 1939).

52. "We find, therefore, that apart from Congressional authorization, only one 'exception' has been imbedded in § 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into § 265 is no justification for making another. Furthermore, the *res* exception, having its roots in the same policy from which sprung § 265, has had an uninterrupted and firmly established acceptance in the decisions.

Justice Frankfurter clearly enunciated the majority's rejection of the use of injunctions to prevent relitigation.⁵³ In a strong dissent, Justice Reed upheld the validity of federal injunctions issued to "protect [federal court] decrees by prohibiting relitigation"⁵⁴

Such a strong majority opinion would seemingly have marked the end of the judicial exceptions to the Anti-Injunction Act, but this was not to be. In June 1948 Congress erased *Toucey* by re-enacting and amending the Anti-Injunction Act.⁵⁵ The Act was amended to allow a federal court to grant injunctions "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."⁵⁶ Part of the comment which follows the amended act states that "[t]he revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision."⁵⁷

Thus *Toucey*, rather than the exceptions, was "laid to rest." Not only do the exceptions remain, but they have increased in number. In *Leiter Minerals, Inc. v. United States*,⁵⁸ the Supreme

The rule of the *res* cases was unequivocally on the books when Congress re-enacted the original § 5 of the Act of 1793, first by the Revised Statutes of 1874 and later by the Judicial Code in 1911." *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 139 (1941). The Court rejected the fraudulent judgment exception found in *Simon v. Southern Ry. Co.*, 236 U.S. 115 (1914), by stating that a judgment was a state proceeding and thus barred by the Act. The Court further rejected the relitigation exception found in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), by saying it was erroneously based on another case, *Looney v. Eastern R. R. Co.*, 247 U.S. 214 (1918), which was not even a relitigation case.

53. "Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress Whatever justification there may be for turning past error into law when reasonable expectations would thereby be defeated, no such justification can be urged on behalf of a procedural doctrine in the distribution of judicial power between federal and state courts.

...

"It is indulging in the merest fiction to suggest that . . . Congress in effect enacted [the judicial exception concerning relitigation] through its silence. There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words." *Id.* at 139-40.

54. *Id.* at 154.

55. 28 U.S.C. § 2283 (1970).

56. *Id.*

57. *Id.* There is some question as to whether all the exceptions prior to *Toucey* have been reenacted, or only the relitigation exception. The Court has never ruled that the "fraudulently obtained judgment" exception still exists.

58. 352 U.S. 200, 226 (1956): "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

Court held for the first time that when interests of the United States are involved, a federal court can enjoin proceedings in a state court.

The Anti-Injunction Act: Legislative Exceptions

The area of legislative exceptions to the Anti-Injunction Act, unlike those made by the judiciary, is one of clear definition and relatively uniform case law, with one notable qualification—the Civil Rights Act of 1871.⁵⁹ This Act and its relationship to the Anti-Injunction Act has been a source of considerable confusion in the federal courts. The controversy centers around the words "suit in equity" found at the end of the Act.⁶⁰ Does it mean that federal injunctive relief is available to one who is the object of pending state prosecution if such prosecution would constitute a denial of rights "secured by the Constitution and laws?"⁶¹ If so, the Civil Rights Act of 1871 would then be a legislative exception to the prohibition of the Anti-Injunction Act.

The Supreme Court has failed to give a definitive ruling on this issue and, therefore, the circuit courts are divided as to whether the Civil Rights Act is an exception. The situation in the circuit courts of appeal can be roughly categorized as follows: Those which hold the Act to be an exception; those which hold it is not; and those which hold it to be an exception of limited application. While the Seventh Circuit has held at least twice that the Civil Rights Act creates no exception,⁶² the strongest language supporting this contention has come from the Fourth Circuit. In *Baines v. City of Danville*,⁶³ a case in-

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. It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager, but the interpretation excluding the United States from coverage of the statute seems to us preferable in the context of healthy federal-state relations."

59. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

60. *Id.*

61. *Id.*

62. *Goss v. Illinois*, 312 F.2d 257 (7th Cir. 1963); *Smith v. Village of Lansing*, 241 F.2d 856 (7th Cir. 1957).

63. 337 F.2d 579 (4th Cir. 1964).

volving a Virginia anti-picketing statute, the court held that only explicit legislative exceptions to the Anti-Injunction Act would be recognized and that the Civil Rights Act did not meet that requirement. The court stated that the Civil Rights Act gives "no suggestion . . . that appropriate relief [under the statute] shall include an injunction which another Act of Congress [the Anti-Injunction Act] forbids."⁶⁴ On the other hand, as early as 1950, in *Cooper v. Hutchinson*,⁶⁵ the Third Circuit held that section 1983 was a clear exception to the Anti-Injunction Act. Reaffirming this position some twenty years later, the court said:

"to be sure other circuits have taken a contrary position . . . but the Supreme Court has not yet deemed it necessary to resolve this conflict We therefore reiterate our statement 'We are satisfied that no opinion of the Supreme Court casts serious doubt upon the validity of the interpretation of 28 U.S.C. § 2283 adopted in *Cooper v. Hutchinson*'"⁶⁶

Finally, there is the category of cases wherein the Civil Rights Act is an exception of limited dimension. In a recent case, *Sheridan v. Garrison*,⁶⁷ the Fifth Circuit held that section 1983 was an exception, but the court was very careful to limit its holding. First, the court said that the exception only applies to cases dealing with first amendment rights. Second, although proceedings are technically begun by the filing of an indictment, the exception will apply if no trial proceedings have actually begun. Third, injunctive relief must be the only way to avoid "grave and irreparable injury"⁶⁸ with "no other equally effective protection" available.⁶⁹ The next year, the Sixth Circuit followed this formula almost exactly in *Honey v. Goodman*,⁷⁰

64. The court further stated that "[i]f every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless." *Id.* at 589.

65. 184 F.2d 119 (3d Cir. 1950).

66. *National Land & Investment Co. v. Specter*, 428 F.2d 91, 95 (3d Cir. 1970). See also *Devita v. Sills*, 422 F.2d 1172 (3d Cir. 1970).

