The Anti-Injunction Statute Reconsidered

Martin H. Redish†

The anti-injunction statute prohibits federal courts from enjoining state court proceedings unless such an injunction is "expressly authorized" by act of Congress, is "necessary in aid" of a federal court's jurisdiction, or is necessary to "protect or effectuate" a federal judgment. In this article, Professor Redish examines the leading decisions interpreting the statute, and argues that the courts have construed the "expressly authorized" exception too expansively and the "in aid" exception too narrowly. He advocates adoption of a broader construction of the "in aid of jurisdiction" exception that would better accommodate the competing claims of state and federal courts to independence within our system of judicial federalism.

The fundamental precept underlying traditional notions of judicial federalism in the United States is that the state and federal courts should be independent of one another. To be sure, state courts are bound by the terms of the supremacy clause¹ to enforce and obey federal law. With only a minimum of exceptions,² however, any federal policing of the state courts must come on direct review by the Supreme Court; the lower federal courts do not sit in collateral judgment over the rulings of state courts.

† Associate Professor of Law, Northwestern University. I would like to thank Ms. Priscilla Walter of the Class of 1978 at Northwestern University School of Law for her invaluable research assistance in the preparation of this article.

¹ U.S. CONST. art. VI, 1. 2.

² The primary exception is federal habeas corpus. 28 U.S.C. §§ 2241-2255 (1970). In recent years the Supreme Court has significantly cut back the availability of federal habeas corpus relief. See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976).

Perhaps this principle of mutual judicial independence explains the original adoption of the anti-injunction statute in 1793, as well as the continued existence of the statute (in somewhat modified form) to this date.³ Prior to its most recent revision in 1948, the language of the statute prohibited virtually all injunctions of state proceedings by a federal court. Paradoxically, the principle of judicial independence prompted the development of various judge-made exceptions to the Act, its seemingly all-inclusive language notwithstanding. If the federal courts were to be free to function properly and to preserve their full jurisdiction, they had to be permitted to enjoin the conduct of certain state proceedings which threatened the exercise of their powers.

The 1948 revision of the statute was designed to codify certain of the common law exceptions and to reestablish the existence of another exception which had been rejected several years earlier by the Supreme Court in *Toucey v. New York Life Insurance Co.*⁴ As a result of this revision, the statute now reads: "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."⁵

The statutory language is not altogether clear, and the sparse legislative history behind the Act is generally at odds with a natural reading of the language. Moreover, judicial interpretation of these exceptions often has been marred by inconsistency and questionable statutory construction. In particular, courts interpreting the Act have generally failed to examine whether their interpretations might effectively impair the exercise of federal court authority in particular cases. This article examines critically the leading decisions interpreting the exceptions to the anti-injunction statute, and suggests a new approach to interpretation of the statute's exceptions that would more properly balance the competing needs for judicial independence within the federal system.

³ As Justice Frankfurter stated in *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939): "[The statute] is an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter."

⁴ 314 U.S. 118 (1941).

⁵ 28 U.S.C. § 2283 (1970).

I. THE BACKGROUND: THE ANTI-INJUNCTION STATUTE FROM 1793 TO 1948

In section 5 of the Act of March 2, 1793, Congress provided that "writs of ne exeat and of injunction may be granted by any judge of the supreme court . . . but no . . . writ of injunction [may] be granted to stay proceedings of any court of a state."⁶ The purpose behind enactment of this provision is unclear. It has been noted that "[t]he anti-injunction provision was but one sentence in one section of a two-page statute."⁷ Likely motives, in the words of one commentator, "were to prevent unhampered intrusions by the new federal courts into the then well-established state court domain and to codify the then prevailing prejudices against any extension of equity jurisdiction and power."⁸

An 1874 revision added an express exception for cases where an injunction was authorized by any law relating to bankruptcy proceedings.⁹ The statute was recodified as section 265 of the Judicial Code of 1911.¹⁰

Despite the statute's seemingly absolute prohibition of federal injunctions against state suits, the courts over the years developed a number of exceptions. Whatever the content of the various exceptions, however, they were never allowed to swallow the rule. It was and continues to be well established, for example, that the statute's bar cannot be circumvented by enjoining a party from pursuing his state action, rather than directly enjoining the state proceeding.¹¹ Similarly, though the statute does not bar injunctive relief prior to the filing of a state judicial proceeding,¹² it does bar injunctions to

⁶ Act of March 2, 1793, ch. 22, § 55, 1 Stat. 334.

⁷ Reaves & Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294, 296 (1971) (footnote omitted). For detailed analyses of the history of the anti-injunction statute, see Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

⁸ Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 480 (1965) (footnote omitted). The same commentator notes that: "Another possible explanation of the statute, but one generally dismissed by commentators, is that the anti-injunction provisions were a reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which extended federal jurisdiction at the expense of the states and generated the eleventh amendment." *Id.* at 481, n.46.

⁹ Revised Statutes of 1874, ch. 12, § 720, 18 Stat. 134. See Reaves & Golden, *supra* note 7, at 298; Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 726 n.4 (1961).

¹⁰ Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162, 28 U.S.C. § 379 (1940).

¹¹ *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4 (1940). See also *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970).

¹² *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Neifeld v. Steinberg*, 438 F.2d 423,

restrain proceedings brought to enforce a previously obtained state court judgment.¹³

Nevertheless, the exceptions which did develop were well-defined and, on occasion, far-reaching. One exception existed for cases arising under statutes which directly or indirectly authorized the stay of state proceedings.¹⁴ Under another exception, the so-called "res" exception, a federal court could enjoin a subsequent state court proceeding that might interfere with the federal court's jurisdiction over a res. This exception, unlike the others, mirrored a power enjoyed by state courts over federal proceedings.¹⁵ In *Hagan v. Lucas*¹⁶ the Court in dictum set forth the basis of the "res" exception: "A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts; if the final process of the one could be levied on property which had been taken by the process of the other."¹⁷ The courts, however, were careful to exclude injunctions against in personam actions from the scope of the "res" exception, limiting its application to in rem and quasi in rem cases.¹⁸ In addition to these exceptions, some early Supreme Court cases¹⁹ intimated that there existed an exception "where federal courts have enjoined litigants from enforcing judgments fraudulently obtained in state courts."²⁰ In its seminal decision *Toucey v. New York Life Insurance Co.*,²¹ however, the Court, in an opinion by Mr. Justice Frankfurter, stated that "[t]he foundation of these cases is . . . very doubtful."²²

432 (3d Cir. 1971).

¹³ *Hill v. Martin*, 296 U.S. 393, 403 (1935); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 779 (3d Cir. 1975).

¹⁴ See text and notes at notes 42-127 *infra*.

¹⁵ See *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

¹⁶ 35 U.S. (10 Pet.) 400 (1836).

¹⁷ *Id.* at 402. The Court also stated that "[t]he first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other." *Id.* An alternative justification of the "res" exception is avoidance of inconsistent directives concerning property prior to judgment. See note 151 *infra*.

¹⁸ *Princess Lida v. Thompson*, 305 U.S. 456, 465-68 (1939); *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922).

¹⁹ *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920); *Simon v. Southern Ry.*, 236 U.S. 115 (1915); *Marshall v. Holmes*, 141 U.S. 589 (1891).

²⁰ See cases cited in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 136 (1941).

²¹ 314 U.S. 118 (1941).

²² *Id.* at 136. Cf., Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. Chi. L. Rev. 471, 486 (1965): "Prior to the *Toucey* decision federal courts could enjoin the enforcement of fraudulently obtained state court judgments, but could not enjoin the prosecution of pending state court proceedings tainted by fraud or collusion." (Footnotes omitted.) Though this exception was not put in the text of the current version of the anti-injunction statute and is not specifically referred to in the legislative history of that revision, Professor Moore is of the firm opinion that the exception still exists. See 1A MOORE'S FEDERAL

The statement in *Toucey* concerning the fraud exception was dictum, however, since the case primarily concerned what has come to be known as the "relitigation" exception. The central issue of the case was, in Justice Frankfurter's words: "Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?"²³ Prior to the decision in *Toucey*, it had been thought by many that a federal court could enjoin a state proceeding that threatened to litigate an issue already decided by the federal court. In his opinion for the Court, however, Justice Frankfurter examined the judicial authority for this exception,²⁴ and concluded that there existed an insufficient basis to justify it: "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."²⁵ After thoroughly tracing the history of the anti-injunction statute and its exceptions, Justice Frankfurter declared that "apart from Congressional authorization, only one 'exception' has been imbedded in [the anti-injunction statute] by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into [the statute] is no justification for making another."²⁶

It was primarily in response to *Toucey* that Congress enacted the 1948 revision of the anti-injunction statute. By its terms, the revision established three exceptions to the statutory ban on federal injunctions against state suits: injunctions could issue (1) where expressly authorized by an act of Congress; (2) where issued in aid of the federal court's jurisdiction; and (3) where necessary to protect or effectuate the federal court's judgments. The Reviser's Note states:

An exception as to acts of Congress relating to bankruptcy

PRACTICE ¶ 0.226, at 2624-25 (2d ed. 1977). Professor Moore also suggests that the pre-*Toucey* common law exception which allowed federal courts "to enjoin the continued prosecution or the fomenting of vexatious and groundless proceedings" is still valid. *Id.* at ¶ 0.227, at 2626. He adds that "as a general rule, the mere existence of a multiplicity of actions at law is normally not sufficient to invoke the equitable jurisdiction of the federal court. But the presence of other equitable factors may warrant equitable relief." *Id.* at 2627-27 (footnotes omitted). It is worthy of note, however, that none of the cases relied on by Professor Moore to support the existence of this exception are post-1948 decisions. Thus it is not clear that the exception has survived the 1948 revision of the Anti-Injunction Act.

²³ 314 U.S. at 126.

²⁴ *Id.* at 137-40 (citing *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Looney v. Eastern Tex. R.R.*, 247 U.S. 214 (1918); *Dial v. Reynolds*, 96 U.S. 340 (1877)).

²⁵ *Id.* at 139.

²⁶ *Id.* at 139.

was omitted and the general exception substituted to cover all exceptions.

The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Insurance Co.*, 62 S. Ct. 139, 314 U.S. 118, 86 L. Ed. 100. A vigorous dissenting opinion (62 S. Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).

Therefore, the revised section restores the basic law as generally understood prior to the *Toucey* decision.

Changes were made in phraseology.²⁷

Neither the statutory language nor the Reviser's Note are entirely clear in scope or intent. The words of one commentator, written while the proposed revision was under consideration, have unfortunately proven to be prophetic: "[A]ny amendment should properly solve more questions than it raises. The proposed revision does not appear to have this virtue."²⁸

II. THE RELITIGATION EXCEPTION

Of the three exceptions set out in the 1948 revision, perhaps the easiest of application has been the one which prompted the revision in the first place—the relitigation exception. Though at times questions may arise as to exactly what issues were determined by a prior federal judgment,²⁹ both the purpose and effect of the exception

²⁷ 28 U.S.C. § 2283 (1970) (Reviser's Note).

²⁸ Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 563 (1947).

²⁹ In *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970), for example, an employer sought an injunction in federal court against a union's picketing. The court denied the request, and the employer proceeded to obtain an injunction in Florida state court. After a subsequent Supreme Court decision recognizing a federal right to picket, the union attempted unsuccessfully to have the state court vacate its injunction. It then successfully sought to have the federal court enjoin the employer from enforcing the state court order. The union argued that the injunction fell within two of the exceptions to the anti-

authorizing federal courts to issue injunctions to protect their prior judgments are relatively clear. Litigants should not be allowed to relitigate in state court issues between them that have already been determined by a federal court, lest the parties prevailing in federal court be subjected to harassment, and the finality and legitimacy of the federal court's findings be undermined. As Justice Reed, dissenting from the Court's rejection of the relitigation exception in *Toucey*, reasoned, the result of a refusal to adopt the exception

is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.³⁰

Though the argument appears to establish a compelling case, its foundation is open to question. It is, of course, true, as Justice Reed argued, that absent the relitigation exception the only recourse to preserve the finality of the prior federal judgment would be a plea of *res judicata* in the subsequent state court proceeding. But Justice Reed—and apparently the Congress in enacting the exception—concluded that such a remedy was wholly inadequate. This conclusion is puzzling. Traditionally, the doctrine of *res judicata* has always been applied by the court hearing the subsequent, rather than the prior, proceeding. If accepted *res judicata* practice trusts the conclusions of the court in the subsequent proceeding, why abandon this traditional trust when the prior proceeding is federal and the subsequent proceeding is state?³¹ Justice Reed cor-

injunction statute, including the relitigation exception. The argument was that when the federal court originally denied the requested injunction it implicitly held that the union had a federally protected right to picket. Thus when the state court enjoined the union's picketing, it violated the federal court's earlier judgment. In rejecting this contention, the Supreme Court concluded that "neither the parties themselves nor the District Court construed the original federal court order as the union now contends it should be construed." 398 U.S. at 293. See also *Doe v. Ceci*, 384 F. Supp. 7 (E.D. Wis. 1974), *aff'd in relevant part*, 517 F.2d 1203 (7th Cir. 1975).

