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Exercise of Federal Court Jurisdiction Not Specifically Conferred - Introduction: If This Be Treason.

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STUDENT SYMPOSIUM

EXERCISE OF FEDERAL COURT JURISDICTION NOT "SPECIFICALLY" CONFERRED

INTRODUCTION: IF THIS BE TREASON . . .

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> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should . . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. (Marshall, C.J., in *Cohens v. Virginia*).[1]

Justice Marshall thought it treason to a federal judge's oath either to take jurisdiction that is not granted or to refuse jurisdiction that is. As to the first, strictly speaking, it cannot happen. It involves a paradox. Since judges interpret the Constitution, they cannot exercise jurisdiction not constitutionally conferred. By the process of interpretation, they can simply find that jurisdiction is conferred. Yet, over the years through this process of interpretation, it must be admitted that the federal courts have on occasion taken an expansive view in finding jurisdiction. As to declining jurisdiction, the federal courts have quite frankly refused to hear cases admittedly within their jurisdiction. Whether the federal courts have thus committed treason to their constitutional responsibilities, however, depends on whether they have taken these actions on a principled basis and whether the principles are valid.

Jurisdiction Not "Specifically" Conferred: Usurpation or Interpretation

Certainly, the federal courts exercise jurisdiction not specifically spelled out in the Constitution. They hear pendent and ancillary matters; they hear cases removed from the state courts under the removal statutes; they hear matters arising under the "federal common law." Yet, none of these jurisdictions are "expressly" provided for in the Constitution. Neither are

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1. 19 U.S. (6 Wheat.) 264, 404 (1821).

they expressly forbidden. "The constitution unavoidably deals in general language."[2] Its writers provided that the federal judicial power should extend to nine types of cases and controversies where they thought there would be a national interest in the availability of a federal judiciary. But the writers of article III did not attempt to foresee every possible need for a federal tribunal and then exhaustively provide by express conferral for such jurisdictions in the Constitution. In light of the intended lasting nature of the document, jurisdiction can be legitimately "implied" by interpreting the express grants of jurisdiction consistent with their purposes.

For instance, in *United Mine Workers v. Gibbs*,[3] the Supreme Court found jurisdiction under the Constitution over state claims that "derive from a common nucleus of operative fact"[4] with a federal question. There is no express mention of such a jurisdiction over state claims in article III. That article, however, does confer jurisdiction over *all cases* arising under the Constitution or laws of the United States. It does not simply confer jurisdiction over federal *issues*. It is legitimate, therefore, to give a purposive meaning to the constitutional language, to say that the related claims "comprise but one constitutional 'case.' "[5] Such an interpretation carries out the purposes for granting federal question jurisdiction. If a litigant has a grievance that requires a sympathetic federal tribunal or a tribunal with expertise in federal law, such a grievance should have access to the federal courts. Without a doctrine like pendent jurisdiction, however, many litigants would forego the federal courts if the grievance involves related state claims. They (and the courts) could not afford the wasteful duplication of time and resources where both courts must hear and decide the same matters. To allow such cases the realistic option of a federal forum, the Supreme Court gave its pragmatic interpretation of an article III "case" in *Gibbs*, while at the same time providing a discretionary flexibility[6] to avoid unnecessary applications of the doctrine where it would enter into state matters without significantly advancing federal interests.

Another instance of the Supreme Court interpreting article III to imply jurisdiction not expressly spelled out therein occurred recently in *Illinois v. City of Milwaukee*.[7] In that case, the Court held that a suit brought by Illinois against four Wisconsin cities and two local sewerage commissions to

2. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).
3. 383 U.S. 715 (1966).
4. *Id.* at 725.
5. *Id.* at 725.
6. The Court made it clear that the power to hear pendent state claims "is a doctrine of discretion, not of plaintiff's right." The trial court should look to "considerations of judicial economy, convenience and fairness to litigants" and avoid "[n]eedless decisions of state law." *Id.* at 726. This discretion recognized in *Gibbs* is another example of doctrines, discussed p. 517 *infra*, by which the federal courts refuse for policy reasons to exercise jurisdiction constitutionally granted in certain situations.
7. 406 U.S. 91 (1972).

abate pollution of interstate waters was controlled by federal common law and that such a claim "arises under" federal "law" for purposes of federal question jurisdiction.[8] Again, neither the Constitution nor the federal statutes expressly refer to a federal common law. But the federal courts have developed judge-made federal law in certain circumstances where they felt federal interests required it.[9] In *Illinois v. City of Milwaukee*, for instance, at issue was the source of legal standards to govern a dispute between a state and municipalities of another state over use of interstate waters. Neither the Constitution nor any federal statute specifically provided an answer to the dispute. Yet, in terms of alternative sources of law, it would clearly be inappropriate to solve such disputes fairly and acceptably to all parties by using the law of either state as the governing law. Once it is decided that a federal common law should govern, then it is certainly appropriate to provide a federal forum to formulate the contours of the governing law and to hold that "laws of the United States" in the Constitution and the statute should be interpreted to encompass "federal common law."

Indeed, such a process is no different than that required to conclude that a case founded on a federal statute is one "arising under . . . the [l]aws the United States."[10] Every claim of federal jurisdiction requires interpretation of the Constitution and relevant statutes. Some questions of interpretation are simply easier than others. The focus should be on whether the interpretation is legitimate in light of the purposes of the grant of federal jurisdiction.[11]

Declining Jurisdiction: Young, Younger, and Beyond

A famous case in which the Supreme Court has been accused of usurping jurisdiction seemingly forbidden by the Constitution is *Ex parte Young*.[12] In that decision, railroad stockholders sought in the federal courts to enjoin the Attorney General of Minnesota from enforcing state laws reducing the railroad's rates on the ground that such state laws violated the 14th amendment. The Attorney General contended that such a suit was barred by the 11th amendment. The Supreme Court could have met the 11th amendment argument by process of interpretation.[13] Instead, the Court engaged in the

8. *Id.* at 99-100, *citing* Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968).

9. *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

10. *E.g.*, Feibelman v. Packard, 109 U.S. 421 (1883).

