

# THE CIVIL RIGHTS ACT OF 1871 VERSUS THE ANTI-INJUNCTION STATUTE: THE NEED FOR A FEDERAL FORUM

In recent years, much litigation has been initiated in the federal district courts by persons seeking to enjoin threatened or pending state prosecutions. The success of such actions has to a large extent depended on the attitude of the particular federal court toward two potentially conflicting policies—the protection and vindication of individual rights and the maintenance of an orderly federal system. The Supreme Court has avoided laying down specific guidelines for the lower courts to follow. It is the purpose of this note to examine the origin and history of this litigation and those factors which have contributed to the conflicting results in the lower courts. The note concentrates on injunctions to stay pending prosecutions, analyzing recent cases in the area and the relative validity of the policy considerations presented by the courts and commentators.

Federal courts historically have been reluctant to issue injunctive relief to block state court proceedings. Several discretionary theories underlie this reluctance, all of which are related to the concept of federalism. First, the doctrine of comity is a policy of non-interference between the state and federal courts. It is not based on any constitutional provision but has evolved from the common law.<sup>1</sup> Secondly, the abstention doctrine, first announced in *Railroad Commission v. Pullman*,<sup>2</sup> commands that substantial constitutional questions should not be decided by the federal court if the case is capable of termination by a state court ruling. This doctrine was designed to avoid needless conflicts between the two court systems and to insure a “scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.”<sup>3</sup> Thirdly, traditional rules of equity require that

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1. Comity has been defined as follows: “[N]o court should interpose its process to take out of the hands of another coordinate court a res or cause of which the latter had taken prior jurisdiction.” Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930). See also *Darr v. Burford*, 339 U.S. 200 (1949).

2. 312 U.S. 496 (1941).

3. See *Burford v. Sun Oil*, 319 U.S. 315, 332 (1943); but see *Baggett v. Bullitt*, 377 U.S. 360 (1964). Wright considers it more precise to refer to “abstention doctrines” rather than “abstention doctrine;” he finds at least four lines of cases which, though they overlap, may be distinguished. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52 (2d ed. 1970).

equity courts not interfere with court proceedings, especially criminal prosecutions, unless the moving party is without an adequate remedy at law. *Ex Parte Young*,<sup>4</sup> a landmark case, established the availability of federal court intervention, but only after a showing of an inadequate remedy at law and irreparable injury.

Whether stated as comity, abstention, or traditional rules of equity,<sup>5</sup> the federal courts have been expressing a judicial attitude that interference with the administration of justice in the states is contrary to the maintenance of two independent court systems. This attitude is reflected in the 1942 case of *Douglas v. City of Jeanette*,<sup>6</sup> in which the Jehovah's Witnesses sought to enjoin a threatened state prosecution for distributing pamphlets in violation of a city ordinance which they alleged was unconstitutional as applied. The Supreme Court refused to intervene, stating: "The arrest by the federal court of the processes of the criminal law within the states . . . are to be supported only on a showing of danger of irreparable injury, both great and immediate."<sup>7</sup> The rationale behind the Court's refusal to authorize intervention was that "the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."<sup>8</sup> The *Douglas* opinion represented the state of the law until *Dombrowski v. Pfister*<sup>9</sup> in 1965.

In *Dombrowski*, plaintiffs were persons active in securing civil rights for Negroes in the South. Threatened by state officials with prosecutions, they brought suit under 42 U.S.C. § 1983<sup>10</sup> alleging that the state statute was unconstitutional on its face and that the threats to enforce this statute were made solely to harass and discourage plaintiffs' exercise of their first amendment rights. The Supreme Court reversed the district

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4. 209 U.S. 123 (1908).

5. It has been said of these obstacles collectively: "Factually the criteria are intimately related. What will satisfy one requirement will often satisfy the rest. The courts are not precise in defining or distinguishing among them." Note, *Federal Injunctions Against State Criminal Proceedings*, 4 STAN. L. REV. 381, 384 (1952).

6. 319 U.S. 157 (1943).

7. *Id.* at 163-164.

8. *Id.* at 163.

9. 380 U.S. 479 (1965).

10. 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 deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

court's dismissal<sup>11</sup> and remanded the cause for the framing of injunctive relief. It found that a normal defense of the state charges would not adequately vindicate petitioners' constitutional rights because the prosecution itself would result in a "chilling effect" on first amendment rights, irrespective of the ultimate outcome. In addition, the petitioners' allegations of bad faith enforcement, if true, would state a sufficient claim for relief notwithstanding *any* interpretation of the statute by the state court.<sup>12</sup> Finally, the Court asserted that abstention is inappropriate in first amendment cases when a statute is justifiably attacked on its face as being vague and overbroad.<sup>13</sup>

*Dombrowski* is similar to *Douglas* in that both cases involved an injunction to stay threatened state court proceedings which allegedly infringed upon petitioners' first amendment rights.<sup>14</sup> The Court attributes the different result to three considerations: (1) the statute in *Douglas* was attacked as being unconstitutional as applied, not on its face;<sup>15</sup> (2) there was no need for an injunction in *Douglas* as the statute was ruled unconstitutional in a separate suit decided the same day;<sup>16</sup> and (3) there were no allegations of bad faith or harassment in the *Douglas* case. It is unclear whether the Court found the bad faith and harassment aspect in *Dombrowski* the determinative factor, or whether the chilling effect on first amendment rights was sufficient by itself. Nevertheless, the *Dombrowski* decision reflected a new responsiveness on the part of the Court to the need for federal court intervention. As a result,

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11. *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964) (The district court would not determine the constitutionality of The Louisiana Communist Propaganda Control Law in advance of appropriate proceedings in the state court).

12. Justice Brennan, speaking for the Court, defines bad faith enforcement as the threatened and/or actual prosecution "without any hope of ultimate success, but only to discourage appellants' civil rights activities." 380 U.S. at 490.

13. 380 U.S. at 489-90. The only limits apparently placed upon injunctive relief by the Court would exist when petitioner's conduct is "hard-core" and would be prohibited under any construction of the statute, or when the statute is capable of an acceptable construction in a single prosecution. *Id.* at 491-92.

14. The question of federal intervention arises in first amendment situations because ". . . freedom of expression must be regarded as the most important of all constitutional guarantees and is entitled to 'super' protection by the Court." Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 554 (1970). Cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Machesky v. Bizzell*, 414 F.2d 283, 289-90 (5th Cir. 1969).

15. *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965).

16. *Id.* at 485. The statute in *Douglas* was ruled unconstitutional in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

*Dombrowski* became the basis for much litigation in the civil rights area, and at the same time became the source of much confusion within the lower federal courts.