67. 415 F.2d 699 (5th Cir. 1970).

68. *Id.* at 705.

69. *Id.* at 708. See also *Duncan v. Perez*, 445 F.2d 558 (5th Cir. 1971), where, in the first case decided on point since the *Younger v. Harris* decision, the court held that § 2283 was not a bar to relief based on § 1983.

70. 432 F.2d 333, 343 (6th Cir. 1970). The remaining circuits have not ruled whether the Civil Rights Act is a legislative exception to the Anti-Injunction Act.

wherein it was decided that, in the same limited circumstances, the Civil Rights Act was an exception to the Anti-Injunction Act. In that case, the petitioners had been indicted for the common law offense of embracery for distributing a letter condemning the actions of the local prosecutor. The court found that the indictments were brought in a bad faith effort to curb the defendant's right of free speech.

The federal district courts reflect the disagreement found in the circuits, and in fact there are disagreements between various district courts within the same circuit.⁷¹ The language in the cases ranges from "the court holds that [the Civil Rights Act] is an 'express authorization' within the meaning of [the Anti-Injunction Act]"⁷² to "[t]he weight of authority and the better reasoned approach require a decision that [the Anti-Injunction Act] prohibits the enjoining of these state proceedings and that [the Civil Rights Act] is not 'an expressly authorized' exception to [the Anti-Injunction Act]."⁷³ Other opinions offer all the possible variations that could exist between two such extreme positions.⁷⁴

The legal writings touching on the relationship issue are as divided as the courts.⁷⁵ The arguments stated are numerous,⁷⁶

71. In a sampling of some fourteen cases decided on point since 1967, seven held that § 1983 created no exception; two felt it was a limited exception; five held it to simply be an exception. Those holding it not to be an exception include: *Cole v. Graybeal*, 313 F. Supp. 48 (W.D. Va. 1970); *Eve Productions, Inc. v. Shannon*, 312 F. Supp. 26 (E.D. Mo. 1970); *Armstrong v. Ellington*, 312 F. Supp. 1119 (W.D. Tenn. 1970); *Hall v. Crosland*, 311 F. Supp. 106 (M.D. Ala. 1970); *Ripley v. Stidd*, 308 F. Supp. 854 (D. Minn. 1970); 208 *Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (S.D. N.Y. 1969); *Brooks v. Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967). Those holding the exception to be limited in scope include: *Gadsden v. Silberglitt*, 299 F. Supp. 1236 (E.D. N.Y. 1969); *Brock v. Schiro*, 264 F. Supp. 330 (E.D. La. 1967). Those holding it to be an exception are: *Stewart v. Dameron*, 321 F. Supp. 886 (E.D. La. 1971); *Duncan v. Perez*, 321 F. Supp. 181 (E.D. La. 1970); *Strasser v. Doorley*, 309 F. Supp. 716 (D. R.I. 1970); *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968); *Hooper v. Gooding*, 282 F. Supp. 624 (D. Ariz. 1968).

72. *Strasser v. Doorley*, 309 F. Supp. 716, 722 (D. R.I. 1970).

73. *Brooks v. Briley*, 274 F. Supp. 538, 553 (M.D. Tenn. 1967).

74. See note 72 *supra*.

75. Comment, 78 HARV. L. REV. 994, 1051 (1964): "The Civil Rights Act . . . evinces neither an unambiguous determination to allow stay of state proceedings nor a purpose to alter the procedural relationship between state and federal courts. It therefore should not be deemed to constitute an 'express' exception to the anti-injunction statute.

"Certainly the phrase 'suit in equity' does not of itself constitute an express authorization of injunctions against state court proceedings" *Id.* at 1050-51. Maraist, *Federal Injunctive Relief Against Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 601 (1970): "The doctrine of 'interposition'—the proposition that section 1983 [the Civil Rights

but the issue really hinges on one central question: If Congress desired the Civil Rights Act to be an exception to the Anti-Injunction Act, why was the Civil Rights Act not more express? Did Congress desire the Civil Rights Act of 1871, coming at the end of the Civil War, to be a repudiation of the extreme motions of federalism exhibited in the Anti-Injunction Act in favor of greater respect for individual rights? Of course, the answer has not yet been found. As long as the jurisprudence of the lower federal courts continues to lack uniformity, only a ruling by the Supreme Court or, absent that, congressional action, can provide the solution.

Abstention

Respect for federal-state harmony and a desire to effectuate smooth functioning of the dual judicial systems in this country caused the federal courts to adopt a policy of abstaining from deciding certain cases even where there existed federal jurisdiction. The landmark case on abstention is *Railroad Commission*

Act] represents an interposition of federal supremacy between a state and its citizens and thus sanctions injunctive relief when necessary to protect those citizens—is of questionable merit; one cannot readily accept the proposition that Congress could have intended to impose such a sweeping change in federal-state relations through a weakly worded 1871 statute and a 1948 Act that sanctioned that interference only when expressly authorized by statute.

"The most persuasive arguments support the proposition that section 1983 is not an exception to the Anti-Injunction Act." Comment, 1965 DUKE L.J. 813, 819-20: "It is submitted that the *Baines* approach [Civil Rights Act not an exception] is not a proper one. . . . Several facts lend credence to an argument that Congress would indeed have approved an injunction in this section 1983 context

"It is reasonable to assume that Congress in 1871 approved interference with the state courts only under exceptional circumstances and where irreparable injury was imminent." Comment, *The Civil Rights Statute As A Statutory Exception to the Anti-Injunction Act*, 4 JOHN MARSHALL J. OF PRACTICE AND PROCEDURE 55, 72 (1970): "The anti-injunction statute authorizes a federal court to enjoin a state prosecution where expressly authorized by an Act of Congress. The conclusion is compelling that section 1983 is such an act of Congress."

76. The arguments against the Act as an exception include: One, the Civil Rights Act is not ambiguous and makes no mention of section 2283. Two, the Civil Rights Act does not fit into any of the three exceptions in section 2283, since it refers to "express" exceptions. Three, Congress could have made the Civil Rights Act an express exception to section 2283, but has failed to take advantage of this opportunity.