11. For an excellent analysis of the problems of interpreting the federal question jurisdiction grant in light of its purposes, see Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

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

13. Since the 14th amendment followed the 11th by 70 years, Justice Peckham

legal fiction that when the Attorney General of Minnesota was acting unconstitutionally, he was "the state" for purposes of the 14th amendment but not for purposes of the 11th.

Pragmatically, the doctrine of *Ex parte Young*[14] is indispensable to one of the basic functions of the federal courts—providing a sympathetic forum for vindication of federal constitutional rights abridged by state officials.[15] However, because of the "logic" of the decision and the possible resulting friction with legitimate state interests, the doctrine was subsequently limited by Congress[16] and the federal courts themselves. Responding to the problems posed by the assumption of authority in *Young*, the Supreme Court later developed doctrines under which the federal courts would decline to exercise the authority in certain circumstances.[17] The abstention[18] and other doctrines[19] in which the federal courts admittedly "decline the exercise of jurisdiction which is given" seem exactly what Marshall condemned in *Cohens*.

Whether a federal court's abstaining is treason to its constitutional responsibility, however, depends on whether article III defines an irreducible minimum of federal court responsibility in exercising "the judicial power." This is not at all a necessary interpretation. The Constitution defines the maximum power of all three branches in creating a government of limited

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could have held that the drafters of the 14th intended that the rights granted under the 14th modified the immunity granted by the 11th. But he did not.

14. 209 U.S. 123 (1908).

15. *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

16. *E.g.*, 28 U.S.C. §§ 1341-1342 (1970) (forbidding federal district court intervention in certain state ratemaking and tax matters); 28 U.S.C. § 2281 (1970) (requiring a three-judge court where an injunction is asked against enforcement of a state statute upon the ground of unconstitutionality); 28 U.S.C. § 2283 (1970) (the Anti-Injunction Statute).

17. In addition to the abstention doctrines discussed later the Supreme Court also developed the rule that a litigant must normally exhaust state administrative remedies before challenging state action in federal court. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

18. There is more than one abstention doctrine. *See generally* C. WRIGHT, FEDERAL COURTS § 52 (1970). In the kind of abstention involved in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), it should be noted that the federal courts do not absolutely decline jurisdiction. The normal procedure is to retain jurisdiction until a decision is received from the state court on the state issues involved. Of this type of abstention, the Supreme Court has stated "this principle does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise." Harrison v. NAACP, 360 U.S. 167, 177 (1959). The resulting delay and expense involved in this type of abstention, however, can effectively render the right to go to federal court illusory. *See* United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965).

19. In addition to the abstention doctrines, there are many other doctrines, not discussed in this introduction, by which the federal courts decline to exercise jurisdiction admittedly present. For instance, discretion to dismiss pendent claims, the discretionary doctrines of justiciability, the doctrine of exclusive primary jurisdiction, and the requirement of exhausting state remedies, all involve the refusal to exercise jurisdiction on policy grounds in various circumstances.

powers.[20] With respect to the other branches where it gives authority in an area, it is not thought to always require exercise of all that authority to preempt state activity in the same area. For instance, the mere existence of the federal legislative commerce clause power does not necessarily preclude state responsibility in the area.[21] The Constitution in fact envisions that state courts may have concurrent responsibility in some constitutional cases,[22] and article III power must be viewed in the context of the overall compromise between legitimate federal and state interests in the creation of a national system of courts. That compromise is not absolutely static, frozen as of 1789. Congress can affect it by legislation, such as the Anti-Injunction Statute.[23] As long as the essential role of the federal courts is preserved, the courts should also be able to administer the compromise with some flexibility in a federal system in flux. Balancing state interests in particular cases against any harm done to the function of the federal courts, the Supreme Court seemingly has opted for a flexible, continuing compromise between state and federal interests rather than an absolute and fixed one.

An example of the Supreme Court's flexible approach is seen in the recent development of the law concerning permissible federal intervention in state criminal proceedings. In 1965, essentially non-violent civil rights demonstrations for racial equality were at their height. It was charged that state officials were using the threat of criminal prosecutions to discourage such protests and that state courts were not protecting federal rights.[24] In this context, the Supreme Court in *Dombrowski v. Pfister*[25] stated that the federal courts could modify the basic rules of equity and federalism prohibiting federal courts from interference with threatened state criminal prosecutions[26] in two circumstances: "where . . . statutes are justifiably attacked on their face as abridging free expression, *or* as applied for the purpose of discouraging protected activities."[27] The alternative ground for intervention when a statute is attacked on its face was new and of significant

20. It is axiomatic, of course, that the federal courts cannot exercise jurisdiction not granted in the Constitution even if granted in a federal statute. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 310 (1809); Marbury v. Madison, 5 U.S. (1 Cranch) 49, 69 (1803).

21. *See* Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

22. *See* U.S. CONST. art. VI.

23. 28 U.S.C. § 2283 (1970). This statute forbids federal injunctions against state proceedings with three limited exceptions. For recent discussions of the exceptions, see Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970); Mitchum v. Foster, 407 U.S. 225 (1972). The Supreme Court has stated its purpose to be "to prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940).

24. *See* Sedler, *The Dombrowski-Type Suit as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 KAN. L. REV. 237, 253-54 (1970).

25. 380 U.S. 479 (1965).

26. *See* Douglas v. City of Jeannette, 319 U.S. 157 (1943).