³⁰ 314 U.S. at 144 (1941) (footnote omitted).

³¹ The American Law Institute has suggested the "[t]he requirements of irreparable harm and lack of any other adequate remedy apply implicitly under the [anti-injunction] statute. . . ." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 306 (1969). It therefore concludes that the relitigation exception will generally not be used, since the federal court will defer to the state court to apply *res judicata* principles. *Id.* The case law, however, generally does not support this conclusion. The overwhelming majority of decisions appear to proceed under the assumption that a party need not have sought and been denied *res judicata* relief in the state court action before seeking an injunction in

rectly noted that the state court is likely to be "unfamiliar with the record already made."³² But this is probably equally true in most cases of state-state and federal-federal *res judicata*. Justice Reed's reasoning fails to explain why the situation of state-federal *res judicata* calls for special treatment.

One possible explanation, not articulated by either Justice Reed or the Reviser, is that the relitigation exception reflects pervasive mistrust of the state courts' ability and willingness to comprehend federal judgments and to accord them proper respect. Whether or not this was, in fact, the concern of those who adopted the relitigation exception, it may well be a perfectly legitimate fear. Because of local prejudice or inexperience with federal law, state courts may often provide a dubious forum for the adjudication of federal rights.³³ Since the framing of the Constitution, however, state courts have been considered—rightly or wrongly—to be appropriate enforcers of federal law.³⁴ Concurrent jurisdiction of state and federal courts over federal cases historically has been the rule rather than the exception.³⁵ Unless we are willing to revise drastically our concepts of judicial federalism, we should be willing to trust the skill and judgment of the state courts to properly apply the doctrine of *res judicata*. After all, we entrust to them the evolution of federal law.³⁶

federal court pursuant to the relitigation exception. See, e.g., *Donelan v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *American Nat'l Bank & Trust Co. v. Taussig*, 255 F.2d 765 (7th Cir. 1958). The decision primarily relied upon by the ALI is *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960). There the federal court did refuse to enjoin the state action, but did so because the state action was found not to involve a relitigation of the issue decided in the prior federal suit. *Id.* at 719. The ALI also relied on *Texaco, Inc. v. Fiumara*, 248 F. Supp. 595 (E.D. Pa. 1965). Though the decision is somewhat ambiguous, it can perhaps be read to support the ALI's position. If so, it stands in contradistinction to the majority of case precedents.

³² 314 U.S. at 144.

³³ See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 69-70, 100 (1975).

³⁴ See Redish & Woods, *supra* note 33, at 52-56; cf. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953): "In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."

³⁵ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Claffin v. Houseman*, 93 U.S. 130 (1876). See generally Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976).

³⁶ Cf. *Lear, Inc. v. Adkins*, 395 U.S. 653, 675 (1969) ("[E]ven though an important question of federal law underlies . . . the controversy, [state courts will] define the extent, if any, to which the states may properly act to enforce the contractual rights of inventors of unpatented secret ideas.").

Of course, there are occasions where, either explicitly or implicitly, federal jurisdiction has been rendered exclusive.³⁷ It might be argued that where the prior judgment concerned a matter in the exclusive jurisdiction of the federal court, a stronger basis for the relitigation exception exists. But such an argument cannot justify the exception's broad sweep, for the exception has never been limited to cases of exclusive federal jurisdiction. Moreover, the existence of exclusive federal jurisdiction has been firmly rejected by the modern-day Supreme Court as a basis for circumventing the statutory ban on enjoining state court proceedings.³⁸ The method of reviewing a state court adjudication of a matter within the exclusive jurisdiction of the federal courts is not by collateral action in the lower federal courts but by direct appeal through the state system, with the possibility of ultimate review by the Supreme Court. There appears no principled basis for a special exception to this doctrine when the effectiveness of a prior federal judgment is at issue.³⁹

This discussion is not designed to suggest that the relitigation exception is unwise, but to suggest that the exception is fundamentally inconsistent with traditional notions of judicial federalism and with the very basis of the anti-injunction statute itself.⁴⁰ It might be advisable to generalize the concern over state court ability that the relitigation exception apparently evinces, so that lower federal courts could more freely enjoin state proceedings. But unless and until we reach that broader conclusion, the basis for the narrow exception of prior federal judgments seems questionable. Whether or not the relitigation exception is justified in policy, it is firmly embedded in the statute, and inadvisability is not a sufficient basis

³⁷ Patent and copyright cases are two leading examples of explicitly authorized exclusive federal jurisdiction. 28 U.S.C. § 1338(a) (1970). The antitrust laws are an illustration of implied exclusive federal jurisdiction. Redish & Muench, *supra* note 35, at 316-18.

³⁸ See *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977).

³⁹ An alternative explanation of the relitigation exception draws support from the genesis of the revision, congressional dissatisfaction with the *Toucey* decision. In one of the cases reviewed in *Toucey*, the party who had lost in federal court filed five separate suits in Delaware state courts. 314 U.S. at 128. Without disparaging the state courts' ability to apply a *res judicata* defense, a federal court might be justified in enjoining the state proceedings on the ground that the burden on the party who prevailed in federal court in asserting the defense in multiple suits and fora would be considerable. See D. CURRIE, *FEDERAL JURISDICTION IN A NUTSHELL* 176 (1976). However, the revision is not limited to cases in which multiple suits are brought to harass the party prevailing in federal court. It would have been easy for Congress, had it so desired, to fashion an exception to the anti-injunction statute covering situations in which multiple state suits are brought that involve a controversy already adjudicated in federal court. In short, because the relitigation and multiplicity exceptions are easily distinguishable, the relitigation exception can be justified only if state courts should not be trusted properly to apply *res judicata* principles.

⁴⁰ See text and note at note 3 *supra*.

for overturning constitutional congressional legislation.⁴¹ Thus for those entrusted with the responsibility of interpreting the statute, as well as for those whose interests will be affected by its interpretation, the relitigation exception is by far the least troublesome of the three. Accordingly, any reconsideration of the anti-injunction statute's purpose and construction must concentrate on the two difficult exceptions: the "expressly authorized" and "in aid of jurisdiction" exceptions.

III. THE "EXPRESSLY AUTHORIZED" EXCEPTION

The 1948 revision of the anti-injunction statute incorporated an exception for cases where injunctions against state court proceedings are "expressly authorized by Act of Congress." As statutory language goes, the meaning of this phraseology would seem to be comparatively clear: whenever an act of Congress "expressly" permits an injunction, one can be issued. A somewhat closer examination, however, reveals that ambiguities exist even at this purely facial level. For example, to constitute an "expressly authorized" exception must the act specifically refer to section 2283? If not, must it at least explicitly permit injunction of state court proceedings, or is it sufficient that it merely provides that "all" proceedings will cease? These problems have been resolved rather easily by the Supreme Court. The Court has made clear, rightly it would seem, that to constitute an "express" authorization a congressional act need not specifically mention section 2283.⁴² In an early decision the Court also made clear that an act providing that other proceedings "shall cease,"⁴³ without specific reference to state court proceedings, was to be considered an exception to the anti-injunction statute. One difficulty with the authority of this case is that it was decided prior to the 1948 revision, and thus is not necessarily definitive under the present version of the Act, which specifically requires an *express* authorization. The decision should still be good law, however, for it is reasonable to construe a statute providing that all proceedings will cease as vesting the federal courts with authority to enjoin ongoing state proceedings.

⁴¹ The advisability of the exception is relevant, of course, in evaluating proposals for revision of the anti-injunction statute. The American Law Institute, in its proposed revision of the statute, recommends continuation of the relitigation exception. ALI, *supra* note 3, at 299-312.

⁴² *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516 (1955).

⁴³ *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 599-600 (1883) (quoting Act of March 3, 1851, ch. 43, § 4, 9 Stat. 635).

Beyond these relatively uncontroversial constructions of the "expressly authorized" exception there exist significant problems. If taken literally, the requirement that the statutory exception be "express"—a requirement which at least one prestigious authority has labeled "unfortunate"⁴⁴—would hamper the federal courts in cases where the policy of a comprehensive federal statutory program demands that the federal courts have power to enjoin state proceedings that threaten the program's effectiveness, but where the statute does not expressly grant that power.⁴⁵ It is in these cases of tension between the dictates of fair construction, on the one hand, and demands of policy, on the other, that the federal courts have foundered in their interpretation of the "expressly authorized" exception.

A. *Studebaker Corp. v. Gittlin*

Probably the most important of these decisions in the lower courts is *Studebaker Corp. v. Gittlin*.⁴⁶ Studebaker sought to enjoin Gittlin's use in a state court proceeding of certain stockholder authorizations to obtain inspection of Studebaker's stockholder lists pursuant to New York law. Studebaker argued that Gittlin had secured the authorizations in violation of SEC proxy rules.⁴⁷ Studebaker contended that no issue under section 2283 was presented by its request "since [the injunction sought] merely enjoined use of the authorizations, leaving Gittlin free to prosecute his New York action on other grounds."⁴⁸ The Second Circuit rejected this contention. Nevertheless, the court held that section 21(e) of the Securities Exchange Act,⁴⁹ which authorizes the Securities and Exchange Commission to obtain an injunction against practices that violate the Act, constitutes an express exception to the anti-injunction statute in a suit brought by a private individual, and that the requested

⁴⁴ ALI, *supra* note 31, at 301 (quoting Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 737 (1961)).

⁴⁵ Cf. *In re Glenn W. Turner Enterprises*, 521 F.2d 775, 781 (3d Cir. 1975) (rule 23 of the Federal Rules of Civil Procedure, concerning class actions, is not an "expressly authorized" exception to section 2283).

⁴⁶ 360 F.2d 692 (2d Cir. 1966).

⁴⁷ *Id.* at 694.

⁴⁸ *Id.* at 696 (footnote omitted).

⁴⁹ 15 U.S.C. § 78u(e) (1970). This statute provides in relevant part:

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute a violation of the provisions of this chapter, or of any rule or regulation thereunder, it may in its discretion bring an action . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

injunction therefore was not barred by section 2283.

On its face, however, section 21(e) does not speak of the authority of a federal district court to enjoin state proceedings, "all" proceedings, or any other kind of proceedings. Thus to view section 21(e) as an "expressly authorized" exception to section 2283 presents some constructional difficulties. In reaching its conclusion that section 21(e) was an expressly authorized exception, the Second Circuit relied primarily on two Supreme Court decisions, *Bowles v. Willingham*⁵⁰ and *Amalgamated Clothing Workers v. Richman Brothers Co.*⁵¹

In *Bowles*, Mrs. Willingham had brought a suit in Georgia state court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942⁵² on the ground that both the orders and the relevant statutory provisions were unconstitutional. When the Georgia court issued a temporary injunction and a show cause order, the Price Administrator sued in federal district court to enjoin Mrs. Willingham from further prosecution of the state proceedings. The Supreme Court held that the Price Control Act "should now be added to that list [of implied legislative amendments to the anti-injunction statute]."⁵³ The basis for the Court's conclusion was twofold. First, "[b]y §205(a) [of the Price Control Act] the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of [certain portions of the Act]."⁵⁴ Second, "by §204(d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals . . . and to this Court."⁵⁵ In short, the Court found that the state action could be enjoined because the Price Control Act authorized the Administrator to obtain injunctions against statutory violations, and because jurisdiction under the Act had been vested exclusively in the Emergency and Supreme Courts.

The *Studebaker* court's reliance on *Bowles* was unwarranted. Both the *Bowles* Court⁵⁶ and the Second Circuit⁵⁷ acknowledged that the Price Control Act impliedly authorized suit injunctions. At the

⁵⁰ 321 U.S. 503 (1944).

⁵¹ 348 U.S. 511 (1955).

⁵² Emergency Price Control Act of 1942, § 705(a), 56 Stat. 33 (expired 1947).

⁵³ 321 U.S. at 510.

⁵⁴ *Id.*

⁵⁵ *Id.* (footnote omitted).

⁵⁶ *Id.*

⁵⁷ 360 F.2d at 697.

time *Bowles* was decided, of course, there was no language in the Act requiring that statutory authorizations be *express*. Since the 1948 revision, however, a statutory exception to section 2283 must expressly authorize injunctions against state suits. No matter how that phrase is defined, the Price Control Act, as both courts conceded, did not meet this requirement.