The arguments that it is an exception include: One, the importance of the rights governed by section 1983 override any policy of non-intervention. Two, deference to state sovereignty should not be automatic. Three, the idea that the Civil Rights Act, coming in 1871, amended *pro tanto* the Anti-Injunction Act, first passed in 1789.

v. Pullman Co.,⁷⁷ wherein Negro porters intervened in an attack on an order of the Texas Railroad Commission requiring a conductor on all pullman cars. Because all conductors were white, the porters alleged racial discrimination before a three judge federal court which enjoined enforcement of the order on grounds that it was violative of the fourteenth amendment. On direct appeal, the Supreme Court admitted that the charges of the porters were substantial,⁷⁸ but sought an alternative to deciding the case on constitutional grounds. The Court held that the district court should have abstained from deciding the issue and remanded the case "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court"⁷⁹ With this decision, the Supreme Court ushered into federal-state relations a new doctrine: Where a state interpretation of a statute or a particular issue could be determinative of a case, then the case should be remanded to the state court for such a determination.⁸⁰ It should be noted that in those cases in which the *Pullman* doctrine of abstention is applied, the federal courts possess jurisdiction to decide the case, but hold that jurisdiction in abeyance, pending the state court determination.⁸¹

Four years after *Pullman*, the Supreme Court reiterated its policy of abstention in *American Federation of Labor v. Watson*.⁸² The state of Florida had amended its constitution to pro-

77. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

78. "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Id.* at 498.

79. *Id.* at 501-02. "These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Id.* at 501.

80. It has been recognized by the Supreme Court that mere difficulty in determining state law, without more, is not sufficient to justify abstention. *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

81. Abstention has been applied to cases which do not fit into the pattern of *Pullman*. Professor Wright has suggested that there are possibly as many as four separate types of abstention: (1) *Pullman*; (2) federal court should abstain where it is asked to intervene in a complicated state regulatory scheme (see *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)); (3) federal court should abstain in eminent domain cases where the state law is unsettled (see *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959)); (4) federal court may abstain for its own convenience. This paper will be confined, however, to a discussion of the *Pullman*-type abstention. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 52 (1970).

82. 327 U.S. 582 (1946).

hibit "closed-shop" agreements between employers and labor unions. Several labor unions brought suit before a three judge district court seeking to restrain law enforcement officials from carrying out threats to prosecute plaintiffs criminally and bringing civil actions for violation of the amendment. The district court held that the Florida amendment did not violate the first and fourteenth amendments of the United States Constitution. On direct appeal, the Supreme Court admitted that the appellants had stated a cause of action in equity (i.e., clear and imminent danger of irreparable injury) and that they had raised substantial constitutional issues, but noted that the amendment had not yet been construed by the Florida courts. Thus, citing *Pullman* extensively, the Court applied the abstention doctrine and directed the district court to retain jurisdiction pending proceedings in state courts.

However, the Supreme Court does not always abstain in *Pullman*-type situations. In *Chicago v. Atchison, Topeka & Santa Fe Railway Co.*,⁸³ the city of Chicago amended its municipal code to require a motor carrier transporting rail passengers between various stations within the city to obtain a certificate of convenience and necessity. When a railroad-sponsored transfer service refused to apply for such a certificate, the city threatened criminal prosecutions. Thereafter, the railroads applied to federal district court for a declaratory judgment concerning the validity of the ordinance. The district court dismissed the complaint, but the circuit court reversed, holding the ordinance violative of the federal constitution. Before the Supreme Court, the city contended that the federal courts should have abstained to allow the state courts to give an authoritative ruling on the scope of the ordinances. Despite the similarity to *Pullman*, the Supreme Court refused: "We see no ambiguity in the section which calls for interpretation by the state courts. . . . Remission to those courts would [only] involve substantial delay and expense" ⁸⁴

The Court applied the *Pullman* doctrine for the first time in a civil rights case, *Harrison v. NAACP*,⁸⁵ but the decision was hardly unanimous. There, five statutes apparently aimed at impeding the work of the NAACP and the Legal Defense Fund

83. 357 U.S. 77 (1957).

84. *Id.* at 84.

85. 360 U.S. 167 (1958).

were enacted by the Virginia legislature. The NAACP sought both a federal declaratory judgment on the constitutionality of the statutes and injunctive relief against their enforcement. The district court declared three of the statutes unconstitutional, but abstained on the remaining two. The Supreme Court, in a six to three decision, authored by Justice Harlan, ruled that the federal court should have abstained on all five statutes until the Virginia courts had had an opportunity to construe them. The majority was careful to point out that abstention was a mere postponement, not an abdication, of federal jurisdiction.⁸⁶ The minority sharply disagreed, contending that civil rights were not the proper subject for abstention. Five years later, the minority viewpoint was adopted in *Baggett v. Bullitt*,⁸⁷ where teachers at the University of Washington sought to have the Loyalty Oath Statute declared unconstitutional and to enjoin its enforcement on the grounds that it inhibited free speech. A three-judge court applied *Pullman* and abstained, pending a construction of the statute by the state courts. The Supreme Court reversed, holding abstention to be improper because "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers."⁸⁸ The Court reasoned that further construction of the state statute would not render it valid and, further, that the delay caused by abstention "may inhibit the exercise of First Amendment freedoms."⁸⁹

The elimination of unnecessary interference by federal courts in state statutory schemes is the avowed purpose of abstention, but often the practical result of this sought after harmony is

86. "[W]e are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system This principal does not of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention" *Id.* at 176-77.

87. 377 U.S. 360 (1964). Although this case did not present a situation of threatened criminal prosecutions, as the statute did not contain any penal provisions, the teachers were threatened with loss of their employment if they failed to comply. The case is important in showing the Court's attitude toward abstention in cases involving civil rights, and particularly first amendment rights.

88. *Id.* at 375.