27. Dombrowski v. Pfister, 380 U.S. 489-90 (1965) (emphasis added).

potential for increased judicial intervention by the lower federal courts.[28] When the peak of such demonstrations had passed, however, the Court in 1971 in *Younger v. Harris*[29] and companion cases[30] "clarified" its earlier holding in *Dombrowski*. Justice Black, speaking for the Court, stated that while some language in *Dombrowski* might lend itself to the interpretation that the Court had substantially broadened the availability of intervention against state criminal prosecution by adding an independent ground for intervention—denominated the "chilling effect"—such language was unnecessary to the opinion and the existence of a chilling effect "should not by itself justify federal intervention."[31] Yet, even in *Younger* and its companion cases, the Court did not draw an absolute line, freezing federal court intervention against overbroad statutes only to situations where plaintiffs could prove bad faith under the heavy standard of *Cameron v. Johnson*.[32] Justice Black left two questions for possible further development: (1) "the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun"[33] and (2) whether "extraordinary circumstances" calling for federal intervention in the future might arise.[34] Further, Justice Brennan, in his opinions in the cases, suggested that declaratory, as opposed to injunctive relief, might be proper where state prosecutions are threatened, but not yet

28. After *Dombrowski*, federal intervention in state matters increased. *See* Sedler, *The Dombrowski-Type Suits as an Effective Weapon for Social Change: Reflections from Without and Within*, 18 KAN. L. REV. 237, 261-62 (1970). The Supreme Court's alarm at the possible overcongestion of the federal courts has certainly affected the Court's decisions in past cases on whether to accept or find jurisdiction. *Cf.* Frothingham v. Mellon, 262 U.S. 447 (1923); Joy v. St. Louis, 201 U.S. 332 (1906). *See* Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

29. 401 U.S. 37 (1971).

30. *See* Byrne v. Karalexis, 401 U.S. 216 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

31. Younger v. Harris, 401 U.S. 50 (1971).

32. 390 U.S. 611 (1968). In *Cameron*, the Court, much to Justice Fortas' chagrin, upheld the trial judge's finding that the state officials were not proceeding in bad faith, stating: "the question was whether the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights." *Id.* at 621.

33. Despite the fact that the Court was interpreting the meaning of a case in which no prosecution was pending, *Dombrowski*, Justice Black said at the beginning of the opinion: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." Younger v. Harris, 401 U.S. 37, 41 (1968).

34. At the end of the opinion, Justice Black stated: "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisite of bad faith and harassment." Justice Black thought that such a circumstance might be found where a statute is " 'flagrantly and patently violative of express constitutional prohibitions.' " He closed: "Other unusual sitations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." Younger v. Harris, 401 U.S. 37, 53-54 (1968).

pending.[35] Together with the holding a year later in *Mitchum v. Foster*[36] that the federal Anti-Injunction Statute is not an *absolute* bar to federal intervention where actions are brought under the Civil Rights Act of 1871,[37] even where state prosecutions are pending,[38] the Court even after *Younger* has left the lower federal courts leeway to intervene where they find a specific situation where federal rights are not adequately protected by state procedures. Thus far, the lower federal courts have not divined exactly where the Supreme Court meant to strike the present balance in the federal-state compromise in this area,[39] probably because the Court itself wanted to have some experience under the *Younger* "system" and time for reflection before drawing any firmer lines.[40]

A Single Step

An "introduction" must remain true to its purpose to set the stage for what follows. This introduction has done little more than describe a few examples of current general doctrines of federal jurisdiction that might appear to be transgressions of Justice Marshall's famous dictum in *Cohens v. Virginia*[41] and suggest that such doctrines are justifiable in terms of the constitutional function of the federal courts. It has been suggested that doctrines such as pendent jurisdiction, federal common law, and abstention are constitutionally permissible without attempting to define their proper scopes.[42] The student developments in the symposium which follows will

35. Perez v. Ledesma, 401 U.S. 82, 93 (1971) (Brennan, J., concurring in part, dissenting in part). Although Justice Black in the Court's opinion in Samuels v. Mackell, 401 U.S. 66, 72 (1971) seemed to express the opinion that declaratory judgments caused the same interference with state affairs as injunctive relief, his holding in that case was limited to the situation where a prosecution was pending.

36. 407 U.S. 225 (1972).

37. 42 U.S.C. § 1983 (1970).

38. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

39. *See* Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973); Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972); Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Y.W.C.A. v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972); Unitarian Church West v. McConnell, 337 F. Supp. 1252 (E.D. Wis. 1972); Kennan v. Nichol, 326 F. Supp. 613 (W.D. Wis. 1971).

40. For an analysis of where the present balance in the federal-state compromise is after Younger, see Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972). For a similar analysis from the viewpoint of its effect on political dissent see Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1 (1972).

41. 19 U.S. (6 Wheat.) 264 (1821).

42. For instance, there are currently a number of interesting problems concerning the proper scope of the doctrines of pendent and ancillary jurisdiction. As to pendent jurisdiction, see Note, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction—Conferring Claim*, 73 COLUM. L. REV. 153 (1973). In the area of ancillary jurisdiction the Supreme Court has recently reviewed *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, — U.S. — (1973). In that case, the Court of Appeals

analyze these and related problems of federal jurisdiction in greater depth. To someone interested in the perception that a new generation of students bring to old but continuing problems, it will be most welcome.

REMOVAL JURISDICTION

The concept of removal jurisdiction is not expressly recognized in any part of the Constitution. It is purely statutory in origin,[43] limited to the transfer of an action from a state court to a federal district court for trial, and "does not embrace the Supreme Court's appellate jurisdiction[44] over state courts."[45] The right of a defendant, in a proper case, to remove the proceedings from a state to a federal court has existed since the passage of the first judiciary act in 1789.[46] The removal statutes have, however, been strictly construed against the removing party.[47]

The jurisdiction which the federal district court acquires upon removal may be described as derivative of state jurisdiction[48] and parallel to the federal court's original jurisdiction.[49] If the state court lacks jurisdiction over the subject matter or parties, the federal district court acquires none upon removal.[50] Even if the federal court would have assumed jurisdiction

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for the Second Circuit held that where named plaintiffs each met the jurisdictional amount requirement of 28 U.S.C. § 1332(a) (1970) but the unnamed members of the class did not, the trial court was correct in refusing jurisdiction over the class proposed and striking all references in the complaint to persons other than the four named plaintiffs. Judge Timbers dissented, arguing that there should be ancillary jurisdiction over the claims of the unnamed class members and that the majority's view severely impaired the use of federal class actions. *Id.* at 1037.

43. Kentucky v. Powers, 201 U.S. 1, 24 (1905).

44. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333 (1816). In *Hunter's Lessee* Chief Justice Story refers to the jurisdiction as both appellate and original reasoning that "there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other." *Id.* at 333. However, it is important to note that the general removal provision, 28 U.S.C. § 1441 (1970) is keyed to original jurisdiction.