One complicating factor, however, is that the Reviser's Note states that "the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision."⁵⁸ If, as the Court in *Bowles* suggested, the exception recognized in the Price Control Act was merely another in a long line of congressional acts "which operate as implied legislative amendments to [the anti-injunction statute],"⁵⁹ then it is arguable that the Reviser's Note suggests that such implied exceptions have survived the 1948 revision, despite the rather clear statutory language to the contrary.

For several reasons, however, it is not likely that this is so. First, it is not clear whether this language in the Note indicated that the revision was designed to restore *all* the exceptions that existed prior to *Toucey* or referred merely to the relitigation exception which *Toucey* had rejected. In *Richman Brothers* Justice Frankfurter stated that "in context it is clear that the quoted phrase refers only to the particular problem which was before the Court in the *Toucey* case."⁶⁰ Indeed, a reading of the entire Note⁶¹ seems to confirm that impression. Second, those "pre-*Toucey*" cases recognizing legislative exceptions to the anti-injunction statute involved statutory authorizations considerably more express than the authorization recognized by the Court in *Bowles*.⁶² Third, there is simply no rational construction of the "expressly authorized" language of section 2283 which permits impliedly authorized exceptions,⁶³ and the clear statutory language should control, contrary legislative history notwithstanding.⁶⁴ Finally, even if any "pre-*Toucey*" decision sur-

⁵⁸ 28 U.S.C. § 2283 (1970) (Reviser's Note).

⁵⁹ 321 U.S. at 510.

⁶⁰ 348 U.S. at 515 n.1. In other words, it is at least arguable that the Reviser's statement that the revision restored pre-*Toucey* law referred only to the relitigation exception. In *Mitchum v. Foster*, 407 U.S. 225, 236-38 (1972), however, the Court appeared to view the quote as applicable to all pre-*Toucey* exceptions.

⁶¹ See text at note 27 *supra*.

⁶² See note 86 *infra*.

⁶³ The term "express" has been defined as "directly and distinctly stated or expressed rather than implied or left to inference." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 803 (unabr. ed. 1961). WEBSTER'S NEW DICTIONARY OF SYNONYMS 313 (1968) lists "implicit" as an antonym to "express."

⁶⁴ See *Schwegmann Bros. v. Calvert Distillers Co.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring): "Resort to legislative history is only justified where the face of the Act is

vives the 1948 revision, the simple fact is that *Bowles* was not a pre-*Toucey* decision.

The *Studebaker* court's reliance on *Richman Brothers* was also misplaced. *Richman Brothers* presented the issue of whether a private party could, pursuant to sections 10(j) and 10(l) of the Labor Management Relations Act,⁶⁵ enjoin another private party from prosecuting an action in state court which invaded the exclusive jurisdiction of the National Labor Relations Board despite the fact that those sections did not, in terms, authorize the enjoining of state court proceedings. In *Richman Brothers* a corporation sued in Ohio state court for temporary and permanent injunctions against a union's picketing, alleging that the conduct of the union amounted to "a common law conspiracy, as well as a statutory and common law restraint of trade."⁶⁶ After failing in its attempt to remove to federal court or to have the state court dismiss the proceeding, the union filed a separate proceeding in federal court to enjoin the corporation from pursuing the state action. Since the Court in *Richman Brothers* ruled that no exception to section 2283 for such a suit was "expressly authorized" by section 10(l) the holding was of little help to the *Studebaker* court. The Second Circuit relied on what can most charitably be referred to as dicta. In rejecting the argument that sections 10(j) and 10(l) constituted an expressly authorized exception to section 2283 when the injunction was sought by a private party rather than by the NLRB, the Court in *Richman Brothers* stated that "the only 'express' authorization, in the freest use of the word, to be found in the . . . Act"⁶⁷ was of a suit by the

inescapably ambiguous" To be sure, some cases suggest that legislative history may be resorted to though statutory language is unambiguous on its face. *State Water Control Bd. v. Train*, 559 F.2d 921, 924 n.2 (4th Cir. 1977) and cases cited therein. See also *United States v. Bryan*, 339 U.S. 323, 335-41 (1950). Some scholars likewise maintain that statutes, even when facially unambiguous, must always be read in light of their purpose. *E.g.*, G. GOTTlieb, *THE LOGIC OF CHOICE* 108 (1968). Even adherents of this position recognize, however, that "the words of the statute remain the most persuasive indication of congressional intent, and their apparent meaning should be rejected only on substantial, unambiguous evidence supporting a contrary interpretation" *State Water Control Bd. v. Train*, at 924 n.20. The cursory Reviser's note cannot be considered such "substantial, unambiguous evidence."

Moreover, by requiring that a statute expressly authorize an injunction of state proceedings, Congress probably wished to make sure that the principles of federalism on which the anti-injunction statute is based are not disregarded unless Congress itself has consciously weighed the competing interests and clearly chosen to disregard the principle of mutual non-interference. The purpose of the expressly authorized requirement may be to prevent courts from inferring that an anti-suit injunction is authorized from the policy and history behind a particular statute. See generally Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A.J. 1314 (1959).

⁶⁵ 29 U.S.C. § 160(j), (l) (1970).

⁶⁶ 348 U.S. at 512.

⁶⁷ *Id.* at 516.

NLRB, not by a private litigant. In an earlier case, *Capital Service, Inc. v. NLRB*,⁶⁸ the Court had held that when the NLRB sought an injunction in federal court against a state proceeding to preserve its exclusive jurisdiction, the federal court could issue that injunction because it fell within the "in aid of its jurisdiction" exception to the anti-injunction statute.

Since *Richman Brothers* was a decision interpreting the 1948 revision of the anti-injunction statute, reliance upon it is not open to the same questions as is the *Studebaker* court's reliance on *Bowles*. Nevertheless, it is not clear that the *Richman Brothers* decision actually viewed sections 10(j) and 10(l) of the Labor Management Relations Act as expressly authorizing injunctions against state proceedings, even when the injunction is sought by the NLRB. The only argument for viewing the case as recognizing that sections 10(j) and 10(l) expressly authorize courts to issue suit injunctions at the behest of the NLRB must rest on the Court's distinction of that situation from the one before it—a backhanded argument at best. Indeed, the language of the *Richman Brothers* opinion was tepid: "[T]he only 'express' authorization, in the freest use of the word, to be found in the . . . Act,"⁶⁹ said the Court, was of an injunctive action by the Board. This hardly provides firm support for the *Studebaker* court's reliance on *Richman Brothers* for the proposition that section 10(l) is an "expressly authorized" exception.

Thus Supreme Court precedential support for the *Studebaker* decision was, at best, doubtful. However, there is a plausible basis for the Second Circuit's conclusion that section 21(e) expressly authorized an injunction sought by the SEC under the peculiar facts of *Studebaker*. What the corporation had attempted to enjoin was not prosecution of the state proceeding itself, but rather use of the authorizations allegedly obtained by Gittlin in violation of the proxy rules. The court correctly rejected the argument that such an injunction was not the type which section 2283 was intended to bar.⁷⁰ It nevertheless remains true that the corporation maintained that use of those authorizations would itself have been a violation of the Securities Exchange Act. Section 21(e) authorizes the SEC to enjoin violations of the Act. Hence, where pursuance of the state proceeding or of an act inherently intertwined with the proceeding is itself

⁶⁸ 347 U.S. 501 (1954).

⁶⁹ 348 U.S. at 512 (emphasis added).

⁷⁰ 360 F.2d at 696: "§ 2283 forbids any federal injunction substantially interfering with the prosecution of a pending state proceeding unless an exception applies."

a violation of the Act, section 21(e) might be held to authorize the issuance of an injunction at the instance of the SEC. Under these fairly unusual circumstances, then, section 21(e) could be said to have "expressly authorized" the injunction.⁷¹ The *Studebaker* court did not invoke this rationale, although later decisions attempting to distinguish *Studebaker* appear to have recognized this approach, as well as its limited applicability.⁷²

On the other hand, even this rationale is subject to question. It is reasonable to assume that Congress inserted the requirement that a legislative authorization of an injunction be "express" in order to insure that the principles of federalism on which the statute is founded are overridden only when Congress has consciously weighed the competing dangers and clearly chosen to intrude upon traditional state judicial prerogatives. It is true that express congressional provision for injunctions against violations of a particular act may seem to allow injunctions against state judicial proceedings which are found to constitute such violations, but absent an explicit statutory reference to the cessation of judicial proceedings there is no assurance that Congress engaged in the necessary weighing of the policy interests at stake in such cases.⁷³ It might be argued that it is possible to discern a conscious congressional decision to subordinate the policies behind the anti-injunction statute from an examination of the legislative history of the excepting statute. However, by requiring an *express* authorization, the anti-injunction statute does not seem to permit such an approach, quite possibly because of the ambiguous and uncertain nature of much legislative history.⁷⁴

⁷¹ This is basically the position adopted by Mr. Justice Stevens, dissenting last term in *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2881, 2894-902 (1977). The case is discussed in text at notes 125-26 *infra*.

⁷² *Vernitron Corp. v. Benjamin*, 440 F.2d 105, 108 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971). In *International Control Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), the court distinguished *Studebaker* on the ground that in that decision "the injunction issued after a decision on the merits holding that Gitlin had, in fact, violated § 14(a), while in this case, ICC's claim of a § 10(b) violation, though presenting a fair ground for subject matter jurisdiction and a temporary injunction has yet to result in a judgment on the merits after trial." *Id.* at 1349.

⁷³ The previously recognized "expressly authorized" exceptions generally meet this requirement, since in those instances the statutory language, although perhaps not explicitly vesting in the federal courts the power to enjoin state court actions, at least expressly provided that state proceedings, or "all" proceedings, shall cease. See cases cited in note 77 *infra*. They therefore demonstrate on the face of the statutory language Congress's concern with the continuation of judicial proceedings. No such assurance is granted by statutes which merely authorize injunction of statutory violations.

⁷⁴ According to one authority "[m]aterials in hearings and floor debates are . . . influenced by the tactics of promoting enactment." R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 155 (1975). Dickerson asserts that these materials "have almost no credi-

Even if this interpretation of the "expressly authorized" exception were valid, however, it would not have justified the result in *Studebaker*. In *Studebaker*, the injunction had been sought not by the SEC, but by a private party. Whether or not section 21(e) could be said to expressly authorize the issuance of a suit injunction when sought by the SEC, the statute cannot be read to authorize an injunction at the instance of a private party. Nevertheless, the Second Circuit held that the section does authorize the issuance of a suit injunction sought by a private party. Relying on the Supreme Court's decision in *J. I. Case Co. v. Borak*,⁷⁵ in which a private cause of action for damages under the Securities Exchange Act had been implied, Judge Friendly concluded that since the statute, in his opinion, expressly authorizes agency injunctive suits, it must therefore also authorize equally essential private injunctive actions against state court proceedings. The difficulty with Judge Friendly's approach, however, is that his duty was to construe section 21(e) not only so as to effectuate its policies, but also to effectuate the policies of section 2283. The *Borak* decision, as Judge Friendly was forced to acknowledge, recognized an *implied* remedy.⁷⁶ The *Studebaker* court, by employing an apt analogy, recognized an implied authority to issue suit injunctions at the instance of private parties, even though section 2283 requires an *express* authorization. Despite its desirability as a matter of policy, the *Studebaker* holding, as a matter of statutory construction, is extremely questionable.

B. The *Mitchum* Test

An opinion which, like *Studebaker*, may be as pleasing in result as it is questionable in its legal reasoning is the Supreme Court's 1972 decision, *Mitchum v. Foster*,⁷⁷ in which it was held that the Civil Rights Act of 1871, commonly referred to as section 1983,⁷⁸ is

bility for the purposes of later interpretation." *Id.* See generally Wasby, *Legislative Materials as an Aid to Statutory Interpretation: A Caveat*, 12 J. PUB. LAW 262 (1963). See also Redish & Muench, *supra* note 35, at 328; note 64 *supra*.

⁷⁵ 377 U.S. 426 (1964).

⁷⁶ 360 F.2d at 698. The ALI agrees. In commenting on *Studebaker*, the ALI states:

The result is a desirable one. If, as *Borak* teaches, private action is needed for enforcement of the Act, it is absurd to deny private action and permit only Commission action when effective enforcement requires an injunction to stay state proceedings while allowing either private or Commission action when there happens to be no state proceeding to be enjoined.

AMERICAN LAW INSTITUTE, *supra* note 31, at 303. The ALI, however, did recognize the awkwardness of using the "expressly authorized" exception to reach the result in *Studebaker*. *Id.*

⁷⁷ 407 U.S. 225 (1972).