89. *Id.* at 379.

lengthy and complex litigation, as exemplified in *England v. Board of Medical Examiners*.⁹⁰ In that case, plaintiff chiropractors had sought declaratory and injunctive relief from the federal district court claiming the educational requirement of the Louisiana Medical Practice Act prevented them from practicing, thus violating their rights under the fourteenth amendment. The district court, applying *Pullman*, abstained on the ground that the state court might find that the statute did not apply to the plaintiffs.⁹¹ At the state hearing, the plaintiffs not only argued that the statute did not apply to them, but also argued that the statute was unconstitutional. When the state court rejected that contention, the plaintiffs attempted to return that issue to the federal district court. However, the federal court refused to hear the case on the ground that the federal issue had been adequately determined by the state court. Although an earlier case seemed to hold to the contrary,⁹² the Supreme Court held, on appeal, "that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court."⁹³ The Court then enunciated a complex procedure to be followed in such a situation.⁹⁴ In a lengthy dissent, Justice Douglas suggested that the instant opinion made the *Pullman* doctrine unworkable and expressed second thoughts on the usefulness of the whole theory.⁹⁵

90. 375 U.S. 411 (1964).

91. *England v. Board of Medical Examiners*, 180 F. Supp. 121 (E.D. La. 1960). Although the district court realized abstention might cause delay and expense, this was not necessarily a consideration in staying its hand: "Where comity moves the federal courts to abstain, the cost in time and money is said to be justified by the resulting federal accommodation." *Id.* at 124.

92. In *NAACP v. Button*, 371 U.S. 415 (1963), the Court had held that after a state court had given an authoritative ruling in an abstention case a party could return to the district court for a final determination.

93. *England v. Board of Medical Examiners*, 375 U.S. 411, 419 (1964).

94. "[The petitioner] may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts' that we referred to in *Button*. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor* [*Government Employees v. Windsor*, 353 U.S. 384 (1957)], and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal claims." *Id.* at 421.

95. "I was a member of the Court that launched *Pullman* and set it on its way. But if I had realized the creature it was to become, my doubts would have been far deeper than they were. . . . Referral to state courts for declaratory rulings on state law questions is said to encourage a smooth operation of our federalism, as it may avoid clashes between the two systems. But there always have been clashes, and always will be and the

The *Pullman* case was the first to announce the doctrine of abstention. By abstaining, the Court was able to avoid the sensitive issue of equal protection raised by the Negro porters. By 1965 the doctrine had undergone radical change however, and the cases indicated that no longer were civil rights a proper subject for abstention and further, that the delay caused by abstention would be harmful in first amendment cases.

The Declaratory Judgment

Often, one seeking a federal injunction against state criminal prosecution will contemporaneously pray to have that statute declared unconstitutional by the federal court. Unlike the history of injunctions, the history of declaratory judgments in the United States is brief, for it is a virtual newcomer to the federal courts. Prior to 1934 the Supreme Court refused to recognize the declaratory judgment, fearing that it was an advisory opinion. However, in that year Congress enacted the Declaratory Judgment Act.⁹⁶ The Act does not authorize advisory opinions, but rather allows the court to grant the petitioner relief through declaration at an earlier stage in the dispute than was possible before the passage of the Act. At this point in the controversy the parties may not have reached the stage where they can seek a coercive remedy, yet they can still present their claims to a federal court for a declaration as to their rights.⁹⁷

The requirements of a declaratory judgment are no less strict than in any other suit in federal court: There must exist a case or controversy between persons having adverse legal interests.⁹⁸ However the question of what constitutes a case or

influence of the *Pullman* doctrine has, I think, been *de minimis*." "What we do today makes the *Pullman* case something of a Frankenstein." *Id.* at 425-26, 429, respectively.

96. 28 U.S.C. § 2201 (1970) states: "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

97. "The purpose of actions for declaratory judgment is to provide a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy. . . ." 3 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 1262, at 274 (Wright ed. 1958).

98. "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases,

controversy may cause difficulty. In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*,⁹⁹ the Supreme Court said:

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."¹⁰⁰

Can a case or controversy be found in the "chilling effect" caused by vague or overbroad statutes regulating first amendment freedoms?¹⁰¹ One federal district court has answered in the affirmative,¹⁰² but this case seems out of line with the Supreme Court case of *Golden v. Zwickler*¹⁰³ rendered a year earlier. There the Court held that once the specific issues in a suit for a declaratory judgment had become moot, the more general question of the statute's constitutionality in terms of its effects on freedom of speech did not present a sufficient case or controversy to warrant hearing the case. Perhaps the aversion of federal courts to render advisory opinions absent a live case or controversy, plus respect for federal-state relations (comity), have caused federal courts to examine closely any request for a

not abstractions,' are requisite. This is as true of declaratory judgments as any other field." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1946). A declaratory judgment applies only to cases or controversies within the constitutional sense. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952).

99. 312 U.S. 270 (1941).

100. *Id.* at 273.

101. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the Supreme Court spoke in terms of the "chilling effect" caused by vague or overbroad statutes regulating freedom of expression. For further discussion of this point, *see* text accompanying note 117 *infra*.

102. "It is well recognized that the 'chilling' effect of state prosecutions upon the exercise of free speech may provide an 'actual controversy' even after the state prosecutions have been dismissed or otherwise become moot." *Decker v. Fillis*, 306 F. Supp. 613, 616 (D. Utah 1969).

103. 394 U.S. 103 (1969). "[I]t appears that suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with a First Amendment interest. Nonetheless, for a number of reasons we are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy." *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969).

declaratory judgment.¹⁰⁴ In fact, the courts are under no mandate to give a declaration. As early as 1941, the Supreme Court held that a district court need not make use of the jurisdiction it acquired through the Declaratory Judgment Act;¹⁰⁵ the power to apply that remedy is discretionary.¹⁰⁶

Unlike the injunction, the request for a declaratory judgment regarding the validity of a state statute need not be heard by a special three-judge federal court.¹⁰⁷ The Supreme Court has held that there is no reason to use the safeguard of a three-judge court because a declaratory judgment does not "paralyze" any state or federal scheme.¹⁰⁸ This is also significant in terms of review, because there is no right to a direct appeal to the Supreme Court unless the constitutionality of the statute is decided by a three-judge federal panel. This lack of the right to a direct appeal in declaratory judgment cases has been explicitly recognized in several Supreme Court decisions.¹⁰⁹ The fact that

104. See note 98 *supra*.

105. "Although the district court had jurisdiction of the suit under the Federal Declaratory Judgment Act, it was under no compulsion to exercise that jurisdiction." *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494 (1942).