45. 1A J. MOORE, FEDERAL PRACTICE § 0.157, at 71 (2d ed. 1965).

46. Act of September 24, 1789, 1 Stat. 73, *as amended* 28 U.S.C. § 1441 (1970). Section 12 of that act provided the requisites for removal, the nature of the suit, the amount in controversy and the defendant as the removing party.

47. *E.g.*, City of Greenwood v. Peacock, 384 U.S. 808 (1966); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); City of Birmingham v. Crosbey, 217 F. Supp. 947, 950 (N.D. Ala. 1963); Rand v. Arkansas, 191 F. Supp. 20 (W.D. Ark. 1961). An exception to this strict construction is found in that area dealing with federal officers, *see* p. 501 *infra*.

48. Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).

49. Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270 (1871). In that case the defense counsel questioned the reasoning of Mr. Justice Story in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). The Court agreed with counsel and intimated that removal was a source of original jurisdiction. Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270, 287 (1871).

50. Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922); *see* General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 288 (1922); Courtney v. Pradt, 196 U.S. 89, 92 (1905).

had the suit been initiated there, such jurisdiction cannot be invoked in a removal proceeding.[51] Thus, upon removal, the federal court must dismiss a case brought in a state court if it is one over which the federal court maintains exclusive jurisdiction.[52] The case cannot be remanded to the state court and the litigants are burdened with the task of re-instituting the action in the federal court.[53]

There are a number of provisions in the Judicial Code governing removal jurisdiction.[54] The most important of these are sections 1441,[55] and 1442,[56] and in more recent years, section 1443.[57]

Section 1441

One must necessarily examine the applicable sections of the Code, and in so doing will understand the subtleties involved in removal proceedings. Section 1441 consolidated previous removal provisions[58] and was drafted to resolve existing statutory ambiguities and conflicts in court decisions.[59] The statute provides that:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
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> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues

51. Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).
52. C. WRIGHT, FEDERAL COURTS § 38, at 131 (2d ed. 1970).
53. *Id.* at 132.
54. *E.g.*, 28 U.S.C. §§ 1332 (establishing jurisdictional amount), 1441, 1442, 1443, 1444 (foreclosure actions), 1445 (nonremovable actions), 1446 (procedure for removal) and 1447 (procedure after removal) (1970).
55. 28 U.S.C. § 1441 (1970).
56. 28 U.S.C. § 1442 (1970).
57. 28 U.S.C. § 1443 (1970).
58. Act of March 3, 1911, ch. 231, §§ 28, 53, 36 Stat. 1094, 1101; Act of January 20, 1914, ch. 11, 38 Stat. 278; Act of January 31, 1928, ch. 14, § 1, 45 Stat. 54, *as amended* 28 U.S.C. § 71 (1940).
59. 28 U.S.C. § 1441 (1970) (Revisor's Notes); Johnson v. Butler Bros., 162 F.2d 87, 89 (8th Cir. 1947) collecting cases sustaining and denying removal petitions.

> therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.[60]

This section is primarily concerned with those cases "of which the district courts of the United States have original jurisdiction . . . ."[61]

Subsection (a) governs the venue of removal actions, expressly providing that venue lies in "the district court of the United States for the district . . . embracing the place where such action is pending."[62] Even though this subsection imposes the requirement of original federal jurisdiction, the state and federal courts must have concurrent jurisdiction or the case will be dismissed.[63] Subsection (a) also provides that the action "may be removed by the defendant or the defendants . . . ."[64] The obvious purpose in limiting the right of removal to the defendants was to restrict the plaintiff who had the initial choice of forum.[65] Such a restriction is a viable and practical means of avoiding a multiplicity of suits.

In diversity situations, subsections (a) and (b) must be jointly construed, and the case must qualify for removal under both provisions or be remanded to the state court.[66] Even though diversity exists which would grant a federal court original jurisdiction as required in subsection (a), subsection (b) is limiting in that the action is removable "only if *none* of the parties in interest properly joined and served as defendants is a citizen[67] of the State in which such action is brought."[68] The question which logically emerges is what is the effect upon removal if the plaintiff adds additional

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60. 28 U.S.C. § 1441 (1970).

61. 28 U.S.C. § 1441(a) (1970). It is beyond the scope of this paper to discuss each removal provision. Attention is directed, however, to 28 U.S.C. § 1332(a) (1970), which states that a controversy must be an amount in excess of $10,000 before it is properly removed. 28 U.S.C. § 1332(a) (1970).

62. 28 U.S.C. § 1441(a) (1970).

63. Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922).

64. 28 U.S.C. § 1441(a) (1970).

65. Victorias Milling Co. v. Hugo Neu Corp., 196 F. Supp. 64, 68 (S.D.N.Y. 1961). It is interesting to note that the right was not always restricted to the defendant. During the period from 1875 to 1887 either party was entitled to remove. Act of March 3, 1895, ch. 137, § 2, 18 Stat. 470; Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104-105 (1941) (the Court referring to the period of 1875 to 1887).

66. Monroe v. United Carbon Co., 196 F.2d 455 (5th Cir. 1952); Eriksen v. Moore Mill & Lumber Co., 157 F. Supp. 888 (D. Ore. 1958); *cf.* Crispin Co. v. Lykes Bros. S.S. Co., 134 F. Supp. 704 (S.D. Tex. 1955). In one instance the court relied on section 1441(a) and did not consider the effect of section 1441(b). Crispin Co. v. Lykes Bros. S.S. Co., 134 F. Supp. 704 (S.D. Tex. 1955).

67. Subsection (b) eliminated the confusion which existed in earlier provisions limiting the right of removal to nonresidents. Act of March 3, 1911, ch. 231, §§ 28, 53, 36 Stat. 1094, 1101; Act of January 20, 1914, ch. 11, 38 Stat. 278; Act of January 31, 1928, ch. 14, § 1, 45 Stat. 54, *as amended* 28 U.S.C. § 71(1940). In those provisions there was doubt whether nonresidents meant something different from non-citizens. Section 1441(b) limits removal only where a defendant is a citizen of the state.