The first conflict resulted from the lower courts' efforts to define the circumstances which justified federal intervention under *Dombrowski*. Many courts interpreted the decision to permit intervention when there was a threatened prosecution instituted *either* in bad faith *or* under a statute alleged to be unconstitutional on its face.<sup>17</sup> Other courts failed to find this disjunctive aspect in *Dombrowski* and always required bad faith enforcement.<sup>18</sup>

While *Dombrowski* involved a threatened prosecution, a second conflict generated by the case was its possible application to a pending state prosecution. It has been argued that a stricter test must be met to enjoin pending prosecutions since the petitioner is entitled to an immediate adjudication of his constitutional claim in the state proceeding, while a petitioner merely threatened with state prosecution has no assurance that his constitutional allegation will ever be adjudicated.<sup>19</sup> The Supreme Court has now apparently settled this question by its decision in *Younger v. Harris*,<sup>20</sup> in which it set out the requirements for federal equitable relief in a pending prosecution case.

Petitioner Harris, indicted under the California Criminal Syndicalism Act,<sup>21</sup> sought to enjoin his prosecution under § 1983 and the *Dombrowski* rationale. The federal district court held the statute void for vagueness and overbreadth and enjoined the district attorney from

17. See *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968); *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969); *Straut v. Calissi*, 293 F. Supp. 1339 (D. N.J. 1968); *Cambist Films, Inc. v. State of Illinois*, 292 F. Supp. 185, 189 (N.D. Ill. 1968); *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968), *rev'd sub. nom.*, *Boyle v. Landry*, 401 U.S. 77 (1971); *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967). All cases recognized a "disjunctive aspect" in *Dombrowski*.

18. See, e.g., *Wells v. Hand*, 238 F. Supp. 779 (M.D. Ga. 1965), *aff'd sub. nom.*, *Wells v. Reynolds*, 382 U.S. 39 (1965); *Zwicker v. Boll*, 270 F. Supp. 131 (W.D. Wis. 1967), *aff'd*, 391 U.S. 353 (1968); *Brooks v. Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967), *aff'd*, 391 U.S. 361 (1968); *Samuels v. Mackell*, 288 F. Supp. 348 (S.D.N.Y. 1968), *aff'd*, 401 U.S. 66 (1971); *Fernandez v. Mackell*, 288 F. Supp. 348 (S.D.N.Y. 1968) *aff'd* 401 U.S. 66 (1971).

19. See, e.g., *Younger v. Harris*, 401 U.S. 37, 56-57 (1971) (Brennan, J., concurring). For a critique of this distinction see Note, *Federal Injunctions Against State Court Proceedings*, 4 STAN. L. REV. 381, 386-91 (1952). See also Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW. L.J. 51 (1967); Note, *The Dombrowski Remedy—Federal Injunctions Against State Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 124-129 (1966).

20. 401 U.S. 37 (1971).

21. CAL. PENAL CODE §§ 11400 & 11401 (1953).

proceeding with the prosecution.<sup>22</sup> On appeal,<sup>23</sup> the Supreme Court reversed, finding that “federal intervention is inappropriate solely on the basis of a showing that the statute on its face abridges first amendment rights.”<sup>24</sup> The Court found that a prosecution under a state statute unconstitutional on its face did not constitute irreparable injury, but only the same injury incidental to every criminal prosecution.

Having thus rejected one element of the *Dombrowski* test for pending prosecution cases, the Court established a new disjunctive test, requiring either bad faith on the part of state officials in initiating the prosecution, or other “extraordinary circumstances”, such as a statute which is “flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph and in whatever manner and against whomever an effort might be made to apply it.”<sup>25</sup>

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22. *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968).

23. The basis for the direct appeal to the Supreme Court is 28 U.S.C. § 1253 (1970).

24. *Younger v. Harris*, 401 U.S. 37, 53 (1971).

Justice Douglas dissented in *Younger*, stating that “[t]he special circumstances when federal intervention . . . is permissible are not restricted to bad faith on the part of state officials or the threat of multiple prosecution . . . [but] also exist where for any reason the state statute being enforced is unconstitutional on its face.” *Id.* at 59 (dissenting opinion).

One concurring opinion in *Younger* stated that federal intervention was improper because petitioner’s constitutional claims could be adequately adjudicated in the state criminal proceedings. The opinion rejected the conclusion of the lower court that Harris had raised his constitutional claims in the state courts through motions to dismiss and for a writ of prohibition, both of which were rejected. It did not consider these modes to be within the “exhaustion of state remedies” doctrine. *Id.* at 57 (Brennan, J., concurring).

The other concurring opinion reiterates the majority’s holding, and emphasizes that its decision only applies when federal courts are asked “to intervene in a criminal prosecution which is contemporaneously pending in a state court.” *Id.* at 54 (Stewart, J., concurring).

In *Samuels v. Mackell*, 401 U.S. 66 (1971), decided the same day as *Younger*, the court decided a distinct but similar issue, declaratory judgments under 28 U.S.C. § 2201 (1970). In *Zwickler v. Koota*, 389 U.S. 241 (1967), the Supreme Court had held that the issues of injunctive relief and declaratory relief must be considered independently; although “exceptional circumstances” are necessary for injunctive relief, the Court held that they are not necessary for declaratory judgments. In *Samuels*, the Court found that “the propriety of declaratory and injunctive relief should be judged by essentially the same standards.” 401 U.S. at 72. The Court based this conclusion on two grounds: (1) a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to “effectuate the court’s judgment” under 28 U.S.C. § 2283; and (2) the declaratory relief would have virtually the same impact as a formally instituted injunction. The Court relied in *Samuels* on a long line of cases dealing with state tax collection, and stated that it can “perceive no relevant differences” between those cases and cases involving state criminal proceedings. However, *Dombrowski* and *Zwickler* both expressly referred to state criminal statutes which affected first amendment rights.

The Court in *Younger* distinguished *Zwickler* on the ground that in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court. 401 U.S. at 57 (Brennan, J., concurring).

25. *Id.* at 53-54, citing *Watson v. Buck*, 313 U.S. 387, 402 (1941).