106. "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Press v. Rickover*, 369 U.S. 111, 113 (1962); and "The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the court." *Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945).

107. "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2384 of this title." 28 U.S.C. § 2281 (1970).

108. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

109. In *Mitchell v. Donovan*, 398 U.S. 427 (1969), there was a request to declare the Minnesota Communist Control Act unconstitutional. A three-judge district court, which earlier had issued an injunction to allow the names of Communist candidates to appear on the election ballot, refused the declaratory judgments saying it was not certain enough that Communists would attempt to run in the future. The Communists sought direct appeal to the Supreme Court. The Supreme Court held that the injunction issue of the first decision was moot and, since the second decision was only on the request for declaratory relief, no direct appeal would be allowed, even though the decision in that case was in fact rendered by a three-judge court. See [also] *Gunn v. University Comm.*, 399 U.S. 383 (1970); *Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970).

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1970). (Emphasis added.)

the Three Judge Court Act and the Direct Appeal Statute apply to injunctions, but not to declaratory judgments, illustrates an important difference in the two remedies. Congress enacted the Declaratory Judgment Act to provide a milder alternative to injunctions, and to a large extent Congress has achieved its purpose.

As previously mentioned, one seeking relief, particularly from state criminal prosecution, will often ask for both declaratory and injunctive relief. This dual request necessitates the use of a three-judge panel and presents the prohibition of the Anti-Injunction Act when state proceedings are pending. However, it is theoretically possible for a party to completely circumvent the bar of the Anti-Injunction Act by first seeking only a declaratory judgment. If the federal court declares the state statute unconstitutional, the petitioner may then seek injunctive relief from the pending proceedings. Then the exception of the Anti-Injunction Act which allows a federal injunction against pending proceedings to "effectuate [the federal court's] judgment" would be applicable.¹¹⁰ This procedure was followed in *Landry v. Daley*,¹¹¹ wherein two disorderly conduct statutes had been declared unconstitutional in an earlier ruling by the federal court. The court then made ad hoc examinations of prosecutions pending under the statutes, issuing injunctions where it deemed appropriate. The court held that:

"The federal anti-injunction statute . . . does not bar the use of our injunctive power in the instant situation. We have already entered a judgment declaring the ordinances in question unconstitutional as overly broad and too vague to meet due process requirements. . . . Consequently, we find an injunction necessary to effectuate our judgment of unconstitutionality of the ordinances. An injunction necessary to 'protect or effectuate' the judgment of a federal court is a stated exception to the prohibition of section 2283 [the Anti-Injunction Act]."¹¹²

Such use of the declaratory judgment illustrates the power of the remedy, a far cry from the "mild" remedy envisaged by Congress.

110. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 596 (1970).

111. 288 F. Supp. 189 (N.D. Ill. 1968).

112. *Id.* at 194.

Finally, the impact of *Zwickler v. Koota*¹¹³ upon the availability of federal relief against state prosecution must be considered. In that case the Supreme Court, in response to a request for declaratory and injunctive relief from a New York law forbidding the distribution of anonymous handbills, held that a district court should consider the two requests independently when deciding whether to hear the issues or abstain.¹¹⁴ Although this holding has not been unanimously applied in the lower federal courts,¹¹⁵ it has gained a wide following in the majority of those courts in cases of both pending and threatened state criminal prosecutions.¹¹⁶

Dombrowski and Its Progeny

Civil rights, federal equitable relief, and comity came together in *Dombrowski v. Pfister*,¹¹⁷ which was called, by some, a

113. 389 U.S. 241 (1967).

114. "For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request, irrespective of its conclusion as to the propriety of the issuance of the injunction." *Id.* at 254.

115. In *McLucas v. Palmer*, 427 F.2d 239, 242 (2d Cir. 1970), the court said: "A declaratory judgment would create the same opportunity as an injunction for delay and disruption of the state criminal proceeding and the same danger of having federal courts plunge themselves into the consideration of issues that may prove academic or at least may appear in a different light after trial.

"[T]he denial of federal relief rests on the desire to avoid unnecessary friction between state and federal courts and piecemeal litigation of criminal cases. Declaratory judgments can be as dangerous as injunctions in that respect." *Engelman v. Cahn*, 425 F.2d 954, 959, n.3 (2d Cir. 1969).

116. "We follow *Zwickler* in holding that the district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Moreno v. Henckel*, 431 F.2d 1299, 1309 (5th Cir. 1970).

"However, *Brown* also seeks declaratory relief that the Oklahoma statute is invalid and this calls for a separate assessment as is required by . . . *Zwickler*. . . ." *Brown v. Fallis*, 311 F. Supp. 548, 551 (N.D. Okla. 1970).

"Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment." *Roe v. Wade*, 314 F. Supp. 1217, 1224 (N.D. Texas 1970).

"Where in fact, basic constitutional questions are sought to be adjudicated, and the existence of the statute or the continued application thereof . . . will have a substantial chilling effect upon the plaintiff's exercise of the freedoms of speech, press, and assembly, the Court must consider a request for declaratory judgment even apart from injunctive relief." *Henley v. Wise*, 303 F. Supp. 62, 72 (N.D. Ind. 1969).

See also *Burton v. City of St. Louis*, 309 F. Supp. 1078 (E.D. Mo. 1970); *Milky Way Prod., Inc. v. Leary*, 305 F. Supp. 238 (S.D. N.Y. 1969); *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969).