68. 28 U.S.C. § 1441(b) (1970).

defendants who destroy diversity. The rule disallowing a plaintiff to defeat jurisdiction through his own *ex parte* action may properly be applied.[69]

The concurrent construction of these subsections in diversity suits is the result of practical considerations. If removal were allowed solely on the basis of the citizenship requirement established by the "original jurisdiction" language of section 1441(a), federal removal jurisdiction would be substantially broadened. Such a construction is clearly contrary to the trend of court decisions.[70] Furthermore, treating section 1441(a) as an independent basis for removal renders section 1441(b) a nullity;[71] the restriction of a defendant's citizenship established by section (b) is a control placed on the diversity jurisdiction of the federal courts and it should be construed to effectuate that result.

But where a state civil action is founded on a federal claim or right falling within the district court's original jurisdiction,[72] citizenship or residence of the parties is immaterial to removal. "This is proper because it is the federal nature of the claim, and not the character of the parties as in diversity cases, that is the basis of removal."[73]

Subsection (c) apparently enlarges the scope of removal jurisdiction by permitting "joinder," although the congressional intent was to restrict the removability of cases.[74] The purpose of subsection (c) was to decrease the volume of federal litigation by refusing the removal of a separable controversy, unless such controversy constituted a *separate and independent* cause of action.[75] This phrase has been interpreted "as an expression of congressional intent that there should be a complete absence of underlying connection between the claims in order to have removal."[76] The leading case in this area, *American Fire & Casualty Co. v. Finn*,[77] involved an ac-

69. 1A J. MOORE, FEDERAL PRACTICE § 0.161 [1], at 530 (2d ed. 1965).

70. In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969); *see* West Virginia State Bar v. Bostic, 351 F. Supp. 1118, 1120 (S.D.W. Va. 1972); Garrett v. Bankers Life & Cas. Co., 334 F. Supp. 368, 369 (S.D. Tex. 1971); Helms v. Ehe, 279 F. Supp. 132, 133 (S.D. Tex. 1968).

71. Eriksen v. Moore Mill & Lumber Co., 157 F. Supp. 888, 890 (D. Ore. 1958).

72. In some situations the district court's removal jurisdiction is narrower than its original jurisdiction. This is seen in diversity cases which may not be removed if the defendant is a citizen of the state where the action is brought. C. WRIGHT, FEDERAL COURTS § 38, at 133 (1970); Finn v. American Fire & Cas. Co., 207 F.2d 113, 115 (7th Cir.), *cert. denied*, 347 U.S. 912 (1953).

73. 1A J. MOORE, FEDERAL PRACTICE § 0.160, at 471 (2d ed. 1965).

74. *E.g.*, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 10 (1951); United Founders Life Ins. Co. v. Blackhawk Holding Corp., 341 F. Supp. 483, 485 (E.D. Wis. 1972).

75. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 11 (1951); *see* Young Spring & Wire Corp. v. American Guar. & Liab. Ins. Co., 220 F. Supp. 222, 229-30 (W.D. Mo. 1963).

76. Note, 49 MICH. L. REV. 1236, 1238 (1951); *see* American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951).

77. 341 U.S. 6 (1951). This case has been the subject of extensive comment; *e.g.*,

tion brought in a Texas state court against two foreign insurance companies and their mutual agent, who was a citizen of Texas. Plaintiff sought damages for a fire loss on property supposedly insured alleging that liability lay among the three defendants and pleading alternate theories under which each would be liable. After removal by the nonresident companies, the plaintiff obtained a favorable judgment against one of them, but no formal judgment was entered with respect to the other two defendants.[78] On appeal to the United States Supreme Court the defendant successfully contended that the controversy was not a proper subject for removal.[79] In construing section 1441(c) the Court stated that the addition of the word "independent" was to give "emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in the state courts . . . ."[80] In remanding the case to the state forum, the Court reiterated its position of strict construction and sought to narrow the interpretation of section 1441(c).[81]

The *Finn* decision also raises an important collateral question: where the defendant has invoked the federal jurisdiction, can he be heard to complain of an adverse judgment on the basis of a procedural error in obtaining it? The defendant in *Finn* was allowed to do precisely this.[82] The dissent in *Finn* employed the concept of "jurisdiction by estoppel,"[83] a creature unique to removal. The theory is that once the defendant has invoked the jurisdiction of the federal court, he should not be heard to complain of improper removal upon receipt of an adverse judgment.[84] The position of the dissent is more logical than that of the *Finn* majority which allows a remand to state court, after which, the plaintiff may sue the defendants individually in the federal court.[85] The result of *Finn* is that the multiplicity of suits, sought to be avoided by section 1441(c), is compounded.[86]

Section 1442

Also pertinent is section 1442 which provides for the removal of a state

Note, 50 MICH. L. REV. 475 (1952); Note, 49 MICH. L. REV. 1236 (1951); Note, 100 U. PA. L. REV. 277 (1951); Note, 30 TEXAS L. REV. 372 (1952).

78. American Fire & Cas. Co. v. Finn, 181 F.2d 845 (5th Cir.), *rev'd*, 341 U.S. 6 (1950), *on remand* 207 F.2d 113 (7th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

79. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 11 (1951).

80. *Id.* at 12.

81. *Id.* at 18.

82. *Id.* at 16-18. The Court reasoned that the removal would be a wrongful extension of federal jurisdiction. *Id.* at 16-18.

83. *Id.* at 21 (Douglas, Black, and Minton, J.J., dissenting); Baggs v. Martin, 179 U.S. 206 (1900). The majority argued that the suit was not one which could originally have been removed. But "[a]ny requirement of § 1441(c) that was not met . . . rose no . . . higher than an irregularity, so far as the petitioner is concerned." American Fire & Cas. Co. v. Finn, 341 U.S. 6, 21 (1951).