⁷⁸ 42 U.S.C. § 1983 (1970).

an expressly authorized exception to the anti-injunction statute.⁷⁹ The case was prompted by a suit filed in Florida state court by a county prosecutor to close a bookshop as a public nuisance. The state court entered a preliminary order prohibiting the store's continued operation, and, after further proceedings in state court, the store owner sought injunctive and declaratory relief against the state court proceedings. He argued that his rights of free expression, protected by the first and fourteenth amendments and section 1983, were being violated by the state proceedings. A three-judge district court held that the injunction was prohibited by section 2283. The Supreme Court reversed, holding that section 1983 expressly authorizes suit injunctions.

The text of section 1983 provides:

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 proceedings for redress.

Like section 21(e) of the Securities Exchange Act, section 1983 certainly does not on its face "expressly" authorize the enjoining of state proceedings. Because the section does provide for the granting of equitable relief, an argument might be made, as it was for section 21(e),⁸⁰ that the Act expressly authorizes injunction of a state judicial proceeding that violates section 1983. While this is a technically conceivable construction of the "expressly authorized" exception, for reasons already explored,⁸¹ it is preferable to interpret this excep-

⁷⁹ *Mitchum* was preceded by a year by *Younger v. Harris*, 401 U.S. 37 (1971), in which the Court specifically left open whether section 1983 constituted an express exception to section 2283. However, the *Younger* decision rendered that question largely academic. In that case the Court held that even if section 1983 were such an exception, the judge-made doctrine of comity generally precluded a federal court from enjoining an ongoing state criminal proceeding. Nevertheless, *Younger* and the related decisions handed down the same day, *Samuels v. Mackell*, 401 U.S. 66, 68-69 (1971); *Boyle v. Landry*, 401 U.S. 77, 80-81 (1971); *Perez v. Ledesma*, 401 U.S. 82-85 (1971), did recognize that under certain comparatively limited circumstances, the doctrine of comity would not preclude the issuance of such an injunction. See generally Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. Rev. 591 (1975). If section 1983 were not an exception to the anti-injunction statute, no injunction could issue even in such exceptional circumstances. Thus the issue decided in *Mitchum* was of practical importance.

⁸⁰ See text and notes at notes 72-74 *supra*.

⁸¹ See text and notes at notes 72-74 *supra*.

tion as limited to situations where the statutory language explicitly refers to the cessation of judicial proceedings.

The Court in *Mitchum*, however, did not hold that a statutory provision for equitable relief, standing alone, is sufficient to establish an "expressly authorized" exception to section 2283. Rather, the Court appeared to consider statutory language providing for equitable relief a necessary but not a sufficient condition for finding an expressly authorized exception. In addition to the presence of statutory language authorizing equitable relief for violations, the Court indicated that the statute must satisfy certain other requirements. In the Court's words, "The test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."⁸²

This test cannot be reconciled with the dictates of section 2283. Because the *Mitchum* test determines the presence of an exception to section 2283 at least in part by reference to factors that go beyond the face of the statute, the test cannot be considered a proper interpretation of the phrase "expressly authorized." If the common meaning of words plays any role in statutory construction,⁸³ the *Mitchum* decision, like that in *Studebaker*, is unsupportable.⁸⁴

In reaching its conclusion, the Court emphasized that "a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception."⁸⁵ In support of this statement, the Court noted that "[t]hree of the six previously recognized statutory exceptions contain no such authorization."⁸⁶

⁸² 407 U.S. at 238.

⁸³ See *Schwegmann Bros. v. Calvert Distillers Co.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

⁸⁴ *Mitchum* is also objectionable if the purpose of the expressly authorized requirement is to preclude wide-ranging judicial inquiry into extra-statutory matters. See note 64 *supra*. That the Court's test turns heavily on extra-statutory factors is evidenced by one commentator's characterization of it:

[T]he test would seem to call for a thorough investigation of the wording of the statute and of its legislative history to determine whether in enacting the statute, Congress had in mind as one remedy the enjoining of state court proceedings. Since in virtually all cases before the courts, the statute in question will lack unambiguous language indicating Congress' intention, legislative history will apparently be the focal point of a federal court's examination.

The Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 215 (1972) (emphasis added).

⁸⁵ 407 U.S. at 237.

⁸⁶ *Id.* (footnote omitted). One of the three exceptions relied upon by the Court, 407 U.S. at 234 & n.12, was removal, 28 U.S.C. §§ 1441-50 (1970), which provides that when a copy of the removal petition is filed with the clerk of the state court, the "State Court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(e). Removal was recognized as an exception in *French v. Hay*, 89 U.S. (22 Wall.) 250, 253 (1874). The Court also

Though the Court was correct in this assertion, it is doubtful that it provides much support for the conclusion that section 1983 is likewise an express exception. First, each of the three exceptions mentioned by the Court had been recognized prior to the 1948 revision, and so were not tested against the requirement that they be "expressly" authorized.⁸⁷ The *Mitchum* Court, relying on the Reviser's Note, concluded that "the criteria to be applied are those reflected in the Court's decisions prior to *Toucey*."⁸⁸ As already noted, however, to the extent the Reviser's Note is inconsistent with the clear language of the statute itself, the latter must take precedence.⁸⁹ The issue is perhaps an academic one, however, since of the three exceptions relied upon by the Court, two were far more express than is section 1983,⁹⁰ and the third—the Emergency Price Control Act of 1942—though clearly an implied exception, was recognized as such both prior to the 1948 revision and after *Toucey*.⁹¹

Even if the formidable obstacle imposed by the plain meaning of the statutory language is disregarded, the logic of the *Mitchum* holding is subject to question. Under the supremacy clause a state court is required to interpret and enforce federal statutory and constitutional law. If a state civil or criminal proceeding is brought pursuant to an unconstitutional statute or by virtue of illegal conduct on the part of state authorities, the defendant may raise these issues by way of defense in the state proceeding. Thus it is not clear, at least upon first examination, why section 1983 could not be given its intended scope even if a federal court were not empowered to enjoin a state proceeding.

relied on the Act of March 3, 1851, ch. 43, § 4, 9 Stat. 635, as amended, 46 U.S.C. § 185 (1970), which provides that once a shipowner deposits with the court an amount equal to the value of his interest in the ship, "all claims and proceedings against the owner with respect to the matter in question shall cease." 407 U.S. at 234 & n.13. The final exception relied upon by the *Mitchum* Court, *id.* at 235 & n.17, was the Emergency Price Control Act of 1942, § 205(a), 56 Stat. 33 (expired 1947). See *Porter v. Dicken*, 328 U.S. 252 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944), discussed in Note, *Incompatibility—The Touchstone of Section 2283's Express Authorization Exception*, 50 VA. L. REV. 1404, 1410-11 (1964).

⁸⁷ It might seem anomalous to construe a statute that explicitly provides for exceptions more strictly than the pre-1948 law, which by its terms authorized no general exceptions whatsoever. But appearances are deceiving. Though the terms of the pre-1948 version of the statute allowed no exceptions, it was well established that the courts had considerable freedom to fashion their own exceptions. When in 1948 Congress amended the statute to provide for three specific exceptions, it seems reasonable to assume, as the Supreme Court made clear in *Atlantic Coast Line*, 398 U.S. at 294-97, that future exceptions to the statute are to be limited to those specified by Congress.

⁸⁸ 407 U.S. at 236-37 (footnote omitted).

⁸⁹ See note 64 *supra*.

⁹⁰ See note 86 *supra*.

⁹¹ See text and notes at notes 51-64 *supra*.

It is true that the Court in *Mitchum* cited impressive legislative history to demonstrate that one of the central purposes of the Civil Rights Act of 1871 was to provide a federal forum for the enforcement of federal constitutional rights, a remedy reflecting strong congressional distrust of the motives and competence of state courts.⁹² As a practical matter, the opportunity to raise constitutional defenses in the course of a state proceeding may not be adequate protection for federal rights.⁹³ But the *Mitchum* Court's recognition of these points is puzzlingly inconsistent with many other decisions interpreting the scope of section 1983. For one thing, the federal courts have not been thought to possess exclusive jurisdiction of section 1983 actions,⁹⁴ although exclusive jurisdiction traditionally will be inferred when a federal right is involved and there is fear of state court incompetence to protect or vindicate that right.⁹⁵ Moreover, it is generally held that state court factual findings will be given collateral estoppel effect in a subsequent section 1983 action in federal court involving the same facts.⁹⁶ If one of the primary purposes of section 1983 was to circumvent state court bias, it makes little sense to bind a federal court adjudicating a civil rights action by the findings of a state court in a prior proceeding. Finally, the greatest enigma in light of the *Mitchum* reasoning is the continued vitality—indeed, expansion⁹⁷—of the doctrine of *Younger v. Harris*.⁹⁸ Although the *Younger* doctrine assumes that section 2283 is no bar to issuance of a federal injunction in section 1983 suits, it nevertheless provides that as a matter of purely judge-made policy a federal court usually should not restrain a state prosecution, even to vindicate constitutional rights. The *Younger* doctrine assumes that an individual's federal constitutional rights can be adequately vindicated by raising them as defenses in the course of

⁹² 407 U.S. at 238-42.

⁹³ See Neuborne, *supra* note 33, at 1114-16, 1118-19; Redish & Woods, *supra* note 33, at 81-92.

⁹⁴ See, e.g., *Ammluny v. City of Chester*, 355 F. Supp. 1300, 1311 n.12 (E.D. Pa. 1973).

⁹⁵ See Redish & Muench, *supra* note 35, at 314-15, 324-25.

⁹⁶ See, e.g., *Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974); *Parker v. McKeithen*, 488 F.2d 553, 558-59 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974). The lower court decisions are not unanimous, however. See *Ney v. California*, 439 F.2d 1285 (9th Cir. 1971) (dictum). The Supreme Court has left the issue open. See *Huffman v. Pursue, Ltd.*, 430 U.S. 592, 606 & n.18 (1975). See generally Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859 (1976); 1974 Wis. L. Rev. 1180.

⁹⁷ See *Trainor v. Hernandez*, 97 S. Ct. 1911 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

⁹⁸ 401 U.S. 37 (1971).

state prosecutions.⁹⁹ Yet, if we are to believe the legislative history as detailed in *Mitchum*, the driving force behind the adoption of the Civil Rights Act was the conviction that state courts are unable to perform effectively the very function *Younger* assumes they can and do perform continuously. It is therefore difficult to see how *Mitchum* and *Younger* can coexist, although the seeming inconsistency appears not to have troubled the Court.¹⁰⁰

It is not clear what effect, if any, adoption of the *Mitchum* approach will have on the development of the "expressly authorized" exception to the anti-injunction statute. Though the test set out in that decision is by no means clear in its application, it might have been thought to portend a shift from the traditional philosophy underlying the anti-injunction statute. The traditional view was expressed in *Richman Brothers* by Justice Frankfurter who, in response to what he characterized as the argument "that federal rights will not be adequately protected in the state courts,"¹⁰¹ stated:

[D]uring more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. . . . 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.¹⁰²

Mitchum, in contrast, recognizes that statutes providing federal

⁹⁹ In *Huffman*, for example, the Court stated: "Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do." 420 U.S. at 611.

¹⁰⁰ A possible reconciliation of *Mitchum*'s reliance on legislative history indicating mistrust of state courts with the *Younger* doctrine is that while Congress's mistrust was justified in the 1870's, it no longer is today. Though, of course, this is true to some degree, questions may still arise at times about the possible hostility of state courts to federal rights. See, e.g., *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961). Moreover, it is unclear whether under the newly devised "implied" version of the "expressly authorized" exception of *Mitchum* the Court should take cognizance of the framers' understanding at the time of original passage, or whether the Court should take into account changed conditions. In this context, it might be significant to note that the original predecessor of section 1983 has been recodified by more recent Congresses. In any event the *Mitchum* Court certainly should have explained the apparent contradiction between the legislative history in which it immersed itself and the *Younger* doctrine it had devised only a year earlier.

¹⁰¹ 348 U.S. 511, 518 (1955).

¹⁰² *Id.*

causes of action may evince a congressional determination that state courts should not be entrusted with the enforcement of federal rights, and that this mistrust may be so deep as to imply a desire that the normal processes of federal review by the Supreme Court be abandoned in favor of the more abrupt and invasive practice of collateral federal injunction.