Because Harris failed to prove either of the two elements needed to establish federal equitable relief, the Court was not required to deal with the second issue that arises in pending prosecution cases: is the federal anti-injunction statute, 28 U.S.C. § 2283, a bar to injunctions sought under § 1983 to stay state court proceedings? Section 2283 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 judgment.<sup>26</sup>

The significant difference in the approach taken in threatened prosecution cases as opposed to pending prosecution actions stems from the statutory language. In the former, the federal court need only determine whether the requirements for equitable relief have been met. If the petitioner satisfies the standards, the injunction will be granted. In disposing of an action to enjoin a pending state prosecution, the court's task is two-fold: to determine whether the test for equitable relief has been satisfied and to consider whether § 2283 bars relief.<sup>27</sup>

Although the Court in *Younger* set out the test for equitable relief in a pending prosecution case, it still has not resolved the question of whether § 1983 is an express exception to § 2283.<sup>28</sup> This lack of guid-

26. 28 U.S.C. § 2283 (1970); it has long been the subject of debate whether § 2283 is an absolute prohibition or merely a legislative expression of comity. Compare *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969) (finding § 2283 a statutory enactment of comity) with *Atlantic C. Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970) (rejecting the *Sheridan* interpretation and finding § 2283 a clear-cut prohibition). For another interpretation of the relationship of comity and § 2283 see *Duke v. Texas*, 327 F. Supp. 1218 (E.D. Tex. 1971).

27. When dealing with § 2283 and § 1983, the issue has always been whether § 1983 is an "express exception" to § 2283. The reasons that § 1983 is not considered under the other two exceptions to § 2283 are that there is generally no need for an injunction against prosecutions "in aid of its jurisdiction" and there is no prior federal judgment to "protect or effectuate". See *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), cert. denied, 381 U.S. 939 (1965); *Honey v. Goodman*, 432 F.2d 333, 346 (6th Cir. 1970) (dissenting opinion); Note, *Incompatibility—The Touchstone of Section 2283's Express Authorization Exception*, 50 VA. L. REV. 1404 (1964).

28. Justice Douglas, in his dissent, went beyond the majority and concurring opinion by concluding unconditionally that § 1983 is an express exception to § 2283, citing *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1970). *Younger v. Harris*, 401 U.S. 37, 62 (dissenting opinion).

Other cases in which the Supreme Court has avoided the issue are: *Bukulich v. Jury Commissioner of Green County*, 394 U.S. 97, 99 n.2 (1969); *Cameron v. Johnson*, 390 U.S. 611, 614 n. 3 (1968); *Cameron v. Johnson*, 381 U.S. 741 (1965); *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1963), cert. denied, 381 U.S. 939 (1965); *Wojcik v. Palmer*, 318 F.2d 171 (7th Cir. 1963), cert. denied, 375 U.S. 930 (1963); *Brooks v. Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967), *aff'd per curiam*, 391 U.S. 361 (1968).

ance on the part of the Court has resulted in conflicting decisions in the lower federal courts.<sup>29</sup>

An evaluation of the lower court decisions on this question necessitates consideration of the history and purpose of § 2283 and the Supreme Court's interpretation of the statute. The statute was enacted in 1793 to limit the power of the federal courts and to avoid friction between the two independent court systems.<sup>30</sup> A number of exceptions were subsequently established, five of which were statutory.<sup>31</sup> Only one of them was specifically referred to in the anti-injunction statute.<sup>32</sup> The other exceptions made reference to stays of state court proceedings<sup>33</sup> or to stays of any court proceedings.<sup>34</sup> In addition, there were several judicially created exceptions.<sup>35</sup> In 1941, the Supreme Court, in *Toucey v.*

29. See note 47 *infra*.

The lower courts, prior to the Supreme Court's decision in *Younger v. Harris* and its companion cases, had anticipated that these cases would resolve the conflict. See, e.g., *Honey v. Goodman*, 432 F.2d 333, 345 (6th Cir. 1970); "Although the complete answer may require congressional action to clarify the relationship between §§ 1983 and 2283, the Supreme Court can definitely decide the question in the cases now before it." See also C. WRIGHT, *THE LAW OF FEDERAL COURTS* 208 (2d ed. 1970).

30. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); but see C. WRIGHT, *THE LAW OF FEDERAL COURTS* 177-78 (2d ed. 1970). The statute as first enacted provided:

" . . . nor 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. 335.

31. (1) The Bankruptcy Act, 11 U.S.C. § 29 (a) (1970); (2) The Federal Removal Act, 28 U.S.C. §§ 1441-1450 (1970); (3) The Interpleader Act, 28 U.S.C. § 2361 (1970); (4) The Shipowners Liability Act, 46 U.S.C. § 185 (1970); and (5) The Frazier-Lemke Farm Mortgage Act, 11 U.S.C. § 203(s)(2) (1970); See *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941).

32. The anti-injunction statute was first revised in 1911 to read:

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.

28 U.S.C. § 379 (1911). The present anti-injunction statute, 28 U.S.C. § 2283 (1970), does not specifically refer to the bankruptcy exception. For the current status of that exception, see 11 U.S.C. § 29(a) (1970).

33. The Interpleader Act, 28 U.S.C. § 2361 (1970); The Federal Removal Act, 28 U.S.C. § 1441-1450 (1970). Since 1941, a sixth statutory exception has been recognized, The Federal Habeas Corpus Act, 28 U.S.C. § 2251 (1964), which also refers specifically to "state" court proceedings.

34. The Bankruptcy Act, 11 U.S.C. § 29(a) (1970); The Shipowners Liability Act, 46 U.S.C. § 185 (1970); The Frazier-Lemke Farm Mortgage Act, 11 U.S.C. § 203 (s)(2) (1970).

35. One exception was the so-called "res cases", which held that the anti-injunction statute did not preclude a federal injunction against state court proceedings which seek to interfere with property in the custody of the federal court. See, e.g., *Farmer's Loan & Trust Co. v. Lake St. Elevated R.R.* 177 U.S. 51 (1900); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

Another exception was an injunction to enjoin litigants from enforcing judgments fraudulently

*New York Life Insurance Co.*,<sup>36</sup> held that federal courts may not enjoin state courts from adjudicating previous federal judgments which were res judicata to the states. Justice Frankfurter, in the majority opinion, made it clear that exceptions were not to be carved out of the anti-injunction statute by the judiciary and that the statute should be strictly construed as a mandate from Congress prohibiting any interference with the state courts by the federal courts.<sup>37</sup> He found only one judicial exception—the so-called “res cases”—to be contained in the statute and found the others to be “sporadic, ill-considered decisions [which] cannot be held to have imbedded in our law a doctrine which so patently violates the express prohibition of Congress.”<sup>38</sup>

In 1948, allegedly to “return the law to its status prior to *Toucey*,”<sup>39</sup> Congress enacted the statute in its present form. It is doubtful whether this purpose has been realized, as the exceptions provided for in the statute do not correspond to those previously recognized: “It is not clear whether the statute preserves all the pre-*Toucey* exceptions, nor is it clear to what extent the 1948 revision permits injunctions in circumstances where an injunction would have been barred even before *Toucey*.”<sup>40</sup> Thus, the purpose and application of the statute are still in dispute.