84. Note, 30 TEXAS L. REV. 372, 374 (1952).

85. Amerian Fire & Cas. Co. v. Finn, 341 U.S. 6, 18-19 (1951).

86. C. WRIGHT, FEDERAL COURTS § 39 (2d ed. 1970).

civil or criminal prosecution brought against an officer of the United States for "any act [done] under color of such office or on account of any right, title or authority claimed under any Act of Congress . . . ."[87] The focal point of this section is subsection (a)(1). It was designed "to prevent federal officers or those acting at their direction from being held accountable in state courts for acts done within the scope of their federal duties."[88]

The predecessor of section 1442[89] was enacted as a result of an attempt by the State of Tennessee to make the collection of duties under federal tariff law a criminal offense.[90] In a case adjudicating that statute Justice Strong emphasized its purpose:

> [W]hen [the statute] speaks [of removal] of criminal prosecutions in State courts, it must intend those that are instituted for alleged violations of State laws, in which defences are set up or claimed under United States laws or authority.[91]

In earlier decisions, the courts were inclined to interpret section 1442 (a)(1) strictly.[92] The opinion by Chief Justice Taft in *Maryland v. Soper*[93] was often used as a test for removal:

> In order to justify so exceptional a procedure, the person seeking the benefit of it should be *candid, specific* and *positive* in explaining his relation to the transaction . . . and in showing that his relation to it was confined to his acts as an officer.[94]

This supports the traditional view of strict construction as well as notes that removal is an "exceptional procedure."[95] The burden was clearly upon the person who claimed the removal.[96]

The modern trend, however, is to construe the statute liberally.[97] The leading case indicating such liberality is *Willingham v. Morgan.*[98] Here, a

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87. 28 U.S.C. § 1442 (1970). The section protects officers of the United States or any agency thereof and any officer of the House or Senate. 28 U.S.C. § 1442(a) was designed to specifically protect the military.

88. Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841, 843 (S.D.N.Y. 1973).

89. § 643 REV. STAT. (1874).

90. Tennessee v. Davis, 100 U.S. 257 (1879). In that case the defendant was a revenue agent. In the course of his employment he was confronted by a group of citizens engaged in distilling alcohol. In self defense he shot one of the men confronting him. Defendant sought removal on the ground of section 643 of the *Revised Statutes.*

91. *Id.* at 262.

92. *E.g.,* Maryland v. Soper, 270 U.S. 9 (1926); Johnson v. Wells Fargo & Co., 98 F. 3 (C.C.N.D. Cal. 1899); Fink v. Gerrish, 149 F. Supp. 915 (S.D.N.Y. 1957).

93. 270 U.S. 9 (1926).

94. *Id.* at 35 (emphasis added).

95. *Id.* at 35.

96. Colorado v. Symes, 286 U.S. 510, 518 (1932). This is a later case and clearly indicates that the dictum of Justice Taft was followed.

97. *E.g.,* Willingham v. Morgan, 395 U.S. 402 (1969); Texas v. National Bank of Commerce, 290 F.2d 229 (5th Cir.), *cert. denied,* 368 U.S. 832 (1961); Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841 (S.D.N.Y. 1973).

98. 395 U.S 402 (1969).

prisoner in the federal penitentiary at Leavenworth, Kansas, filed suit in a state court against the warden and chief medical examiner alleging that they had innoculated him with "a deleterious foreign substance" and had assaulted, beaten and tortured him in various ways. The defendants sought to have the cause removed to a federal court. In affirming this right the Supreme Court noted that the statute is "at the very least . . . broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law."[99] *Morgan* affirms the notion that the test for removal should be broader than that for official immunity in view of the purpose of the statute to protect federal officers from interference by hostile state courts.[100] In justification of its holding, the Court stated that the petitioners could not possibly have been "candid, specific and positive" because the respondent had filed a "scattergun" petition.[101] The Court intimated that had this been a criminal case the requirements for removal might be more stringent,[102] but unfortunately no elaboration was provided. The Court apparently reasoned that there is a compelling "state interest in conducting criminal trials in the state courts."[103] Section 1442(a)(1) is the only part of removal jurisdiction which has been expanded by the courts. It can be theorized that the liberal construction is the product of a nation of agencies, acting under auspices of federal authority and seeking the protection of the federal forum.[104]

Section 1442

Section 1443[105] concerns civil rights cases and its primary purpose is to prevent invidious discrimination under local ordinances, statutes or constitutions.[106] The section states that any civil or criminal prosecution may be removed by the defendant:

> (1) [W]ho is denied or cannot enforce . . . a right under any law providing for the equal civil rights of citizens of the United States . . .,
>
> (2) For any act under color of authority derived from any law providing for equal rights . . . .[107]

99. *Id.* at 406-07.
100. *Id.* at 405.
101. *Id.* at 408.
102. *Id.* at 409 n.4.
103. *Id.* at 409 n.4.
104. *See* Willingham v. Morgan, 395 U.S. 402, 405 (1969); Tennessee v. Davis, 100 U.S. 257, 263 (1879); Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841, 843 (S.D.N.Y. 1973); United States v. Penney, 320 F. Supp. 1396 (D.D.C. 1970).
105. For an excellent comprehensive and historical analysis of this section, see Comment, *Federal Removal and Injunction to Protect Political Expression and Racial Equality: A Proposed Change*, 57 CALIF. L. REV. 694, 710 n.81 (1969).
106. Walker v. State, 417 F.2d 5 (5th Cir. 1969); Poore v. State, 243 F. Supp. 777 (N.D. Ohio 1965), *aff'd*, 206 F.2d 33 (6th Cir. 1966).
107. 28 U.S.C. § 1443 (1970). The predecessor of this section was section 641

Two early Supreme Court decisions formulated the standards to be applied in civil rights cases.[108] In *Strauder v. West Virginia*,[109] the petitioner, a Black, sought removal because a West Virginia statute denied Blacks the right to serve on either the grand or petit juries. The Court allowed the petitioner to remove because he was being denied a right guaranteed by the United States Constitution and this denial was manifest in a formal expression of state law.[110] The second removal decision, *Virginia v. Rives*,[111] was decided on the same day as *Strauder*. In this case petitioners, both Blacks, had been jointly indicted for murder. They sought removal primarily because of existing prejudice demonstrated by the absence of Black jurors. They contended that judgment by white peers was a denial of 14th amendment guarantees. Their petition was refused because it did not allege a denial of rights manifested in a formal expression of state law. The court referred the defendants in this case to "the revisory power of the higher courts of the State" with ultimate appeal to the Supreme Court.[112] *Strauder* and *Rives* dictate that removal is not warranted simply by an allegation that a denial of rights may occur at the trial, but will be warranted "*only* if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts."[113]