C. The *Lektro-Vend* Case: Application of the *Mitchum* Test

The confusion surrounding the *Mitchum* test was exacerbated last term by the Court's decision in *Vendo Co. v. Lektro-Vend Corp.*¹⁰³ The issue in *Lektro-Vend* was whether "§ 16 of the Clayton Act, which authorizes a private action to redress violation of the antitrust laws, comes within the 'expressly authorized' exception to § 2283."¹⁰⁴ Petitioner had sued respondents in Illinois state court for breach of noncompetition covenants. Respondents then sued petitioners in federal court, alleging that the covenant which formed the basis of the state action constituted an unreasonable restraint of trade in violation of sections 1 and 2 of the Sherman Act.¹⁰⁵ The federal action remained dormant while the state court litigation proceeded. After the Illinois Supreme Court affirmed an award for violation of the agreement,¹⁰⁶ however, respondents sought and the federal court granted a preliminary injunction against collection of the state court judgment.¹⁰⁷ In addition to the "expressly authorized" ground, the district court also found the injunction justified as necessary in aid of its jurisdiction.¹⁰⁸

The Court of Appeals for the Seventh Circuit affirmed,¹⁰⁹ but the Supreme Court reversed. The basis of the Court's decision is not easy to discern. The first point to note, however, is that appearances are deceiving. Although five Justices held that under the particular circumstances involved in *Lektro-Vend* section 16 of the Clayton Act did not authorize an injunction, close examination reveals that six Justices thought that, at least under certain circumstances, section 16 does constitute an "expressly authorized" exception to section 2283.

¹⁰³ 97 S. Ct. 2881 (1977).

¹⁰⁴ *Id.* at 2886.

¹⁰⁵ 15 U.S.C. §§ 1-2 (1970).

¹⁰⁶ *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 321 N.E.2d 1 (1974), *cert. denied*, 420 U.S. 975 (1975).

¹⁰⁷ *Lektro-Vend Corp. v. Vendo Co.*, 403 F. Supp. 527 (N.D. Ill. 1975).

¹⁰⁸ *Id.* at 536-37. *See also* note 156 *infra*.

¹⁰⁹ 545 F.2d 1050 (7th Cir. 1976).

Three opinions were written. The opinion announcing the judgment of the Court was written by Mr. Justice Rehnquist and concurred in by Justices Stewart and Powell. Mr. Justice Blackmun, joined by the Chief Justice, concurred in the result, and Mr. Justice Stevens, joined by Justices Brennan, Marshall, and White, dissented. In his opinion Justice Rehnquist reaffirmed the *Mitchum* doctrine, but determined that section 16 does not satisfy the *Mitchum* criteria.¹¹⁰ He concluded that although the Clayton Act met the first requirement of *Mitchum* in that it created a "uniquely federal right or remedy," it failed to fulfill *Mitchum's* second requirement that it "could be given its intended scope only by the stay of a state court proceeding."¹¹¹ In *Mitchum*, said Justice Rehnquist,

absence of express language authorization for enjoining state court proceedings in § 1983 actions was cured by the presence of relevant legislative history. In this case, however, neither the respondents nor the courts below have called to our attention any similar legislative history in connection with the enactment of § 16 of the Clayton Act.¹¹²

In dissent, Justice Stevens pointed out that section 16 expressly authorizes injunctions against violations of the antitrust laws, and argued that because state court litigation might itself constitute such a violation, the act "expressly authorizes" an injunction of a state court proceeding that is itself a violation of the antitrust laws.¹¹³ This argument parallels the argument that might have been employed to support the view that section 21(e) of the Securities Exchange Act and section 1983 are "expressly authorized" exceptions.¹¹⁴ In addition to his argument premised on what he called a "rather obvious reading of the statutory language,"¹¹⁵ Justice Stevens also reasoned that section 16 of the Clayton Act is an expressly authorized exception under the two-pronged *Mitchum* test. Relying in part on legislative history, he asserted that "[s]ection 16 of the Clayton Act created a federal remedy which can only be given its intended scope if it includes the power to stay state court proceedings in appropriate cases."¹¹⁶

The confusion as to the meaning of *Lektro-Vend* derives pri-

¹¹⁰ 97 S. Ct. at 2887-89.

¹¹¹ *Id.* at 2887-88 (quoting *Mitchum*, 407 U.S. at 238).

¹¹² 97 S. Ct. at 2888.

¹¹³ *Id.* at 2897-98.

¹¹⁴ See text and notes at notes 70-74 *supra*.

¹¹⁵ 97 S. Ct. at 2898-99 (footnote omitted).

¹¹⁶ *Id.* at 2900.

marily from the opinion of Mr. Justice Blackmun, whose concurrence proved essential to the Court's decision. While agreeing with Justice Rehnquist that in this case section 16 did not authorize an anti-suit injunction, Justice Blackmun concluded that "application of the *Mitchum* test for deciding whether a statute is an 'expressly authorized' exception to the Anti-Injunction Act shows that § 16 is such an exception under narrowly limited circumstances."¹¹⁷

The basis for Justice Blackmun's disagreement with Justice Stevens is not entirely clear. Upon first examination it appears that the two differed only over the prerequisites that must be established before the bringing of a state court action will constitute a violation of the antitrust laws. Justice Blackmun stated that

no injunction may issue against currently pending state-court proceedings unless those proceedings are themselves part of a "pattern of baseless repetitive claims" that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings.¹¹⁸

Justice Stevens, on the other hand, rejected Justice Blackmun's differentiation "between a violation committed by a multiplicity of lawsuits and a violation involving only one lawsuit,"¹¹⁹ arguing that the bringing of a single action can violate the antitrust laws.

If this were the sole basis of the dispute between Justices Blackmun and Stevens, it could be taken as established law that section 16 is an "expressly authorized" exception, the only open question being whether the bringing of a single state suit can violate the antitrust laws. But Justice Blackmun confused matters by adding in a footnote: "Since I believe that federal courts should be hesitant indeed to enjoin on-going state-court proceedings, I am of the opinion that a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper."¹²⁰ This passage suggests that Justice Blackmun's refusal to find an exception to the anti-injunction statute on the facts of *Lektro-Vend* was not premised on the view that the bringing of a single lawsuit cannot violate the antitrust laws, but rather on the policy behind section 2283. But other portions of Jus-

¹¹⁷ *Id.* at 2893 (Blackmun, J., concurring in the result).

¹¹⁸ *Id.* at 2893-94.

¹¹⁹ *Id.* at 2902.

¹²⁰ *Id.* at 2893 n.*.

tice Blackmun's opinion indicate that his decision was based entirely on construction of the antitrust laws.¹²¹

The one conclusion that can be safely asserted is that *Lektro-Vend* means that section 16 of the Clayton Act constitutes an "expressly authorized" exception to section 2283 when the state litigation sought to be enjoined is part of a "pattern of baseless, repetitive claims" employed as an anticompetitive device.¹²² The decision, however, will be of little aid to courts faced with interpreting the "expressly authorized" exception in section 2283.

The conflict among the three opinions illustrates the unworkability of the *Mitchum* test. Though both Justices Rehnquist and Blackmun purported to apply the test, they reached opposite conclusions, while Justice Stevens, also purporting to apply *Mitchum* at least in part, reached yet a third conclusion. Interestingly, both Rehnquist and Stevens relied on legislative history to support their respective conclusions.¹²³ Justice Rehnquist argued that the act in question "must necessarily interact with, or focus upon, a state judicial proceeding."¹²⁴ He found no such concern in the Clayton Act's language or legislative history. Justice Stevens, on the other hand, relied on the intent of the framers of the antitrust laws that the statutory charter of economic freedom be supported by "all remedial process or writs proper and necessary to enforce its provisions."¹²⁵ A consequence of this reliance on legislative history will likely be substantial uncertainty regarding which statutes constitute "expressly authorized" exceptions. Perhaps it was out of a desire to avoid just this kind of uncertainty that Congress commanded that statutory exceptions be "express."

The primary thrust of the opinion of Justice Stevens is apparently an attempt to replace the *Mitchum* test with a less complicated facial examination of the statute in question.¹²⁶ If two simple

¹²¹ Evidence that Justice Blackmun's disagreement with Justice Stevens actually concerned the scope of the antitrust laws, rather than the anti-injunction act, is found in their differing interpretations of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the leading case concerning the applicability of the antitrust laws to the bringing of judicial proceedings. Compare 97 S. Ct. at 2893 n.*, 2894 (Blackmun, J.), with *id.* at 2902 (Stevens, J.).

¹²² It can also be concluded that § 2283 will not bar an injunction against "future repetitive litigation." 97 S. Ct. at 2891 n.9 (opinion of Rehnquist, J.).

¹²³ 97 S. Ct. at 2888-89, 2891-92, 2895-98.

¹²⁴ *Id.* at 2892 (footnote omitted).

¹²⁵ *Id.* at 2900 (Stevens, J., dissenting) (quoting Sen. Sherman, 21 CONG. REC. 2456 (1890)).

¹²⁶ 97 S. Ct. at 2899-901. Although Justice Stevens seems to have been the ultimate winner on the issue of whether § 16 is an expressly authorized exception, it does not appear that he won a majority for his "facial" analysis. Justice Rehnquist specifically rejected it,

conditions are met, Justice Stevens would find an express exception to the anti-injunction statute: (1) the act in question must on its face authorize injunctive relief for violations; and (2) the state judicial proceeding must constitute a violation of that act. This approach has the advantage of providing a relatively clear directive that is at least arguably consistent with the language of the anti-injunction statute. However, as noted previously,¹²⁷ by allowing the "expressly authorized" requirement to be satisfied without at least some statutory reference to the cessation of judicial proceedings, such a test fails to ensure that suit injunctions will issue only where Congress has consciously determined that the policies of the excepting statute outweigh the policies undergirding the anti-injunction statute.

IV. THE "IN AID OF JURISDICTION" EXCEPTION

By far the most enigmatic of the three exceptions to the anti-injunction statute is the one allowing an injunction to be issued when necessary in aid of the federal court's jurisdiction. The wording of this exception is not particularly revealing. Unfortunately, neither the pre-1948 decisions, the Reviser's Note, nor the post-revision cases are of much help in clarifying the meaning of the cryptic statutory language.

A. The Reviser's Note

Perhaps most disappointing in this respect is the Reviser's Note. In regard to the "in aid of jurisdiction" exception, all that the Note states is: "The phrase . . . was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts."¹²⁸ If this were all the provision was intended to mean, it would be a narrow exception indeed, for two reasons.¹²⁹ First, the exception to the anti-injunction statute allowing federal courts to enjoin state proceedings in cases that have been removed to federal courts has always been thought to constitute an

id. at 2890 n.8, and Justice Blackmun's concurring opinion appears to have relied exclusively on the *Mitchum* test. Later in his opinion Justice Stevens himself supported his conclusion that § 16 was an express exception by reference to *Mitchum*. *Id.* at 2900.

¹²⁷ See text and notes at notes 72-73 *supra*.

¹²⁸ 28 U.S.C. § 2283 (1970) (Reviser's Note).

¹²⁹ It has been said that the "in aid of jurisdiction" exception "should be interpreted narrowly, in the direction of federal non-interference with orderly state proceedings." *T. Smith & Son, Inc. v. Williams*, 275 F.2d 397, 407 (5th Cir. 1960).

"expressly authorized" legislative exception, although the decisions to that effect were rendered prior to the 1948 revision.¹³⁰ If its only purpose were to allow an exception which is already permitted by another exception added in the 1948 revision, the "in aid of jurisdiction" exception would probably be entirely superfluous.¹³¹ Additionally, even if it were concluded that absent the "in aid of jurisdiction" exception federal injunctions following removal would not be allowed, the exception would add nothing of real significance to the power of federal courts if it added *only* the power to issue post-removal injunctions. As Professor Currie has pointedly queried: "If the state court is determined to ignore a removal petition, what is to assure it will heed an injunction?"¹³²

That the "in aid of jurisdiction" exception was intended to do more than permit injunctions in aid of the jurisdiction of courts trying removed causes is implied, somewhat surprisingly, by the same Reviser's Note which at an earlier point indicated that to be its sole purpose. It will be recalled¹³³ that the Note states that "the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision."¹³⁴ If by this the Reviser meant that the three exceptions were, taken as a whole, intended to codify all judicially created exceptions in existence prior to *Toucey*, then certainly the "in aid of jurisdiction" exception must include the traditionally recognized¹³⁵ "res" exception.¹³⁶ The "res" exception permits a federal court which has secured in rem jurisdiction by attaching a res to enjoin a state court from interfering with its jurisdiction over the res.¹³⁷ Since the revision the courts, taking their cue from the phrasing of the exception as well as from that part of the Reviser's Note declaring that the pre-*Toucey* law was af-

¹³⁰ *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (removal exception to anti-injunction statute recognized); *Dietzsch v. Huidekoper*, 103 U.S. 494 (1880) (same).

¹³¹ In *T. Smith & Son, Inc. v. Williams*, 275 F.2d 397, 407 (5th Cir. 1960), the court stated:

It is even questionable whether the phrase ["in aid of its jurisdiction"] authorizes injunctions to protect jurisdiction of original actions; the Reviser's Notes indicate that the phrase was added "to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts."