The Supreme Court cases interpreting § 2283 since 1948 have only

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obtained in the state courts. See *Marshall v. Holmes*, 141 U.S. 589 (1891); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920).

An apparent exception was a line of cases which allowed federal injunctions against relitigation of a matter already decided in the federal court. See *Looney v. Eastern Texas Ry.*, 247 U.S. 214 (1918); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

For the Supreme Court's treatment of these exceptions, see *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), which expressly overruled the “relitigation” exception and cast doubt upon the other exceptions. See notes 36-38 *infra* and accompanying text.

36. 314 U.S. 118 (1941).

37. *Id.* at 140-41.

38. *Id.* at 139-40. See note 35 *supra*.

39. Advisory Committee Note, reprinted following text of 28 U.S.C. § 2283 (1970). The following cases and article have cited the comment with approval: *Younger v. Harris*, 401 U.S. 37, 60 n. 3 (Douglas, J., dissenting); *Atlantic C. Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, (1970); *Honey v. Goodman*, 432 F.2d 333, 340 (1970); Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 100 (1966); but see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1372 at 299-300 (1971); C. WRIGHT, THE LAW OF FEDERAL COURTS 179-81 (2d ed. 1970); Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L.Q. 11 (1971).

40. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1372 at 300 (1968). See also Comment, *Anti-Suit Injunction Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 482 (1965).



stimulated the controversy over the scope of the statute. In *Amalgamated Clothing Workers of America v. Richman Brothers Co.*,<sup>41</sup> the court refused to grant a labor union's petition for an injunction against an employer's suit in the state court even though the union conduct in controversy was subject to the exclusive authority of the Labor Management Relations Act and therefore outside of the state's authority. Justice Frankfurter reiterated the position he articulated in *Toucey* that in § 2283 "Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. . . . Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."<sup>42</sup> Thus the indication was clear that the judiciary was not to carve out any additional exceptions even under the revised statute. Despite this apparent prohibition, the Court, with Justice Frankfurter again writing the opinion, formulated another exception to § 2283 two years later in *Leiter Minerals, Inc. v. United States*.<sup>43</sup> The court held that § 2283 was inapplicable to stays sought by the United States and emphasized the frustration to national interests which would result if the rule were otherwise:

. . . the frustration of superior federal interests that would ensue from precluding the federal government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.<sup>44</sup>

Finally, in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*,<sup>45</sup> a case involving a federal court injunction to stay a previous state court injunction prohibiting union picketing, the Court again reversed its position. It rejected the principle that § 2283 was only an act of comity and reiterated its statement in *Amalgamated* that there are to be no exceptions unless "based on one of the specific statutory exceptions to § 2283."<sup>46</sup> Thus the Supreme Court's decisions regarding the anti-injunction statute are conflicting and offer little guidance in the

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41. 348 U.S. 511 (1955).

42. *Id.* at 514.

43. 352 U.S. 220 (1957).

44. *Id.* at 226.

45. 398 U.S. 281 (1970).

46. *Id.* at 287.

determination of whether § 1983 is an exception expressly authorized by Congress.

In the lower courts, the Fourth and Seventh circuits have held that § 1983 is not an express exception to § 2283, while the Third, Fifth, and Sixth Circuits have held that it is.<sup>47</sup> The leading case to adopt the former position is *Baines v. City of Danville*.<sup>48</sup> The Negro petitioners sought to enjoin pending criminal proceedings in the state court, alleging the state court injunction and the city ordinances under which they were prosecuted were unconstitutional. The Fourth Circuit applied the comity doctrine and recognized that a defendant in a state prosecution will receive an adequate hearing in that forum on his federal constitutional claims. The court indicated that to allow federal intervention is to needlessly generate federal-state friction.<sup>49</sup> The *Baines* court also found that the exceptions currently recognized are authorized either expressly or at least implicitly, whereas § 1983 "creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids."<sup>50</sup> The

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47. The Fourth and Seventh circuits have held that § 1983 is not an express exception to § 2283. Fourth Circuit: *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965). Seventh Circuit: *Goss v. Illinois*, 312 F.2d 257, 259 (7th Cir. 1963); *Wojcik v. Palmer*, 318 F.2d 171 (7th Cir. 1963), *cert. denied*, 375 U.S. 930 (1963); *Smith v. City of Lansing*, 241 F.2d 856 (7th Cir. 1957); *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681, 714 (N.D. Ill. 1960). *See also* *Island Steamship Lines, Inc. v. Glennon*, 178 F. Supp. 292, 295 (D. Mass. 1959).

The Third, Fifth and Sixth circuits have held that § 1983 is an express exception to § 2283. Third Circuit: *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir. 1950); *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957). Fifth Circuit: *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969); *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *Dilworth v. Riner*, 343 F.2d 226, 232 (5th Cir. 1965); *Duke v. Texas*, 327 F. Supp. 1218 (E.D. Tex. 1971); *Carmichael v. Allen*, 267 F. Supp. 985 (N.D. Ga. 1967); *Hulett v. Julian*, 250 F. Supp. 208 (M.D. Ala. 1966). Sixth Circuit: *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1970). *See also* *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968), *rev'd sub. nom.*, *Boyle v. Landry*, 401 U.S. 77 (1971); *but see* *Cameron v. Johnson*, 262 F. Supp. 873, 878 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611 (1968).

48. 337 F.2d 579 (4th Cir. 1963), *cert. denied*, 381 U.S. 939 (1963).

49. *Id.* at 589. *See also* *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Supreme Court has stated: "To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. . . . There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 519 (1955). *But see* *Honey v. Goodman*, 432 F.2d 333 (6th Cir. 1971) (stating that when state proceedings are instituted in bad faith, ". . . the very concept of federalism has eroded. To enjoin the proceedings at that point, rather than permit state courts to be used as instrumentalities for the suppression of unpopular ideas, would minimize existing federal-state friction, not 'needlessly' generate it.") at 343.

50. 337 F.2d at 589.

court concluded that “unless the later statute [§ 1983] contains, or carries with it, strong evidence of an intention to repeal the earlier [§ 2283] or to carve out an exception from it, a court’s duty is to harmonize the two.”<sup>51</sup> The court harmonized the two statutes by finding no compelling reason to ignore the congressional command of non-intervention contained in § 2283.<sup>52</sup> This rationale, then, gives effect to the language of § 2283 and is based on the theory that had Congress intended to make § 1983 an exception to the anti-injunction statute, it would have done so through express language as it had done with other recognized exceptions.<sup>53</sup>

Several months prior to the Supreme Court’s decision in *Younger*, the Sixth Circuit in *Honey v. Goodman* held that § 1983 is an express exception to the anti-injunction statute. *Honey* is the most significant case taking this position, not only for the court’s responses to the traditional arguments in opposition to its holding, but also because it recognizes certain important policies which are relevant to the proper construction of the two statutes.