Accordingly, under section 1443, the defendant must show first, that he is denied or cannot enforce his rights in a state court and secondly, that these are civil rights guaranteed to all citizens of the United States.[114] Confusion appears to exist in the first requirement,[115] evidenced by two recent cases.[116]

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of the *Revised Statutes* of 1874. Although both subsections to section 1443 concern federal law protecting equal civil rights, the subsections operate on different principles. Subsection (1) will be fully developed in this text. In subsection (2) a defendant need only show that he is "colorably" protected by federal law. Tennessee v. Davis, 100 U.S. 257 (1879). For a scholarly discussion of these provisions see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 851-82 (1965).

108. Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879).

109. 100 U.S. 303 (1879).

110. *Id.* at 310-11.

111. 100 U.S. 313 (1879).

112. *Id.* at 319.

113. Georgia v. Rachel, 384 U.S. 780, 800 (1966) (emphasis added). The doctrine laid down in *Strauder* and *Rives* was expanded in Neal v. Delaware, 103 U.S. 370 (1880) and Bush v. Kentucky, 107 U.S. 110 (1882). Because of a policy of racial discrimination, both cases were removed. The Court voted, however, that a pretrial removal petition alleging such discrimination stated no ground for removal.

114. Heebe, *Removal of State Criminal Prosecutions to Federal Courts—Comments on City of Greenwood v. Peacock and Georgia v. Rachel*, 13 LOYOLA L. REV. 57, 59 (1966-67).

115. *Id.* at 60.

116. Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966).

In *Georgia v. Rachel*,[117] the petitioner was charged with failure to leave a place of business upon the owner's request, a misdemeanor under local law. He thereupon successfully removed the action to the federal district court on the basis that the local law was discriminatory and a violation of equal rights.[118] Following the *Strauder-Rives* doctrine, *Rachel* dictated that a denial of rights in the state court must be capable of prediction.[119] This requirement will not be met unless the defendant can show that he will be denied rights in *each and every state court*.[120] The "each and every state court" requirement has been referred to as "unfortunate phraseology,"[121] and it may be more appropriate to say that the requirement will be met when it can be *firmly predicted* that the defendant will be denied his rights in each state court through which his case would pass.[122]

In another case[123] the Court denied the right of removal to the petitioners, Blacks involved in a voter registration drive, who were arrested for minor infractions of a local ordinance—a law which they alleged to be so vague as to deny them their civil rights. The Court distinguished this case from *Rachel* because the right to obstruct a public place was not absolute and, therefore, not entitled to federal protection.[124] Unfortunately, as in the earlier cases, the Court scrutinized only the law and not its inequitable application, and left the defendants to the traditional remedy: vindication of federal claims on review by the Supreme Court.[125] These decisions do establish a "firm prediction" requirement as well as enforce the Court's adherence to the *Strauder-Rives* doctrine.

Although primarily applied in cases of racial equality,[126] removal under

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117. 384 U.S. 780 (1966).

118. *Id.* at 785. It is important to note that while the case was pending on appeal in the court of appeals the Civil Rights Act of 1964 was enacted and the petitioners relied heavily on a specific provision. It was this reliance which led to a successful removal.

119. Georgia v. Rachel, 384 U.S. 780, 800 (1966).

120. *Id.* *See* Heebe, *Removal of State Criminal Prosecutions to Federal Courts—Comments on City of Greenwood v. Peacock and Georgia v. Rachel*, 13 LOYOLA L. REV. 57, 60 (1966-67).

121. Heebe, *Removal of State Criminal Prosecutions to Federal Courts—Comments on City of Greenwood v. Peacock and Georgia v. Rachel*, 13 LOYOLA L. REV. 57, 60 (1966-67).

122. *Id.* In *Rives* the Court stated that "[w]hen he has only an apprehension that such rights will be withheld from him . . . he cannot affirm that they are actually denied . . . . Yet such an affirmation is essential to his right to remove his case." Virginia v. Rives, 100 U.S. 313, 320 (1879); *accord*, Georgia v. Rachel, 384 U.S. 780, 799 (1966).

123. City of Greenwood v. Peacock, 384 U.S. 808 (1966).

124. *Id.* at 826.

125. Section 1443 had not been of great significance until the adoption of the Civil Rights Act of 1964.

126. Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); New York v. Galamison, 342 F.2d 255 (2d Cir. 1965); City of Birmingham v. Crosbey, 217 F. Supp. 947 (N.D. Ala. 1963). It is imperative that the

section 1443 has been attempted by defendants in other criminal proceedings.[127] A leading decision in this area is *Rand v. Arkansas*[128] where the defendant was indicted for and convicted of murder in the second degree. The defendant's petition for removal alleged that she would be denied her constitutional right to trial by an impartial jury because the case had been highly publicized. The federal district court denied removal and remanded the litigation to the state court reasoning that it could not "determine *in advance of the trial* whether a wrong [will occur] so fundamental that it will make the whole proceeding a mere pretense of a trial and render any conviction and sentence wholly void . . . ."[129] The mere maladministration of local laws by local officials will not warrant a removal,[130] nor will illegal, corrupt or prejudicial acts of such officials suffice.[131] The requirement of firm prediction does serve "the principle of duality within the federal scheme by severely limiting the occasions upon which federal courts will interfere in a state criminal proceeding."[132] Although the Supreme Court has stated that there is a more compelling state interest involved in criminal proceedings,[133] identical standards have been applied.[134]

Judicial interpretation of the statutes concerning removal jurisdiction has been highly restrictive except in that area dealing with federal officers. Such a severe policy may be grounded in several practical considerations.[135] If a defendant is allowed to remove in a doubtful case, he may attack the validity of the removal action after receiving an adverse judgment.[136] The courts have construed the statutes strictly against the removing party to

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reader realize another limitation imposed by *Rachel.* This concerns the Supreme Court's determination that the removal for the protection of civil rights applies only to laws of specific civil rights which are stated in terms of racial equality, and not to the whole gamut of constitutional rights. Georgia v. Rachel, 384 U.S. 780 (1966).