¹³² D. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 711 (2d ed. 1975).

¹³³ See text and notes at notes 58-61 *supra*.

¹³⁴ 28 U.S.C. § 2283 (1970) (Reviser's Note). But see text and note at note 60 *supra*.

¹³⁵ See text and notes at notes 14-18 *supra*.

¹³⁶ In *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2888, 2892 (1977), Mr. Justice Rehnquist, speaking for himself and two other members of the Court, stated that "the 'necessary in aid of' exception to § 2283 may be fairly read as incorporating this historical *in rem* exception."

¹³⁷ See text and notes at notes 14-18 *supra*.

firmed, have concluded that the res exception falls within the umbrella of the "in aid of jurisdiction" provision.¹³⁸

B. The *Kline* "Rule"

Both before and after the 1948 revision, the courts have drawn a strict distinction between cases which are in rem, in which an injunction in aid of the federal court's jurisdiction may issue, and those which are in personam, in which generally no injunction may be awarded. This distinction originated in the Supreme Court's decision in *Kline v. Burke Construction Co.*¹³⁹ The respondent construction company in that case originally had brought an action at law against petitioners in federal court¹⁴⁰ for breach of a contract calling for the company to pave certain streets. After the company's action had been filed, petitioners sued in a state chancery court for an accounting and damages, alleging that the company had abandoned its contract. After much procedural wrangling in both cases, the company sought to have the state proceeding enjoined by the federal court. The district court denied the injunction, but the court of appeals reversed and remanded with instructions that the injunction be issued. On certiorari, the Supreme Court reversed, holding that the injunction was barred by the anti-injunction statute, "construed in connection" with the All Writs Act.¹⁴¹ The anti-injunction statute at the time incorporated no "in aid of jurisdiction" exception,¹⁴² but the respondent claimed that the injunction was sanctioned by the All Writs Act, which authorizes federal courts to issue writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."¹⁴³ The Court concluded that the suit injunction sought by the respondent was not agreeable to established principles. "It is well settled," the Court noted, "that where a federal court has first

¹³⁸ See, e.g., *Hyde Constr. Co. v. Koehring*, 388 F.2d 501 (10th Cir.), cert. denied, 391 U.S. 905 (1968); *Green v. Green*, 259 F.2d 229 (7th Cir. 1958); C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 204 (3d ed. 1976); ALL, *supra* note 31, at 304. But see text at note 60 *supra*.

¹³⁹ 260 U.S. 226 (1922).

¹⁴⁰ Jurisdiction was premised solely on grounds of diversity of citizenship. 260 U.S. at 227.

¹⁴¹ *Id.* at 229.

¹⁴² "Section 265 of the Judicial Code provides: '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.'" 260 U.S. at 228-29 (quoting Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162 (current version at 28 U.S.C. § 2283 (1970))).

¹⁴³ Act of March 3, 1911, ch. 231, § 262, 36 Stat. 1162 (current version at 28 U.S.C. § 1651(a) (1970)).

acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court."¹⁴⁴ However, it continued,

a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.¹⁴⁵

Although the *Kline* decision was not an interpretation of the revised anti-injunction statute, the distinction drawn in that case between in rem and in personam actions for suit-injunction purposes retains vitality.¹⁴⁶ Viewed as a matter of first impression, however, the distinction seems dubious.

Neither the *Kline* opinion nor the cases following *Kline* explain why the impairment of a federal court's "jurisdiction" is greater where the concurrent actions are in rem. If the federal court is hearing an in personam action, the conclusion of a concurrent state proceeding in the same matter will greatly restrict the freedom of the federal court, since the federal court will be bound by the doctrines of res judicata and collateral estoppel to apply most, if not all, of the factual findings and legal conclusions of the state court.¹⁴⁷ The *Kline* Court recognized this effect, but pointed out that the federal court technically retains its jurisdiction.¹⁴⁸ It applies the

¹⁴⁴ 260 U.S. at 229, 230. See also *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1938).

¹⁴⁵ *Id.* at 230.

¹⁴⁶ See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295-96 (1970); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 780 (3d Cir. 1975).

¹⁴⁷ Res judicata will apply if the same plaintiff brought both state and federal actions on the same cause of action. Collateral estoppel will be relevant if the defendant in one action is the plaintiff in the other, and there are overlapping issues of fact. See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 527-75 (2d ed. 1977) (res judicata); *id.* at 575-99 (collateral estoppel). Although there will be no collateral estoppel effect on pure issues of law, collateral estoppel may apply to mixed law/fact issues—in other words, to the application of general legal principles to specific situations. *United States v. Moser*, 266 U.S. 236, 241-42 (1924); F. JAMES & G. HAZARD at 571-73.

¹⁴⁸ Compare the interpretation of an analogous requirement in the "All Writs" statute, which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1970). The Court in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), declared: "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." *Id.* at 255.

principles of res judicata, the Court said, "in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case."¹⁴⁹ It is not clear, however, why a state court's exercise of jurisdiction over a res previously attached by the federal court "necessarily impairs . . . the jurisdiction of the Federal Court."¹⁵⁰ In most in rem or quasi in rem cases, the major "impairment" of federal court jurisdiction would arise from state court orders prior to judgment respecting the res that might conflict with prejudgment orders entered by the federal court.¹⁵¹ But a similar conflict of interlocutory orders might be engendered by concurrent state and federal in personam proceedings on the same matter, especially if the actions are equitable in nature. The second jurisdictional impairment arising from concurrent state-federal in rem or quasi in rem actions is the inability of the federal court to enter an effective decree disposing of the property in those cases where the state proceeding concludes before the federal. Yet federal court judgment premised upon the fact findings and legal conclusions of a state tribunal seems equally ineffectual.

The courts continue to follow the *Kline* "rule."¹⁵² The Supreme Court reaffirmed the *Kline* "rule" in its 1970 decision in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*.¹⁵³

¹⁴⁹ 260 U.S. 226, 230.

¹⁵⁰ 260 U.S. 226, 229.

¹⁵¹ In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court stated that the purpose of "the rule requiring that jurisdiction be yielded to the court first acquiring control of property" is "avoiding the generation of additional litigation through permitting inconsistent dispositions of property." *Id.* at 819. In dissent, Mr. Justice Stewart, joined by Justices Blackmun and Stevens, argued that the rule concerning priority of jurisdiction in in rem cases "applies only when exclusive control over the subject matter is necessary to effectuate a court's judgment." *Id.* at 822. He argued that the principle was inapplicable in the instant case because "[h]ere the federal court did not need to obtain *in rem* or *quasi in rem* jurisdiction in order to decide the issues before it." *Id.* According to the ALI, the res exception is premised on the recognition "that commencement of an action in one court, be it state or federal, results in the unavailability of the res for control or disposition by a second court." ALI, *supra* note 31, at 304.

¹⁵² See, e.g., *In re Glenn Turner Enterprises Litigation*, 521 F.2d 775, 780 (3d Cir. 1975); *Jett v. Zink*, 474 F.2d 149, 156 (5th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Heyman v. Kline*, 456 F.2d 123, 131 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972); *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508 (10th Cir.), *cert. denied*, 391 U.S. 905 (1968). See text and notes at notes 158-167 *infra*.

¹⁵³ 398 U.S. 281 (1970). More recently, in *Carter v. Ogden Corp.*, 524 F.2d 74 (5th Cir. 1975), the Fifth Circuit expressed its understanding that the *Kline* doctrine is still good law: Although in an in rem action it may be necessary for the federal court to enjoin the later state proceedings to protect its jurisdiction . . . an in personam action may proceed simultaneously in state and federal court and the federal court cannot enjoin the state action even if the federal suit was filed first. . . . While it is true that the decision in the suit that first reaches judgment may be res judicata as to the least part of the other suit that is not sufficient basis for an injunction.

Id. at 76 (citations omitted).

While reaffirming *Kline*, however, the court seemed to weaken its underpinnings. The Court noted that the "in aid of jurisdiction" exception, as well as the relitigation exception, implies "that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."¹⁵⁴ This language suggests the Court did not view the "in aid of jurisdiction" exception as limited to situations where, as a result of the concurrent state proceeding, the federal court would be completely deprived of its jurisdiction to continue, and perhaps suggests that all that is required is that the state proceeding seriously threaten the federal court's "flexibility and authority to decide that case." But if this is so, retention of the *Kline* "rule" becomes impossible, for the requirement that a federal court give effect to the findings made in concurrent state court proceedings¹⁵⁵ will in many cases seriously impair the federal court's "flexibility." The Court did not seem to notice any inconsistency, however, and it is likely that its specific reaffirmance of *Kline* will stand for the indefinite future.¹⁵⁶

C. Departures from the *Kline* "Rule"

Despite general acceptance of the *Kline* principle, it has not been consistently applied. There are various judicially recognized exceptions to *Kline* which seem difficult to distinguish from *Kline* itself and which the courts have adopted without noting that they were in any way departing from *Kline*.

Perhaps the classic example is a group of decisions most conveniently referred to as "the insurance cases." The fact pattern of these cases is fairly uniform. The insurance company seeks a declaratory judgment in federal court that a particular policy is invalid, usually on grounds of fraud. The insured or beneficiary files an action in state court, seeking to recover under the policy. The insur-

¹⁵⁴ 398 U.S. 281, 295 (1970).

¹⁵⁵ See 28 U.S.C. § 1738 (1970).

¹⁵⁶ In *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977), the opinion of Mr. Justice Rehnquist explicitly reaffirmed the *Kline* rule. "Although the 'necessary in aid of' exception to § 2283 may be fairly read as incorporating this historical *in rem* exception, the federal and state actions here are simply *in personam* We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court." *Id.* at 2892 (citations omitted). Justice Rehnquist, however, spoke for only three members of the Court. Neither the concurring opinion of Justice Blackmun nor the dissenting opinion of Justice Stevens reached the issue. Although Justices Blackmun and Burger concurred in the result, and therefore must have agreed with the plurality that the suit injunction was not "necessary in aid of jurisdiction," they did not concur in Justice Rehnquist's explicit reaffirmance of *Kline*.

ance policies usually contain an incontestability clause, stating that after a specified period the insurer is barred from contesting the validity of the policy. Hence if the state court action by the insured or beneficiary is filed after the period has run, the insurer is defenseless. Even if the insurer's federal action for a declaratory judgment is filed prior to the running of the contestability period, conclusion of the state action first could render useless any relief obtained by the insurer in the federal action. If the state court awards the plaintiff the relief sought, the insurer must abide by that valid judgment. When both actions are brought in federal court, the court hearing the declaratory action by the insurer has the option of enjoining the legal action by the insured or beneficiary, even if that action has been filed prior to the running of the period of the incontestability clause.¹⁵⁷ When the declaratory action is brought in federal court and the suit on the policy in state court, however, any request to enjoin the state proceeding must contend with the anti-injunction statute.

Nevertheless, federal courts have generally felt free to enjoin the state proceeding.¹⁵⁸ Since the declaratory action in federal court is clearly not an *in rem* case, the question that arises is whether the insurance cases can be reconciled with *Kline*.¹⁵⁹ After all, *Kline* concluded that the maintenance of a concurrent *in personam* proceeding does not sufficiently interfere with the federal court's authority to justify an injunction "in aid of its jurisdiction." Yet the insurance cases hold that a federal court is empowered to enjoin a

¹⁵⁷ *American Life Ins. Co. v. Stewart*, 300 U.S. 203 (1937).

¹⁵⁸ *E.g.*, *Hesselberg v. Aetna Life Ins. Co.*, 102 F.2d 23, 27 (8th Cir. 1939); *Jamerson v. Alliance Ins. Co. of Philadelphia*, 87 F.2d 253, 256 (7th Cir.), *cert. denied*, 300 U.S. 683 (1937); *Provident Mut. Life Ins. Co. v. Parsons*, 70 F.2d 863, 868 (4th Cir.), *cert. denied*, 293 U.S. 582 (1934); *Brown v. Pacific Mut. Life Ins. Co.*, 62 F.2d 711, 713-14 (4th Cir. 1933); *Mutual Benefit Accident Ass'n v. Teal*, 34 F. Supp. 714, 717 (E.D.S.C. 1940). See also 1A MOORE's, *supra* note 22, ¶ 0.225, at 2620-21.

¹⁵⁹ In *Brown v. Pacific Mut. Life Ins. Co.*, 62 F.2d 711, 713 (4th Cir. 1933), the court did attempt to distinguish *Kline*:

[W]e find nothing in [*Kline*] which limits to actions *in rem* the right of a federal court of equity to protect its jurisdiction. It involved no situation where it was necessary for a court of equity to protect against encroachment on its jurisdiction or the lawful effect of its orders or decrees, but merely one where individual proceedings were pending in the state and federal courts, in both of which the ultimate relief sought was a money judgment.