Plaintiffs in *Honey* were members of the Kentucky Chapter of the Southern Committee Against Repression and were charged with embracery<sup>55</sup> for mailing letters to area residents protesting the transfer of

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51. *Id.* at 590-91.

52. *Accord*: “It is . . . difficult to see why the right of an individual to test the constitutionality of a state law by a suit in the federal court—a right which he possesses only by virtue of the provisions of the federal statutes should be deemed to be more sacred than the right of a state to have the action of its courts freed from restraint by a federal court injunction—a right which it also possesses only by virtue of a federal statute . . . . Such a doctrine . . . clearly violates the spirit and theory which inspired the Act of 1793 and . . . evaluates the right of an individual to resort to the federal court more highly than the right of a state to resort to its own courts.” Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930). *But see* note 53 *infra*.

53. *But see* *Younger v. Harris*, 401 U.S. 37, 62 (1971) (Douglas, J., dissenting): “There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century [§ 2283] to control another statute [§1983] also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.”

54. 432 F.2d 333 (6th Cir. 1970).

55. The common law offense of embracery has been defined in *Brown v. Beauchamp*, 21 Ky. L.R. 268, 269 (1827): [W]here one attempts to corrupt, or influence, or instruct a jury, or any way to incline them to be more favorable to the one side or the other, by money, letters, promises, threats, or persuasions, except only by the strength of evidence, and the arguments of counsel in open court at the trial of the cause . . . .” In *Commonwealth v. Denny*, 235 Ky. 588, 31 S.W.2d 940 (1930), the definition was expanded by including in the word “jury” those persons who have been selected for jury duty although not necessarily impaneled or sworn to serve on any particular case.

a trial arising out of Louisville's civil disorders. Plaintiffs filed suit in federal court requesting the convocation of a three-judge panel to issue a declaratory judgment with respect to the constitutionality of the embracery statute<sup>56</sup> and to enjoin the pending prosecution in the state court.<sup>56</sup> The complaint alleged that the embracery statute was unconstitutional on its face and as applied and that the prosecutions were instituted in bad faith. The district court held that the anti-injunction statute prohibited the court from issuing the relief prayed for and dismissed.<sup>57</sup> The Sixth Circuit Court of Appeals reversed and held that the anti-injunction statute does not bar relief in first amendment cases if the prosecution complained of is instituted in bad faith and has a chilling effect on first amendment rights.<sup>58</sup>

The court, in accordance with the Supreme Court's mandate in *Atlantic Coast Line Railroad*,<sup>59</sup> found § 2283 to be more than "a mere principle of comity", but nevertheless held that the statute could be avoided when the "highly unusual and very limited circumstances" of *Dombrowski v. Pfister* are proved.<sup>60</sup> Thus the court decided that § 1983 is an "exception expressly authorized by an Act of Congress" only in certain exigent circumstances. The court justified this result by using the

56. The convocation of the three-judge district court to rule on the constitutionality of the embracery offense was sought under 28 U.S.C. §§ 2281 & 2284 (1970); the injunction was sought under 42 U.S.C. § 1983 (1970), for which jurisdiction was invoked in the district court under 28 U.S.C. § 1343(3) & (4) (1970).

57. *Honey v. Goodman*, 432 F.2d 333, 336 (6th Cir. 1970).

58. *Id.* The court found the common law offense to be constitutional on its face and thus upheld the district court's refusal to convene a three-judge panel on that issue.

The petitioners contended that they were being punished for their expression of controversial ideas in a manner akin to "pure speech." The court relied on *Schenck v. United States*, 249 U.S. 47 (1919) and *Bridges v. California*, 314 U.S. 252 (1941), to hold that a state has the right to regulate pure speech when used to create a clear and present danger of substantive evils that the states have a right to prevent, one of these evils being the threat to the administration of justice. 432 F.2d 333, 338.

The necessity for a hearing by the federal district court was eliminated by an agreement entered into by the parties dismissing both the criminal action in the state court and the § 1983 action in the district court. Letter on File, Washington University Law Quarterly.

Before the decision in *Honey*, the courts in the Sixth Circuit were in conflict; compare *Armstrong v. Ellington*, 312 F. Supp. 1119 (W.D. Tenn. 1970) and *Brooks v. Briley*, 274 F. Supp. 538 (M.D. Tenn. 1967), *aff'd mem.*, 391 U.S. 361 (1968); with *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967).

59. See notes 45 and 46 *supra* and accompanying text.

60. 432 F.2d at 343. *Honey* breaks the bad faith test down into several elements: (1) selective enforcement of a statute, (2) with no real hope of ultimate success, (3) for the sole purpose of punishing the defendants, and (4) discouraging others from exercising their freedom of speech. *Id.*

Supreme Court's rationale in *Leiter Minerals*<sup>61</sup> that § 2283 is inapplicable if its effect would be to frustrate a superior federal interest. The superior federal interest to be protected in this situation is the first amendment guarantee of freedom of speech. When a *Dombrowski*-type situation is present, "the frustration of superior federal interests that would ensue from precluding an aggrieved citizen from obtaining a stay of state court proceedings would be so great as to pose a threat of irreparable injury to a national interest."<sup>62</sup>

The *Honey* court emphasized the infirmities of a result which would grant relief when a prosecution was threatened, but would deny relief if the prosecution was pending.<sup>63</sup> This distinction has been criticized as creating a "race between the prosecutor and his intended victims to the state and federal courthouse respectively, with the victor getting all the 'spoils'."<sup>64</sup> In addition, such a distinction does not take into account that rarely, if ever, does a prosecutor announce in advance his plans to prosecute.<sup>65</sup>

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61. See note 43 *supra* and accompanying text. For another case using this rationale, see *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969).

62. 432 F.2d at 343. Judge Kalbfleish concurred in the result, preferring to rely on the 1965 decision in *Cameron v. Johnson*, 381 U.S. 741 (1965), wherein the Supreme Court remanded a case to be reconsidered in light of *Dombrowski* and instructed the lower court to decide whether § 2283 barred relief; see note 95 *infra*. Judge O'Sullivan dissented, regarding § 2283 as an "absolute prohibition against enjoining state court proceedings unless the injunction falls within one of the three specifically defined exceptions." *Id.* at 346.