117. 380 U.S. 479 (1965).

landmark case. Appellants were members of the Southern Conference Educational Fund (SCEF), a civil rights organization engaged in work in Louisiana. Claiming that the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law were overboard, and thus void on their face as violative of the first amendment freedom of expression, appellants sought declaratory and injunctive relief under the Civil Rights Act¹¹⁸ from a three-judge federal court. They further alleged bad faith on the part of local law enforcement officials, claiming that threats to enforce various sections of the statutes were made purely to harass them, without any hope of securing valid convictions.¹¹⁹

The federal district court refused to decide the case, however, finding that the issues did not present a situation of threatened irreparable injury and that a possible narrow construction of the applicable sections of the statutes by the state courts would avoid the necessity of deciding the constitutional issue.¹²⁰

On direct appeal, the Supreme Court reversed, first noting that, due to a successful motion to quash, no state proceedings were actually pending at the time relief was sought from the federal courts. Thus, the Anti-Injunction Act was inapplicable.¹²¹ The Court then noted the general principle that a federal court will not interfere with a state's good faith administration of its criminal laws, but failed to apply the principle because special circumstances were said to exist in the instant case. The delay necessary to allow appellants to return to the state courts would have had an adverse effect on the very first amendment rights appellants were seeking to protect.¹²² Furthermore, the Court

118. 42 U.S.C. § 1983 (1970).

119. In *Dombrowski* the Louisiana police had raided appellants' offices, seized their files, and arrested them. However, a state court quashed the arrest and ordered the illegally seized evidence returned. But, prosecution was continually threatened and after suit was filed in the federal district court, the Orleans Parish Grand Jury returned indictments against appellants, under several sections of the aforementioned statutes.

120. *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964).

121. See text accompanying note 31 *supra*.

122. "But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965).

decided that cases dealing with statutes limiting freedom of expression were of a special nature:

"The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."¹²³

The Court disagreed with the district court over the propriety of abstention: "We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."¹²⁴ The Court reasoned that since there were continuing threats to enforce additional provisions of the statutes, the violations of which were not charged in the indictments, a single state criminal proceeding on the indictments would not resolve all the constitutional questions springing from the statute. The Court considered piecemeal litigation on each section to be an unacceptable method of resolving constitutional issues raised by the overbroad statute.

The Court further found the necessary prerequisites for traditional equitable relief to be present in *Dombrowski*. The allegations of appellants tended to show bad faith enforcement of the statutes, if not harassment. Further, there was the vagueness and overbreadth of the statutes themselves: "We have already seen that where, as here, prosecutions are actually threatened, this challenge [vagueness and overbreadth], if not clearly frivolous, will establish the threat of irreparable injury required by . . . equity."¹²⁵ Hence, the district court was directed to enjoin all state prosecutions under the statute.¹²⁶

123. *Id.* at 486-87.

124. *Id.* at 489-90. The Court further stated: "[A]bstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hardcore' conduct that would obviously be prohibited under any construction." *Id.* at 491-92.

125. *Id.* at 490.

126. The Court recognized the right of the district court to modify the injunction to permit prosecutions if the state, in a non-criminal action, sufficiently narrowed the statutes.

Justice Harlan, dissenting, expressed concern over federal-state relations in the aftermath of *Dombrowski*. He felt the case stood for the proposition that abstention was not to be applied in any suit wherein criminal statutes were attacked for vagueness on claims based on the first and fourteenth amendments.¹²⁷

But was *Dombrowski* really a landmark case? The idea that a court of equity would not interfere in state criminal prosecutions had already fallen into partial disfavor before *Dombrowski*.¹²⁸ Throughout the immediately preceding decades, the idea had developed that civil rights presented special cases for the application of equitable relief. It had previously been stated that the mere delay required by abstention was sufficient to "chill" the very rights for which protection had been sought.¹²⁹ Furthermore, the necessity of good faith prosecution of criminal laws had often been mentioned in federal courts of equity.¹³⁰ In only one area was *Dombrowski* clearly important: The case indicated that where there was the mere threat of prosecution on an overbroad statute regulating freedom of expression, and a single prosecution would not be sufficient to resolve the constitutional issues, then federal equitable relief would be appropriate.¹³¹ In addition, if the statute regulating free speech were not overbroad, but was applied in bad faith for the purpose of "discouraging protected activities," federal intervention would again be applicable.¹³² Indeed, were this the holding, *Dombrowski* would have signified a considerable easing in the requisites of irreparable injury and a corresponding greater chance for securing federal equitable relief. In fact, some lower federal courts have interpreted *Dombrowski* to mean that mere vagueness or overbreadth of a statute regulating the freedom of expression plus the threat of prosecution, without the presence of bad faith, could justify intervention.¹³³

127. *Id.* at 498-502.

128. See text accompanying notes 16 and 17 *supra*.

129. See text accompanying note 89 *supra*.

130. *Douglas v. Jeanette*, 319 U.S. 157 (1943); *Watson v. Buck*, 313 U.S. 387 (1941); *Beal v. Missouri P. R.R.*, 312 U.S. 45 (1940).

131. See note 123 *supra*.

132. See text accompanying note 125 *supra*.

133. *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968). See *PBIC, Inc. v. Byrne*, 313 F. Supp. 757 (D. Mass. 1970) (either facially invalid statute or bad faith of the prosecution, without the other, may be sufficient to justify federal intervention to enjoin state prosecution); *Original Fayette County Civil & Welfare League, Inc. v. Ellington*, 309 F. Supp. (W.D. Tenn. 1970) (special circumstances requiring an injunction may be present even absent bad faith enforcement if first amendment rights are at stake); *Lan-*

The cases decided by the Supreme Court after *Dombrowski* did nothing to clarify whether a threatened prosecution under an invalid statute was sufficient for an injunction. However, it is interesting to note how the Court applied *Dombrowski* to those cases dealing with federal court intervention in state proceedings. In *Cameron v. Johnson*,¹³⁴ the Court said: "*Dombrowski* recognized . . . the continuing validity of the maxim that a federal district court should be slow to act 'where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court . . .'"¹³⁵ and interpreted *Dombrowski* as being consistent with other decisions in its area.