Whether or not traditional equity practice authorized such an action, by its terms the Anti-Injunction Act draws no distinction between legal and equitable actions. As Professor Fiss remarked in an analogous context, this distinction may "be faulted for its use of doctrines of equity—doctrines forged in the battles of English Chancery—to further views of federalism, a political principle central to American government." Fiss, *Dombrowski*, 86 Yale L.J. 1103, 1107 (1977).

concurrent state in personam proceeding. There is, however, one important difference between the two situations. All *Kline* holds is that the res judicata effect of a state court action on a concurrent federal action is not a sufficient interference to fall within the "in aid of jurisdiction" exception. In the insurance cases, the threat to the federal action is not the danger of res judicata or collateral estoppel, since the issues in the federal and state actions are usually different. In the federal case, the issue is whether the policy is invalid for fraud, and in the state action the issue is whether the insured can recover under the policy, the fraud issue having been foreclosed by the incontestability clause. The danger is that although the federal court may be free to decide the case as it wishes, the conclusion of the state proceeding may render the federal court's decision of no practical importance to the litigants.

Whether this type of interference with the federal proceeding is greater than a res judicata effect is open to question. Indeed, it might be argued that the interference caused in the insurance cases is even less significant than that caused by the res judicata effect of concurrent in personam action, since in the insurance cases at least the federal court is free independently to decide the case before it. In any event the interference with the authority of the federal court in the insurance cases certainly seems no greater than the interference in the *Kline* situation. It could also be argued that the crucial distinction between *Kline* and the insurance cases is that in the former the defendant in the state action can generally raise all available defenses while in the latter he is not permitted to assert his primary defense. But the statutory language allows federal injunctions of the state proceedings "where necessary in aid of [the federal court's] jurisdiction." By its terms, the section focuses on the interference with the authority of federal courts to adjudicate cases. It is difficult to see how the reach of a federal court's power under this section can turn solely on the precariousness of the defendant's position in the state court action.

An even more striking departure from *Kline* came in the Supreme Court's decision in *Capital Service, Inc. v. NLRB*.¹⁶⁰ An employer successfully sought a state court injunction barring continued picketing by a union. Several days later, the employer filed an unfair labor practice charge against the union with the NLRB. Five weeks after the state court granted a preliminary injunction, the Regional Director of the NLRB issued an unfair labor practice com-

¹⁶⁰ 347 U.S. 501 (1954).

plaint against the union. The Regional Director then petitioned the federal district court for an injunction restraining the union's picketing pending final adjudication by the Board, and sought to have the employer enjoined from enforcing its state court injunction against the union. The district court granted the suit injunction, and the court of appeals affirmed. The Supreme Court affirmed, concluding, in an opinion by Mr. Justice Douglas, that the injunction was permissible as necessary in aid of the district court's jurisdiction. The Court reasoned that

[i]f the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted "where necessary in aid of its jurisdiction."¹⁶¹

In ruling that the federal court had the power to enjoin the state proceeding "in aid of its jurisdiction," the Court made no mention of the Reviser's Note, the pre-*Toucey* decisions, or *Kline*. The Court's interpretation of the "in aid of jurisdiction" exception in *Capital Service* seems inconsistent with all of them. Certainly *Capital Service* was a case of concurrent in personam proceedings, one state and one federal. Yet the Court concluded that under the circumstances of the case the federal court could enjoin a party from enforcing his state judgment in order to ensure that the federal court could exercise its jurisdiction freely and fully in deciding the case. So described, the case seems inescapably in conflict with *Kline*, for it is clear that when a federal court is required by the doctrine of res judicata to apply the findings and conclusions of a concurrent state court proceeding it is unable to "exercise its jurisdiction freely and fully." Yet this result is mandated by *Kline*.

There are several possible ways to distinguish *Capital Service* from *Kline*. First, *Capital Service* involved a matter that, because of federal preemption, the state court had no jurisdiction to adjudicate. It is possible to argue that the case turned on this alone. Such an interpretation of *Capital Service* is supported by the phrasing of the question on which the Court granted certiorari: "In view of the fact that exclusive jurisdiction over the subject matter was in the

¹⁶¹ *Id.* at 505-06.

National Labor Relations Board, . . . could the Federal District Court, on application of the Board, enjoin petitioners from enforcing an injunction already obtained from the state court?"¹⁶² Moreover, the Court noted in its opinion that "[w]here Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right."¹⁶³ But, as the previously quoted portions of the opinion demonstrate, the Court was primarily concerned with preserving the freedom of the district court to dispose of the matter as it saw fit, a concern that is no less urgent in cases involving issues as to which the state court has concurrent jurisdiction. Furthermore, a narrow reading of *Capital Service* would disregard the principle, emphasized only a year later in *Richman Brothers*, that the mere fact that a state proceeding invades exclusive federal jurisdiction is not a sufficient basis for circumventing the limits of the anti-injunction statute.¹⁶⁴ Although *Capital Service* involved a case of exclusive federal jurisdiction,¹⁶⁵ the Court did not rest its decision on that narrow ground. *Capital Service* departs from the thinking of *Kline* that a concurrent in personam proceeding in state court cannot "interfere" with the exercise of the federal court's jurisdiction. Such interference can just as readily result when the federal court's jurisdiction is not exclusive.

Another difference that might serve as a basis for distinguishing *Kline* from *Capital Service* is that the threat to the federal court's power in *Capital Service* arose not from a potential res judicata or collateral estoppel effect, as in *Kline*, but rather from a state injunction binding the parties. In both cases the federal court's flexibility has obviously been limited. It might, however, be maintained that the interference is more substantial in the injunction situation because any departure from the terms of the state order by the parties might lead to a contempt citation whereas in the collateral estoppel situation the federal court may, under certain narrow circumstances,¹⁶⁶ refuse to abide by the state findings. Such circumstances have been extremely rare in past years, however, and the *Kline* Court apparently assumed that in general the federal court must enforce

¹⁶² 346 U.S. 936 (1953), quoted at 347 U.S. at 504.

¹⁶³ 347 U.S. at 504.

¹⁶⁴ 348 U.S. at 515.

¹⁶⁵ In *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956), for example, the court appeared to read *Capital Service* as limited to cases of exclusive federal jurisdiction.

¹⁶⁶ See, e.g., *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951).

state findings. Hence this distinction is unpersuasive.

A complicating factor in explicating the *Capital Service* case is that one year after *Capital Service* was decided, the Court in *Richman Brothers* seemed to view the *Capital Service* decision as falling under the "expressly authorized" rather than the "in aid of jurisdiction" exception.¹⁶⁷ But *Capital Service* placed itself squarely within the "in aid of jurisdiction" exception, with no mention of the "expressly authorized" category. More importantly, despite the existence of *Kline* as a conflicting precedent, *Capital Service* makes more sense as an interpretation of the "in aid of jurisdiction" exception than as an interpretation of the "expressly authorized" exception, since the case concerned the threat posed by a concurrent state proceeding to a federal court's free and full exercise of its jurisdiction to decide a case.¹⁶⁸

Where all this leaves the "in aid of jurisdiction" exception is not altogether clear. Those who feel that principles of judicial federalism dictate a narrow view of this exception may simply point to the continued widespread adherence to *Kline*. Yet the insurance cases and *Capital Service* appear inconsistent with this view, for the Court in these cases recognized that, even in a situation involving parallel in personam proceedings, a state proceeding may seriously threaten the meaningful exercise of a federal court's jurisdiction in a particular case. Because of the uncertain state of the law as well as the questionable logic of the *Kline* rule, a new approach to the "in aid of jurisdiction" exception is needed.

V. A REVISED INTERPRETATION OF THE "IN AID OF JURISDICTION" EXCEPTION

For several reasons already discussed, the *Kline* rule inadequately protects the jurisdiction of federal courts from interference by state judicial proceedings. Certainly the language of the statutory exception that the modern descendants of *Kline* interpret does not require so narrow a reading. Indeed, it is the height of irony that while the courts have stretched, twisted, and distorted the language of another exception—the "expressly authorized" category—beyond

¹⁶⁷ 347 U.S. at 505.

¹⁶⁸ If *Capital Service* were to arise today, the anti-injunction statute would not bar a suit injunction. In *Leiter Minerals v. United States*, 352 U.S. 220, 224-26 (1957), the Supreme Court held section 2283 inapplicable to injunctions sought by the United States. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144-47 (1971), the Court extended *Leiter* to federal agencies. *Nash-Finch*, however, is irrelevant to the reasoning of the Court in *Capital Service*. *Id.* at 141-42.

recognition when deemed necessary to preserve the prerogatives of the federal courts and the federal system,¹⁶⁹ they have declined to adopt a rational reading of the "in aid of jurisdiction" language that would permit federal injunctive relief when the threatened interference with the authority of the federal courts is substantial. Consequently, if a federal court desires to avoid the duplication of time, effort, and money caused by concurrent proceedings in state and federal courts in a case where a suit injunction is not expressly authorized, its only option is to stay itself even if the issue in both cases involves significant federal interests.¹⁷⁰

This problem can be remedied by giving the "in aid of jurisdiction" exception an interpretation commensurate with its broad language: whenever a federal court has jurisdiction in a case before it, the exception should be construed to empower the federal court to enjoin a concurrent state proceeding that might render the exercise of the federal court's jurisdiction nugatory.¹⁷¹ Such an injunction would most certainly be "in aid of" the federal court's jurisdiction under a legitimate interpretation of the phrase since it preserves the authority of a federal court to decide a case properly before it, free of interference from state actions.

This is not to suggest that in all cases of concurrent jurisdiction the federal court should feel free to enjoin the state proceeding "in aid of its jurisdiction." Though the exception can be read to give

¹⁶⁹ *Mitchum v. Foster*, 407 U.S. 225 (1972); *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2d Cir. 1966). See text and notes at notes 42-102 *supra*.

¹⁷⁰ *Cf. P. Biersdorf & Co., Inc. v. McGohey*, 187 F.2d 14 (2d Cir. 1951) (stay of federal proceeding approved where both state and federal actions concern validity of federally registered trademarks). In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court analyzed factors which a federal court should consider in deciding, in cases of concurrent federal and state court jurisdiction, whether to stay itself. *Id.* at 814-17. The Court emphasized, however, that "[o]nly the clearest of justifications will warrant dismissal." *Id.* at 819. See generally Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977).

¹⁷¹ See, e.g., *Lektro-Vend Corp. v. Vendo Co.*, 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd*, 97 S. Ct. 2881 (1977), in which, in a federal antitrust suit, the trial court authorized an injunction of a suit to collect a state court judgment, partially because "further collection efforts would eliminate two plaintiffs . . . as parties under the case or controversy provisions of Article III since they would necessarily be controlled by [the defendant] Thus the injunction is also necessary to protect the jurisdiction of the Court." 403 F. Supp. at 536-37. Affirming on an alternate ground, the Court of Appeals for the Seventh Circuit rendered no decision on the "in aid of jurisdiction" issue. 545 F.2d at 1055. In reversing, however, the Supreme Court necessarily rejected the district court's reasoning, Justice Rehnquist, speaking for three members of the Court, expressly rejected the district court's interpretation of the "in aid of jurisdiction" exception. 97 S. Ct. at 2892-93. Although the rest of the Court did not discuss the issue, concurring Justices Blackmun and Burger necessarily agreed with Justice Rehnquist.

federal courts the power to enjoin any concurrent state proceeding that threatens the effective exercise of their jurisdiction, the courts could, in their discretion, refuse to enjoin concurrent state proceedings in certain instances.

The two-level structure of power and discretion is familiar in the law of federal jurisdiction. A federal court may have power to exercise pendent jurisdiction over certain state claims, for example, but will in many instances exercise its discretion not to do so.¹⁷² Indeed, the doctrine of comity and restraint developed in *Younger v. Harris*¹⁷³ and its progeny is premised on the inherent authority of the federal courts to refuse to exercise their power to enjoin state proceedings.¹⁷⁴ Guidelines are needed to determine when a federal court should exercise its potentially broad powers under the "in aid of jurisdiction" exception and when it should choose to defer to the state court.

The goal of such an analysis should be to balance evenly the interest of the state courts in remaining free from collateral federal interference against the importance of preserving the authority and integrity of the federal court's jurisdiction. This analysis should examine the following factors:

- (1) How significant is the federal interest in the substance of the case?
- (2) How important is the exercise of the federal court's expertise in the development of federal law?
- (3) How burdensome is the conduct of concurrent proceedings?
- (4) Which action was filed first?
- (5) How significant is the interference with the independence

¹⁷² See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

¹⁷³ 401 U.S. 37 (1971).