63. The determination of whether a particular prosecution is threatened or pending may create additional problems for one seeking federal intervention. See *Carey, Federal Court Intervention in State Criminal Prosecution*, 56 MASS. L.Q. 11, 42 (1971).

The Supreme Court in *Dombrowski* pointed out that since the grand jury had not yet convened and indictments had not been issued before the filing of the complaint, no state proceedings were instituted within the meaning of § 2283. In addition, indictments issued and currently pending did not invoke § 2283 because the sole reason the indictments were obtained was the erroneous dismissal of the temporary restraining order by the district court. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). See also *Taylor v. Kentucky State Bar Ass'n*, 424 F.2d 478, 482 (6th Cir. 1970) (holding that disbarment proceedings, prior to their adjudication in the court in which the power to disbar resides, are not pending proceedings; therefore, the anti-injunction statute does not apply).

64. *Honey v. Goodman*, 432 F.2d 333, 343 (6th Cir. 1970), citing Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92 (1966); see also *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969); *Boyer, Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW. L.J. 50 (1967). The threatened—pending distinction has also been criticized on the ground that the amount of interference with the sovereignty is equal in either situation. *Id.* at 95-96.

65. 432 F.2d at 343.

The court also noted the scope of the jurisdiction provided for by § 1983 and stated that § 1983 was intended to alter the balance of power between the federal and state courts.<sup>66</sup> The basis of this rationale is that the statute was passed by a Reconstruction Congress and "its very purpose was to protect the rights of freedmen against abusive conduct of state officials."<sup>67</sup> Section 1983 was thus intended to increase the duty and power of the federal court in protecting constitutional rights and to ". . . escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts. . . ."<sup>68</sup> Contrary to *Baines*, the court was not swayed by the lack of any reference to § 2283 or to some type of "proceeding" in the various provisions of § 1983, but found that the purpose of § 1983 as stated above precludes the applicability of the anti-injunction statute.

While Judge Celebreeze, speaking for the majority, did not explicitly compare § 1983 to the six generally recognized statutory exceptions, other writers have done so in an effort to demonstrate that the considerations which led to establishing these statutes as exceptions apply to § 1983 as well.<sup>69</sup> It is true, as Professor Wright observes, that, in contrast to § 1983, the six statutes all contain provisions which clearly allow the federal government and/or private parties to enjoin other "proceedings."<sup>70</sup> However, this analysis seems deficient for three reasons: (1) it does not consider the judicially created exceptions prior to *Toucey*;<sup>71</sup> (2) it does not consider the 1948 statute which provides for exceptions which do not fit squarely with those which existed prior to

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66. *Id.* at 342.

67. *Id.*

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

*Monroe v. Pape*, 365 U.S. 167, 180 (1961). See also *Younger v. Harris*, 401 U.S. 37, 58 (1971) (Douglas, J., dissenting); *Zwickler v. Koota*, 389 U.S. 241, 248 (1967); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Taylor v. Kentucky Bar Ass'n*, 424 F.2d 478, 481 (6th Cir. 1970). See also Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

68. 432 F.2d at 342, quoting *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

69. E.g., Note, *Incompatibility—The Touchstone of Section 2283's Express Authorization Exception*, 50 VA. L. REV. 1404 (1964); Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92 (1966).

70. C. WRIGHT, *THE LAW OF FEDERAL COURTS* 141, 181 (2d ed. 1970).

71. See notes 31 & 35 *supra* and accompanying text.

its enactment;<sup>72</sup> and (3) it does not reflect the rationale of the *Leiter Minerals* exception.<sup>73</sup> Some writers have attempted to isolate characteristics common to all of the statutory exceptions. One suggested approach has identified two such elements: (1) the exceptions are incompatible with the anti-injunction statute, *i.e.* the purpose of § 2283 is contrary to the purpose of the particular statute in question;<sup>74</sup> and (2) the remedies provided for under these statutes would be substantially limited if § 2283 were held to bar their use.<sup>75</sup> These characteristics are similarly applicable to § 1983. Arguably the incompatibility is present because one statute prohibits the enjoining of a state court proceeding while the other provides for the enjoining of any unconstitutional state action, which may include a state court proceeding.<sup>76</sup> The substantial lessening of § 1983's remedy would occur because state court prosecutions are a major vehicle whereby state officials may infringe upon constitutional rights.<sup>77</sup>

A careful analysis of the arguments advanced by the *Baines* and *Honey* courts indicates persuasive reasoning on both sides of the issue. A resolution of the resulting judicial conflict could depend on the policy considerations presented by the relationship between § 1983 and § 2283. The Sixth Circuit, in *Honey*, is the first court to raise what may be the most important policy consideration: that is, the real need for a federal forum for individuals who believe their constitutional rights are being violated by the conduct of state officials.<sup>78</sup>

The argument most often put forward against the availability of a federal forum is that the states are bound to follow the federal constitu-

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72. See note 40 *supra* and accompanying text.

73. See notes 43 & 44 *supra* and accompanying text.

74. See Note, *Incompatibility—The Touchstone of Section 2283's Express Authorization Exception*, 50 VA. L. REV. 1404 (1964).

75. See Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 101 (1966).

76. See Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 738 (1961).

77. See notes 89 & 91 *infra*; *cf.* *United States v. Screws*, 325 U.S. 91, 107-113 (1945).

78. For an earlier discussion of the policies involved, see the dissenting opinion of J. Wisdom in *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964): "The main issue in this case is not, as the majority opinion declares, 'the State's basic right of self-preservation'. No one questions this right. The main issue is whether the State is abusing its legislative and criminal processes: whether the State, under the pretext of protecting itself against subversion, has harassed and humiliated the plaintiffs and is about to prosecute them solely because their activities in promoting civil rights for Negroes conflicts with the State's steel-hard policy of segregation." *Id.* at 569.

tion to the same degree as the federal courts.<sup>79</sup> Professor Amsterdam has set forth additional arguments for justifying state court adjudication of constitutional claims.<sup>80</sup> This procedure arguably effectuates at least four policies of federalism: (1) the assumption by state courts of more responsibility in the administration of federal law; (2) the lessening of friction between state and federal courts; (3) the avoidance of unnecessary constitutional litigation in the federal courts; and (4) the prevention of disruption of orderly state proceedings which results in confusion and uncertainty in the state court process.

These policy considerations are logically sound and probably reflect what was intended when the federal system was adopted.<sup>81</sup> However, these policies do not reflect changes and failures in the federal-state relationship. First, the Civil War amendments and the Reconstruction statutes caused major changes in our federal system.<sup>82</sup> Secondly, this

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79. Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 727 (1961).

"The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts. . . . We cannot assume that this confidence has been misplaced." *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 518 (1955).