In *Zwickler v. Koota*,¹³⁶ in language similar to that used in *Dombrowski*, Justice Brennan spoke for the majority:

"These principles [that absention is not proper] have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such a case to force the plaintiff to . . . suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."¹³⁷

The Court then held that the merits of a declaratory judgment request should be considered independently of a request for injunction where the two remedies are sought in the same petition. The Court felt that this result was an outgrowth of *Dombrowski* and its treatment of the doctrine of abstention:

"*Dombrowski* teaches [us] that the questions of abstention and of injunction are not the same.

dry v. Daley, 288 F. Supp. 200 (N.D. Ill. 1968) (state court prosecution based on vague and overly broad provisions of statute may itself be violative of due process and warrant federal injunction against prosecution).

134. 390 U.S. 611 (1968). This case had first come to the Court in 1965 (381 U.S. 741 (1965)). There, pickets brought an action to enjoin prosecutions under a Mississippi Anti-Picketing Statute, claiming, *inter alia*, that it violated their rights under the Civil Rights Act of 1871. The Court remanded the case after the *Dombrowski* decision with instructions to the district court to decide if the Civil Rights Act constituted an exception to the Anti-Injunction statute. The district court held that the Act did not constitute an exception. On appeal, the Supreme Court affirmed the lower court's ruling because the challenged state statute was not overly broad nor was there bad faith prosecution, thereby ignoring the question of the relationship between the Civil Rights Act and the Anti-Injunction Act.

135. *Id.* at 618.

136. 389 U.S. 241 (1967). See text accompanying note 113 *supra*.

137. *Id.* at 252.

"It follows that . . . a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute."¹³⁸

Another case in which appellants sought to take advantage of *Dombrowski* was *Zwicker v. Boll*.¹³⁹ There, students arrested in a demonstration were charged with disorderly conduct. They unsuccessfully sought both declaratory and injunctive relief from a three-judge court. The district court held:

"*Dombrowski* requires a federal court to enjoin threatened state prosecution when there is reason to believe that the state's action will have a 'chilling effect' upon a citizen's exercise of his rights under the first and fourteenth amendments."¹⁴⁰

In holding that it was necessary to show both a bad faith prosecution and an invalid statute to prove a chilling affect, the three-judge court seemed to be interpreting *Dombrowski* as merely an application of the traditional requirements for the applicability of federal injunctive relief. The Supreme Court affirmed the denial of relief without comment.¹⁴¹

Dombrowski, then, had left the area of federal injunctive relief from state court prosecutions unsettled. It had stated the rule that the mere threat of prosecution coupled with an invalid statute regulating first amendment freedoms might be sufficient to warrant an injunction, but it was unclear whether the Supreme Court would apply the rule to cases presenting similar situations.

Younger and Samuels

The question of whether the invalidity of a statute affecting freedom of expression, without more, could justify federal injunctive relief was finally treated in two recent Supreme Court cases: *Younger v. Harris*¹⁴² and *Samuels v. Mackell*.¹⁴³ In *Young-*

138. *Id.* at 254.

139. 391 U.S. 353 (1968).

140. *Zwicker v. Boll*, 270 F. Supp. 131, 135 (W.D. Wis. 1967).

141. *Zwicker v. Boll*, 391 U.S. 353 (1968).

142. 401 U.S. 37 (1971).

143. 401 U.S. 66 (1971). The Court also rendered five related decisions on the same day: *Fernandez v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971).

er, appellee Harris had been indicted for violation of the California Criminal Syndicalism Act.¹⁴⁴ Harris brought suit in federal district court under the Civil Rights Act, section 1983, to enjoin any prosecution against him, claiming that the state act inhibited his exercise of first and fourteenth amendment rights. The district court declared the act void due to vagueness and overbreadth, and enjoined any further prosecution against Harris. In granting an appeal to the state's prosecutor, the Supreme Court asked him to argue, *inter alia*, that the injunction violated the Anti-Injunction Act. The effect of this argument is not reported, however, because the Court did not base its reversal on that statute. Rather, the Court noted the federal policy of refusing to intervene in state criminal proceedings except under special circumstances and sketched a brief outline of the decisions prior to *Dombrowski* which held that irreparable harm was a requisite to injunctive relief.¹⁴⁵ However, the major pre-*Dombrowski* decisions cited by the Court¹⁴⁶ dealt with *threatened*

144. CALIF. PENAL CODE §§ 11400-11401 (Deering 1959): "§ 11400: 'Criminal syndicalism' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

"§ 11401. Unlawful acts: Penalty.

"Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or

"4. Organizes or assists in organizing or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

"5. Wilfully by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."

145. 281 F. Supp. 507 (C.D. Cal. 1968).

146. *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Fenner v. Boykin*, 271 U.S. 240 (1926); *Ex parte Young*, 209 U.S. 123 (1908).

prosecutions while *Younger* involved a *pending* prosecution, an important difference.¹⁴⁷

The Court based its holding on the failure of appellee to meet the traditional requirements for an injunction by not establishing a case of irreparable harm, rather than on the prohibition contained in the Anti-Injunction Act. In this way, the Court attempted to clarify the *Dombrowski* decision. Noting that *Dombrowski* had been erroneously interpreted by some courts to mean that a bad faith prosecution need not be present to obtain injunctive relief,¹⁴⁸ the Court recognized that such a misunderstanding was not wholly unjustified,¹⁴⁹ but held it was not a correct statement of the holding because both bad faith prosecution and an invalid statute were present in *Dombrowski*.¹⁵⁰ Although *Dombrowski* did present both harassment and an overbroad statute, it is not as clear as the Court would have it seem that the holding of *Dombrowski* was not stated in the alternative—bad faith or an invalid statute which “chilled” the first amendment rights.¹⁵¹ The Court denied injunctive relief, finding that the appellee had not shown harassment; hence, the prerequisite of irreparable injury had not been satisfied.

In another case decided the same day as *Younger*, the Court rendered an opinion concerning the propriety of a declaratory judgment once a requested injunction had been denied. In *Samuels v. Mackel*,¹⁵² appellants were charged with violating two New York criminal anarchy statutes. They alleged that the statutes were “[v]oid for vagueness in violation of due process, and an abridgment of free speech, press, and assembly in

147. *Younger v. Harris*, 401 U.S. 37, 41 (1971). At the very beginning of the opinion the Court made it clear that it was dealing solely with pending prosecutions: “We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun.”