¹⁷⁴ A detailed analysis of the scope and advisability of the *Younger* doctrine is beyond the scope of this article. However, even if it were concluded that retention of *Younger* is advisable, it would not follow that the criteria suggested here, see text and notes at notes 160-64, would be useless. Although it is true that the *Younger* doctrine has been substantially expanded in recent years, see, e.g., *Trainor v. Hernandez*, 97 S. Ct. 1911 (1977), the Court has still limited its application to section 1983 cases where the state was the plaintiff in the state proceeding sought to be enjoined. Thus the suggested criteria for application of the "in aid of jurisdiction" exception could be applied to all those cases left untouched by *Younger's* reach.

Moreover, a strong argument could be made that case-by-case development of the criteria described here would more evenly balance the needs of the state courts to remain free from undue federal judicial interference with those of the federal courts to stand as the primary guarantor of federal rights than does the *Younger* rule, which stands as a virtual bar to federal court injunction.

and flexibility of the federal court that will result from the prior conclusion of the state court proceeding?

(6) How substantial is the investment of state judicial resources in the case?

The first two considerations will generally overlap, because the need for the expertise of the federal court is usually proportionate to the federal interest in the subject matter of the case.¹⁷⁵ These factors are included because the most serious danger arising from the *Kline* doctrine is the threat to the ability of federal courts to adjudicate effectively questions of federal law and federal rights, of which they are the fundamental guarantors.¹⁷⁶

The next two factors concern the interests of the litigants, rather than the needs of the federal system. The American Law Institute has suggested that the burden caused by the conduct of multiple proceedings should not be a consideration in determining whether a federal court should enjoin an ongoing state proceeding. Indeed, in its suggested revision of section 2283 the ALI removes the language of the "in aid of jurisdiction" exception for the reason that it is capable of being read to authorize injunction of a concurrent state in personam proceeding.¹⁷⁷ But the avoidance of multiple litigation is often a goal of our procedural system, and with good reason. The duplication of effort, time, and expense that results from such proceedings is wasteful. On certain occasions, the burdens may be so substantial as to justify departure from the traditional rule of federal-state non-interference. The order of filing is a relevant consideration because a party who files an action should not ordinarily have his choice of forum undermined by the subsequent actions of his opponent. This factor should not be considered determinative,

¹⁷⁵ Cases will arise, however, in which the two factors do not overlap. For example, in a suit brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1970), a strong federal interest in ensuring that the purposes of the Act are achieved is present. But in view of the long history of state court adjudication of negligence cases in general and F.E.L.A. cases in particular the need for the federal judiciary's expertise may be minimal.

¹⁷⁶ See generally Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-31 (1977). See also *Steffel v. Thompson*, 415 U.S. 452, 473 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 543-44 (1973).

¹⁷⁷ The language of [the "in aid of jurisdiction" exception of] § 2283 is too broad . . . since it could be construed as allowing an injunction against a state proceeding that involves the same subject matter as an in personam action in the federal court. To allow this would be contrary to previously settled law that in personam actions involving the same subject matter may proceed in state and federal court at the same time. . . . This should remain the law. The mere burden on a party of being 'subjected to litigation in other courts' is precisely what comity requires the federal court to disregard as a ground for intervention.

ALI, *supra* note 31, at 304.

however, since to do so would put a premium on a race to the courthouse, and the other enumerated factors are often likely to be more significant in a particular case. Thus if the case is primarily concerned with questions of federal law, the fact that the state action was filed first should probably not be dispositive.

In the majority of cases it is likely that the first and second factors will predominate over the third and fourth, since the federal court may as easily avoid the costs and problems of multiple litigation by staying itself as by enjoining the state proceeding. If the case concerns no issues of federal law a stay of the federal action may be appropriate. If the federal action is filed first, however, and there is reason to believe that the state proceeding was filed solely to harass the federal plaintiff, the federal court may appropriately enjoin the state proceeding even though the case presents few or, in diversity cases, no issues of federal law.¹⁷⁸

The fifth factor emphasizes the need to preserve the flexibility of the federal court. In some instances in which state and federal proceedings overlap the degree of interference with the federal action caused by the conduct or prior conclusion of the state proceeding will be so minimal as not to warrant issuance of a suit injunction. For example, the findings of fact which the federal court would be required to apply under collateral estoppel principles may be merely peripheral to the case being litigated in federal court. On the other hand, even in cases where there is no *res judicata* or collateral estoppel effect, there may be situations—like the insurance cases—in which prior conclusion of the state action would render any relief awarded by the federal court meaningless. In such cases a federal court might reasonably conclude that the interference with its flexibility caused by the state suit is substantial enough to warrant an injunction.¹⁷⁹

¹⁷⁸ The proposed approach might be challenged on the ground that it generally ignores or undervalues the congressional policies undergirding diversity jurisdiction. The answer to this objection is that a suit injunction is seldom of practical importance in diversity cases. The plaintiff may fairly be required to abide by his choice of forum. The defendant may remove when the plaintiff is not his co-citizen, provided that the suit was not brought in the defendant's home state, in which case the defendant's need for a federal forum is absent. The only situation in which a suit injunction probably should be available is when, such as in the insurance cases, removal does not protect the federal court's ability to freely and fully decide the case before it.

¹⁷⁹ In *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975), the court rejected the argument that a federal injunction against the Kentucky Attorney General, prohibiting him from executing upon his state court judgment of nearly \$500,000 against Glenn Turner and his enterprises, was necessary in aid of the district court's jurisdiction, even though if the judgment were collected the defendants might be rendered judgment proof. *Id.* at 780. If this were to happen, any damage relief awarded to plaintiffs in their federal action

The final factor involves assessment of the judicial resources invested in the state proceeding. For example, if a suit injunction is sought only after substantial discovery, a pre-trial conference, jury impanelment, and much of the trial itself, the federal court should require a more substantial showing that important federal interests are infringed by the conduct or prior conclusion of the state proceeding than in instances in which only the initial pleadings have been filed in state court at the time the injunction is sought. In fact, it would be difficult to imagine a case where federal interests are so compelling as to justify such a significant disruption of the workings of the state judicial system. This factor properly encourages the party seeking the suit injunction to do so quickly. Absent such a criterion litigants would be encouraged to waste the resources of opponents and state judicial systems by pursuing state court litigation until it appears unpromising.

Acceptance of the proposed analysis no doubt requires rejection of the broad rule extracted from *Kline*. But the suggested approach is entirely consistent with both the insurance cases and *Capital Service*. Indeed, if the *Kline* rule could be limited to diversity cases, where removal is usually adequate protection against local bias, the rule would generally yield results consistent with those suggested by the revised interpretation of the "in aid of jurisdiction" exception. But suit injunctions are sometimes necessary to protect the jurisdiction of a federal court sitting in a diversity case, and *Kline* has never been limited in its application to diversity cases. More important, the *Kline* rule is fundamentally unsound. It is therefore wise to reject *Kline* entirely and begin with a completely fresh approach to the question.

It might be argued that both the broader interpretation of the "in aid of jurisdiction" exception and the suggested guidelines for use of this broader interpretation are inconsistent with the congressional intent evidenced in the Reviser's Note. In a sense this is true, for in discussing the purposes of the "in aid of jurisdiction" exception the Reviser spoke in limited terms. However, the Reviser's discussion of the exception is so limited that it fails even to refer to the res exception, yet courts have continued to recognize the exist-

would as a practical matter be meaningless. The court first questioned the assertion that "the various defendants would be unable to pay any federal judgment." *Id.* The court proceeded to note, however, that: "[M]ore importantly, the inability of defendants to pay a judgment . . . still would not be sufficient justification to issue the federal injunction." *Id.* Under the analysis suggested here, the federal court might well take into account the likelihood that pursuit of the state action would render meaningless any relief awarded in the federal action, thus rejecting the holding of *Glenn Turner* and cases like it.

ence of this doctrine under the rubric of the "in aid of jurisdiction" exception. Ultimately, the Reviser's Note is so cursory and ambiguous that its value as an aid for judicial interpretation of the statute is minimal. As long as the suggested construction is consistent with the statutory language and represents an appropriate balance of federal and state interests, the judiciary should not decline to adopt it merely because it appears to go beyond the vague purposes outlined by the Reviser.¹⁸⁰

The revised interpretation of the "in aid of jurisdiction" exception might achieve many of the results reached by the *Mitchum* approach—for example section 1983 actions would often be excepted from the bar of the statute—while avoiding many of the problems generated by the *Mitchum* approach.¹⁸¹ More important, the proposed approach, unlike the *Mitchum* test, provides a framework for making finely-tuned judgments. If, on balance, the six factors outlined above so counsel, the federal court should enjoin the state proceeding "in aid of its jurisdiction."

The revised interpretation of the "in aid of jurisdiction" exception is not a perfect substitute for the *Mitchum* approach, however, for the "in aid" provision requires that the federal court possess some independent jurisdiction to be aided.¹⁸² The exception cannot be used if the sole claim in the federal court is the prayer for a suit injunction, for in those circumstances the federal court has no pre-existing jurisdiction to aid. If, in addition to seeking an injunction, the federal complaint also seeks a declaration of the federal rights being adjudicated in the state proceeding, the requirement that the federal court possess jurisdiction to be aided is met so long as the declaratory judgment request is cognizable in federal court.¹⁸³ The free exercise of jurisdiction to render the declaratory judgment might be impeded substantially by the operation of collateral estoppel if the state proceeding concludes first. Even if the only federal issues are pure questions of law, a situation in which there would

¹⁸⁰ It might also be contended that the expanded reading of the "in aid of jurisdiction" exception suggested here is inconsistent with the understanding, also derived from the Reviser's Note, that the 1948 revision was designed to "restore . . . the basic law as generally understood prior to the *Toucey* decision." As noted previously, see text and notes at notes 60-61 *supra*, however, it is likely that this sentence was intended to refer only to the relitigation exception.

¹⁸¹ See text and notes at notes 77-127 *supra*.

¹⁸² *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511 (1955).

¹⁸³ In order to bring a declaratory judgment action in federal court, however, the federal issues must be essential elements in a hypothetical "coercive" cause of action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

be no collateral estoppel effect,¹⁸⁴ an injunction might be appropriate because the prior completion of the state action, with the possible result of a criminal conviction or substantial civil award, would render meaningless any federal declaratory relief that might subsequently be awarded.¹⁸⁵

CONCLUSION

It is generally recognized that the anti-injunction statute is rife with inadequacies and ambiguities. Despite this, neither the suggestions for revision¹⁸⁶ nor the current case law recognize the fundamental inconsistencies that inhere in the act as presently interpreted.

It is likely that most of the problems may be corrected without legislative revision. Though the statutory language leaves much to be desired, adoption of the construction of the "in aid of jurisdiction" exception proposed in this article could do much to reassert the power and integrity of the federal courts in their relations with their counterparts in the states. Such a reassertion would bring the anti-injunction statute into alignment with the general trend toward federal judicial supremacy in post-Civil War federalism, while affording appropriate regard to the independence of state courts.

¹⁸⁴ *United States v. Moser*, 266 U.S. 236 (1924).

¹⁸⁵ See text at notes 179 *supra*.

¹⁸⁶ The primary suggested revision is that of the ALI. In its section 1372, the ALI proposes:

A court of the United States shall not grant an injunction to stay proceedings in a State court, including the enforcement of a judgment of a State court, unless such an injunction is otherwise warranted, and: (1) an Act of Congress authorizes such relief or provides that other proceedings shall cease; or (2) the injunction is requested by the United States, or an officer or agency thereof; or (3) the injunction is necessary to protect the jurisdiction of the court over property in its custody or subject to its control; or (4) the injunction is in aid of a claim for interpleader; or (5) the injunction is necessary to protect or effectuate an existing judgment of the court; or (6) the injunction is sought to preserve temporarily the status quo pending determination of whether this section permits grant of a permanent injunction; or (7) the injunction is to restrain a criminal prosecution that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws.

ALI, *supra* note 31, at 51-52. The primary contribution of the suggested revision is the addition of number 7. It is submitted, however, that the revised analysis of the "in aid of jurisdiction" exception suggested here would more effectively allow federal judicial protection of federal rights. With the exception of cases described in number 7, the ALI revision maintains the in personam/in rem distinction that has been read into section 2283, a distinction that is unjustified and unworkable. Additionally, the ALI revision does little to remove the current controversy over the meaning of the "expressly authorized" exception. Finally, the ALI revision retains the relitigation exception, though as argued above, the exception is irreconcilable with the purposes of the act.