Amsterdam offers the following rebuttal to those who argue that under our federal system state courts have the power and the ability to protect federally guaranteed rights: "True, state courts are competent to administer federal law, and they may by self-denial act to vindicate federal liberties. Theory casts them in this protective role, but the battle is not over theory. The battle is for the streets, and on the streets conviction now is worth a hundred times reversal later." Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 801 (1965).

80. Amsterdam, *supra* note 79, at 828-32.

81. "It should never be forgotten that this slogan, 'Our Federalism', born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The phrase "Our Federalism" was defined earlier in the Court's opinion as ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in separate ways." *Id.* at 44. *But see* note 53 *supra*.

82. *See* U.S. CONST. amend XIII (1865), amend. XIV (1968) and amend. XV (1870); 42 U.S.C. § 1981 (1970) (enacted in 1870); § 1982 (1970) (enacted in 1866); § 1983 (1970) (enacted in 1871); § 1985 (1970) (enacted in 1861); § 1986 (1970) (enacted in 1861); and § 1994 (1970) (enacted in 1867). The legislative history of 42 U.S.C. § 1983 reflects the affirmative power of Congress to enforce fourteenth amendment rights. This view regards § 1983 as a "civil war amendment" representing a judgment by the Reconstruction Congress to upset the traditional notions of "federalism" in order to protect many of the newly-won rights. *See, e.g., Younger v. Harris*, 401 U.S. 37, 58 (1971) (Douglas, J., dissenting); Note, *The Dombrowski Remedy-Federal Injunction Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92, 105-18 (1966). Some writers go further and suggest that the reason federal district courts were created in the beginning was to give citizens a forum which would not be tainted by local prejudices and interests. *See, e.g., Dombrowski v. Pfister*, 227 F. Supp. 556, 569-83 (1964) (Wisdom, J., dissenting); Amsterdam, *supra* note 79, at 802.



system has been ineffective in the area of civil rights. Amsterdam has indicated many reasons for this failure:<sup>83</sup> local interests and prejudices are often at cross-currents with federal constitutional law; many local judges and officials are unfamiliar with federal law; state prosecutions are often weighed against the defendant; "the defendant is often exhausted before his remedies";<sup>84</sup> many of the prosecutions which now pass through the state courts and then into federal courts would never be instituted if the prosecuting attorney knew that he would have to present his case in a federal court; and, although the state courts may be capable of hearing the more traditional constitutional issues such as right to counsel or right to speedy trial, the justification for allowing states to try constitutional issues fails when "the activity underlying the criminal prosecution is federally immune from state inhibition."<sup>85</sup>

The argument that the states do not adequately protect the constitutional rights of their citizens has been attacked as unsubstantiated and unfair.<sup>86</sup> Although the allegations are difficult to verify, empirically numerous recent occurrences indicate serious shortcomings:<sup>87</sup> the failure

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83. Amsterdam, *supra* note 79, at 832-38. See also Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 How. L.J. 51 (1967).

84. Amsterdam, *supra* note 79, at 834.

85. *Id.* at 837. Other obstacles to an adequate vindication of constitutional rights in the state courts may be as follows: (1) if the defendant is a Negro, he is faced with juries, courtrooms, and officials from which other Negroes have been systematically excluded; (2) even if federal rights are ultimately vindicated, it will be a lengthy and costly experience; (3) bail must be posted at every turn and professional bondsmen are "out" for civil rights workers in the South; (4) local prejudices and sympathies often lead to adverse fact-finding which hurts the defendant on each appeal. *Id.* at 795-801.

He concludes: "Beyond these risks, these hardships, these repressions and delays, the ultimate message of the state court process to the Negro comes through loud and clear: 'Litigation is not a meaningful avenue to the enjoyment of federal rights.' He is no Cassandra who sees that there can be but one response to such a message." *Id.* at 799; see also Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecution Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 How. L.J. 51 (1967).

86. *Compare*: "I hope we will never become so bigoted as to think that state judges are any less devoted to the principles of the federal constitution than other judges and lawyers." Address by Chief Justice Warren Burger, March 12, 1971, National Conference of the Judiciary, 54 JUDICATURE 410, 413 (1971), *with*: "I do not know that the Supreme Court of the United States itself would be willing formally to find Mississippi justice *either* conspiratorial or incompetent, were such a finding required as a condition of authorizing timely federal intervention into state criminal prosecutions destructive of federal rights. But I do not need to try these factually and politically untriable issues in order to conclude that in its normal processes Mississippi Justice too unbearably clogs the freedoms indispensable to a free society." Amsterdam, *supra* note 79, at 800.

87. Professor Lusky has described two types of local resistance which are employed to deprive Negroes of their constitutional rights in the South: one, which he calls the Mississippi method, is

of local communities to comply with constitutional requirements in their school systems;<sup>88</sup> the stalling and harassment tactics employed by local courts to intimidate minority groups;<sup>89</sup> the failure of local officials to protect the voting rights of its citizens;<sup>90</sup> and, the harassment and bad faith prosecutions used against unpopular groups and persons.<sup>91</sup>

The traditional arguments against federal intervention would appear

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prosecuting unpopular persons on unlawful criminal charges; the other, the Alabama method, is withholding the protection of claimed federal rights. Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1179-85 (1963); Professor Amsterdam concurs substantially in Lusky's statements and adds: "In this regard it [Mississippi Justice] differs only in degree from the justice administered in other Southern States, and in States outside the South." Amsterdam, *supra* note 79, at 800. See also U.S. COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT—A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965).

88. See, e.g., *Green v. New Kent County School*, 391 U.S. 430 (1968); *Griffin v. County School Bds.*, 377 U.S. 218 (1964); *Watson v. City of Memphis*, 373 U.S. 526 (1963); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966); *Price v. Denison Independent School Dist. Bd. of Educ.*, 348 F.2d 1010 (5th Cir. 1965); *Green v. School Bd.*, 304 F.2d 118 (4th Cir. 1962); *Northcross v. Board of Educ.*, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962); *Taylor v. Board of Educ.*, 191 F. Supp. 181 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961). For more recent developments, see NEWSWEEK, May 3, 1971 at 26.

89. *Barr v. City of Columbia*, 378 U.S. 146 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Wolfe v. North Carolina*, 364 U.S. 177 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Staub v. City of Baxley*, 355 U.S. 313 (1958).

90. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 383 U.S. 745 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *United States v. Classic*, 313 U.S. 299 (1941); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964); *United States v. Dogan*, 314 F.2d 767 (5th Cir. 1963); *Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).