148. *Id.* at 50: “The District Court [in *Younger*], however, thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found ‘on its face’ to be vague or overly broad, in violation of the First Amendment.”

149. *Id.*: “We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument.”

150. *Id.*: “But as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards.”

151. See note 133 *supra*.

152. 401 U.S. 66 (1971).

violation of the First and Fourteenth Amendments"¹⁵³ and, thus, any prosecution under the statutes would harass appellants and cause them irreparable damage. Appellants petitioned for injunctive relief and, in the alternative, for a declaratory judgment, but only the declaration was granted. Referring to *Younger*, the Court held that appellants had failed to establish the possibility of irreparable damage necessary for injunctive relief and that the request for declaratory relief should be denied.¹⁵⁴ In refusing declaratory relief, the Court reasoned that the Declaratory Judgment Act required declaratory judgments to be tested by the standards of traditional equitable relief. Hence, if no irreparable harm were shown, no declaratory relief could be granted. Thus, the standards for a declaratory judgment were as rigid as those for an injunction.¹⁵⁵

In so ruling the Court made no mention of the holding of *Zwickler v. Koota*¹⁵⁶ that considerations for injunctive and declaratory relief should be judged independently. Perhaps because *Samuels* purported to deal only with *pending* prosecutions,¹⁵⁷ the Court felt no need to mention a case dealing with *threatened* prosecution. However, the distinction between pending prosecutions and threatened prosecutions as justification for neglecting *Koota* is weakened by the fact that the Court uses the two situations almost interchangeably in *Younger*, *Dyson v. Stein*,¹⁵⁸ and *Perez v. Ledesma*.¹⁵⁹ Further, it does not necessarily follow from the difference between pending and threatened prosecutions that a different result should be reached in regard to requirements for declaratory relief as opposed to injunctive relief. Although intervention may cause interference with state officials in either

153. *Id.* at 67.

154. "[O]ur decision in the *Younger* case is dispositive of the prayers for injunctions here. . . . [W]e hold that [the] alternative prayer [for declaratory judgment] does not require a different result" *Id.* at 68.

155. "[T]he same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Id.* at 73. But Fed. R. Civ. P. 57 shows that traditional equitable standards do not strictly govern a request for declaratory relief: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

156. 389 U.S. 241 (1967).

157. "[W]here the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by *essentially* the same standards." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). (Emphasis added.)

158. 401 U.S. 200 (1971).

159. 401 U.S. 82 (1971).

case, surely a declaratory judgment will cause no more disturbance in relation to an injunction in a *pending* prosecution than it would cause in relation to an injunction in a *threatened* prosecution. The Court implies that in a threatened prosecution, considerations for a declaratory judgment should be distinct from those governing an injunction, while in a pending prosecution, the considerations should be the same. In support of the Court's decision, it may be said simply that any interference with pending state proceedings must be approached more delicately than those with threatened state proceedings. However, this policy justification does not explain why the Court decided, four years after *Koota*, that a declaratory judgment is as disruptive as an injunction, a decision which effectively repudiated *Koota*.

Conclusion

What is the state of *Dombrowski* as interpreted by the *Younger* court? It was noted that *Younger* treated the request for injunctive relief by reference to cases of threatened and not pending prosecutions. Traditionally, the two situations have been distinguished because it was felt that more friction was created by federal interference in pending prosecutions. Indeed, the distinction is pivotal in dealing with the Anti-Injunction Act. However, the *Younger* court, in using cases of threatened and pending prosecution almost interchangeably, impliedly made an important statement on the doctrine of traditional equitable relief: That relief depends on the presence of irreparable harm, unaffected by the fact that state proceedings may be pending or threatened. The pending-threatened distinction is a product of an entirely different concept, that of comity. Though it can be said that *Younger* does not affect *Dombrowski* because the former speaks only to cases of pending prosecution, with the realization that irreparable harm does not depend on that distinction and, further, the *Younger* court's statement that an overbroad statute, absent harassment, does not constitute irreparable harm, it is submitted that *Dombrowski* has been effectively limited. By approaching the problem in terms of failure to meet the standards of traditional equitable relief, the Court did not find it necessary to comment on comity and abstention. Since the Court appears to de-emphasize the special nature of statutes regulating first amendment freedoms, it would seem that the

premise that civil rights are not a proper area for abstention may soon be re-evaluated.

Other problems remain unsettled in this area. The Court has yet to authoritatively rule on whether the Civil Rights Act (section 1983) is an exception to the Anti-Injunction Statute. Because Harris raised this issue in *Younger*, the Court had the opportunity to decide it, but apparently the Court chose to avoid this issue in order to clarify *Dombrowski*. There is finally the problem of *Samuels*—does it overrule *Koota* so that considerations for rendering a declaratory judgment are now the same as those for ordering an injunction in *threatened* as well as *pending* prosecutions? The answers to these questions await clarification by the Supreme Court.

S. Gene Fendler

STANDING AND ADMINISTRATIVE AGENCIES— EXPANDING CONCEPTS OF JUDICIAL REVIEW

Administrative agencies are a relatively recent innovation, and their exact function in the governmental process is still being defined. At the same time, they continue to increase in both number and authority. On the federal level, recent laws such as the Wilderness Act¹ and the National Environmental Policy Act² have added a new dimension of responsibilities to the agencies' concerns.

In the wake of these new laws has come the question of what parties may invoke the aid of the courts in order to compel adherence to these new enactments. Thus, the recurring problem of standing to invoke judicial review of administrative actions has arisen once more in a dramatically different context. Old notions of legal and economic injuries appear incapable of solving aesthetic and environmental problems. Yet, old notions sometimes die slowly. While some courts have perceived that new weapons must be fashioned if these public rights are to be upheld, others cling tenaciously to traditional concepts in dealing with this "complicated specialty of federal jurisdiction."³ It is

1. 16 U.S.C. §§ 1131-1134 (1970).

2. *Id.* §§ 4321-4347.

3. *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 156 (1953). In this case, the Secretary of the Interior and a cooperative electrical association sought to set aside a license granted to a private util-