There are indications that state intimidation and harassment still exist in 1971 against Negroes who attempt to exercise their voting rights. One article states: "Once Blacks get to the old white courthouse in Charleston, they are signed up fairly, *because the county clerk is under federal court orders to do just that*" (emphasis added). Wall Street Journal, June 22, 1971, at 1, col. 1.

91. See, e.g., *City of Greenwood v. Peacock*, 384 U.S. 808 (1966); *United States v. Price*, 383 U.S. 787 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D.Pa. 1968); see generally UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965); Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 HOW L.J. 51 (1967).

The "May Day", 1971, mass arrests in Washington, D.C., see NEWSWEEK, May 17, 1971, at 24-29, present a vivid *Dombrowski* situation. Although Washington, D.C. is under the direct supervision of the federal government, it is considered a "state or territory" within the meaning of the Civil Rights Act. *Sewell v. Peglow*, 291 F.2d 196 (4th Cir. 1961), *citing Talbott v. Silver Bow County*, 139 U.S. 438, 444 (1891) and *Hurd v. Hodge*, 334 U.S. 24 (1948); see *Edwards v. Sard*, 250 F. Supp. 977 (D.D.C. 1966).

to be outweighed by the recognition, underscored by the recent events described above, that there is a need for a federal forum. In addition, the Supreme Court in *Younger* has in effect supported the *Honey* rationale in several respects.<sup>92</sup> First, the Court's reliance on the threatened prosecution cases, although dealing with a pending case, supports the soundness of the rationale that any distinction between threatened and pending prosecution is artificial and illogical.<sup>93</sup> Secondly, by extending the *Dombrowski* bad faith test to pending prosecutions, the Court has undercut the traditional justification for invoking § 2283: the existence of an adequate state forum for the protection of petitioner's federal constitutional rights. If the petitioner can satisfy the bad faith test, it cannot be seriously argued that he will be able to properly present his first amendment claims in state court. By meeting the test, he will have shown: (1) that the prosecutor undertook the case knowing he had no hope of securing a valid conviction; and (2) that the prosecution itself was an attempt to harass the defendant and discourage the exercise of his first amendment rights.<sup>94</sup> In such a situation, a refusal to enjoin a pending prosecution because of § 2283 has little justification. The peti-

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92. The cases that have cited *Honey* to date have not diminished its significance. See *Livingston v. Garmire*, 442 F.2d 1322 (5th Cir. 1971); *Major v. Ferdon*, 325 F. Supp. 1141 (N.D. Calif. 1971); *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971).

93. Although the court states that "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," 401 U.S. 37, 41 (1971), it reasons extensively from the line of cases involving threatened prosecutions. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Williams v. Miller*, 317 U.S. 599 (1942); *Watson v. Buck*, 313 U.S. 387 (1941); *Beal v. Missouri Pac. Ry.*, 312 U.S. 45 (1941); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Ex parte Young*, 209 U.S. 123 (1908).

Additionally, most of the cases used by the Supreme Court did not involve any first amendment situations, thereby avoiding what the Court in *Dombrowski* felt especially determinative. See notes 10-14 *supra* and accompanying text. Cf. *Landry v. Daley*, 288 F. Supp. 200, 216 (N.D. Ill. 1968): "Furthermore, defendant's contention here completely ignores the underlying rationale of the *Dombrowski* decision. *Dombrowski* rests on the unstated premise that full exercise of First Amendment freedoms should not be substantially impaired, but rather actively encouraged, in a democratic society such as our own."

94. See note 12 *supra*. *Sheridan v. Garrison* explained the rationale that would make *Dombrowski* applicable to pending prosecutions brought in bad faith: "[W]here a person threatened by a bad faith prosecution that suppresses first amendment freedoms must defend the suit in order to vindicate his rights, he has no adequate remedy at law, and the assumption underlying the principles of comity, which is that state courts can adequately protect federal rights, consequently disappears." 415 F.2d 699, 707 (5th Cir. 1969). The Eastern District of Texas has used the *Younger* case to enjoin a pending state court injunction by finding that the underlying reason for demanding irreparable injury before intervention is absent when the state proceeding involved is not a criminal prosecution, either threatened or pending. *Duke v. Texas*, 327 F. Supp. 1218, 1233 (E.D. Tex. 1971).

tioner's first amendment rights have already been "chilled" by the initiation of the prosecution; further deprivation of these rights would appear likely if the state were allowed to proceed. Thirdly, the Supreme Court could have decided the *Younger* case by holding that § 2283 was an absolute bar to federal intervention; this result would have rendered the Court's determination of whether the petitioner had met the test for intervention unnecessary. However, because the Court was extremely careful to articulate its test for intervention against pending prosecutions and to determine whether the petitioner had met this test, it appears that had this test been met, § 2283 would not have been a bar. It seems unlikely that the Court would carefully delineate the kinds of facts and circumstances which would justify federal intervention if § 2283 would have precluded relief regardless of the actual facts or circumstances.<sup>95</sup>

*Honey* explicitly recognizes the need for federal relief in order to preserve "superior federal interests"—first amendment rights. The court has taken a logical and necessary step in holding that § 2283 is not a bar when the requisite criteria are met. The criteria enunciated in *Younger* will require a substantial burden; bad faith, frequently alleged, is difficult to prove; the other instance, "extraordinary circumstances",<sup>96</sup> may never occur.<sup>97</sup> *Younger* may have taken much of the substance out of *Dombrowski*, but it has tacitly approved the *Honey* rationale extending federal intervention to pending prosecutions. There needs to be, however, a specific directive from the Supreme Court or Congress affirming the *Honey* rule in order to insure adequate protection of constitutional rights.

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95. The order in which the court discussed the two issues involved in pending cases takes on added significance when one compares the approach used in *Cameron v. Johnson*, 381 U.S. 741 (1965). In that case, the Court remanded to the district court to consider first whether § 2283 bars federal injunctive relief. "If § 2283 is not a bar, the court should then determine whether [equitable] relief is proper. . . ." *Id.* In reversing the order in which the issues are to be considered, the Court in *Younger* has indicated the approach to be used in the future by the lower federal courts. The cases decided post-*Younger* indicate the Court's directive is being followed. *See, e.g., Livingston v. Garmire*, 442 F.2d 1322 (5th Cir. 1971).

96. *See* text accompanying note 25 *supra*.

97. One writer has expressed in the following manner the difficulty which will be encountered in meeting this "extra ordinary circumstances" test: "A statute providing that any defense attorney who objects to the admissibility of evidence offered by the prosecutor shall be summarily held in contempt and taken from the courtroom to be hanged might meet the test, assuming that 'Due Process' and 'Cruel and Unusual Punishment' are sufficiently *express* constitutional prohibitions." Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L.Q. 11, 45 n. 49 (1971).