127. *E.g.* Tamasino v. California, 451 F.2d 176 (9th Cir. 1971), *cert. denied,* 406 U.S. 926 (1972) (removal denied where defendant challenged arbitrary imposition of sentencing); Schneider v. California, 427 F.2d 1178 (9th Cir. 1970) (removal denied because no federal law required two persons convicted of the same crime to receive identical sentences); West Virginia State Bar v. Bostic, 351 F. Supp. 1118 (S.D.W. Va. 1972) (removal denied because the petition alleged no racial overtones and because there was no indication that federal rights would not be protected in the state court).

128. 191 F. Supp. 20 (W.D. Ark. 1961). Although decided prior to the "racial equality" criteria set out in *Rachel, Rand* is still a viable instructional aid to the bar.

129. *Id.* at 26 (emphasis added).

130. Arkansas v. Howard, 218 F. Supp. 626, 630 (E.D. Ark. 1963).

131. Van Newkirk v. District Att'y, 213 F. Supp. 61, 62 (E.D.N.Y. 1963).

132. Comment, *Federal Removal and Injunction to Protect Political Expression and Racial Equality: A Proposed Change,* 57 CALIF. L. REV. 694, 715 (1969). The author of this article coined the term "advance certainty barrier" to replace "firm prediction."

133. Willingham v. Morgan, 395 U.S. 402, 409 n.4 (1969).

134. *E.g.,* City of Greenwood v. Peacock, 384 U.S. 808 (1966); Orleans Materials & Equip. Co. v. Isthmian Lines, Inc., 218 F. Supp. 322 (E.D. La. 1963).

135. Young Spring & Wire Corp. v. American Guar. & Liab. Ins. Co., 220 F. Supp. 222 (W.D. Mo. 1963).

136. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951).

avoid such an occurrence. The better solution would be to estop a defendant from denying the courts' jurisdiction once he has invoked it.[137] Another consideration is that removal jurisdiction is an infringement on state sovereignty. But the advent of the *Erie* doctrine,[138] requiring federal courts to apply state substantive law in deciding non-federal issues, "has largely eliminated jockeying for a federal . . . forum to obtain an advantage in the applicable substantive law."[139] To refuse removal on the ground that it is an infringement would nullify its utility.

The least valid reason for strict construction is to relieve the congestion in the federal courts,[140] but a federal fact-finding forum is indispensable to effectively enforce Constitutional guarantees against local action.[141] A litigant endangered by the deprivation of a federal right should be entitled to the protection of the federal forum. The equity achieved justifies any resultant congestion. Clarification and simplification of the provisions would more effectively enable defendants to utilize federal remedies unavailable at the state level.

Often involved in removal proceedings are the related concepts of ancillary and pendent jurisdiction. Both terms identify means of conferring federal jurisdiction over matters which, if independently pleaded, would be outside the purview of the federal court.[142] Although the distinction between these two doctrines is somewhat less than clear,[143] ancillary jurisdiction is often invoked by defendants and intervening third parties, while pendent jurisdiction may be limited to plaintiffs' joinder of state and federal claims in a single suit.[144]

ANCILLARY JURISDICTION

Ancillary jurisdiction is based upon the premise that a court which appropriately has jurisdiction over the subject matter under litigation, may assume jurisdiction over collateral issues raised by the case, even though such issues would be denied federal court consideration if independently

137. *Id.* at 21 (Douglas, Black and Minton, J.J., dissenting); Baggs v. Martin, 179 U.S. 206 (1900).

138. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

139. 1A J. MOORE, FEDERAL PRACTICE § 0.157[13], at 386 (2d ed. 1965).

140. *See generally* City of Greenwood v. Peacock, 384 U.S. 808 (1966) where Justice Stewart argues that a relaxation of the statutes will lead to an onslaught of petitions.

141. City of Greenwood v. Peacock, 384 U.S. 808, 840 (1966) (Douglas, J., dissenting).

142. C. WRIGHT, FEDERAL COURTS §§ 9, 19 (1970).

143. *Id.* §§ 9, 19. *See* Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970). *Compare* United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (pendent jurisdiction), *with* Sheppard v. Atlantic States Gas Co., 167 F.2d 841 (3d Cir. 1948) (ancillary jurisdiction).

144. C. WRIGHT, FEDERAL COURTS, § 19 (1970).

initiated.[145] Ancillary controversies are "auxiliary, accessorial or subordinate" to the principal cause of action.[146] Therefore, if a federal court has assumed jurisdiction over the main subject matter, the ancillary action need not satisfy the requisites of jurisdictional amount[147] or diversity of citizenship.[148] The reasons for ancillary jurisdiction seem clear: it allows the court to render a decision that includes all pertinent areas; and further, it abrogates the need for subsequent litigation on matters subordinate to the primary federal claim. This dual purpose was reaffirmed by Justice Sutherland in *Local Loan Co. v. Hunt*[149] where it was stated: That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled."[150]

At its inception, the doctrine of ancillary jurisdiction developed as a "functional necessity" born of judicial confusion.[151] On the one hand, equity demanded that the courts devise a method of adjudication disposing of all parties and issues in the suit.[152] On the other hand, the law seemed to preclude the exercise of federal court jurisdiction in areas not specifically authorized by the United States Constitution.[153] As a result, courts were reluctant to reach final judgments, and soon became ridden with a multiplicity of suits.[154] In light of this dilemma, a clarification of when jurisdiction should be exercised over matters ancillary to the main cause was deemed necessary.[155]

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145. Walmac Co. v. Isaacs, 220 F.2d 108, 113-14 (1st Cir. 1955). *See* Dugas v. American Surety Co., 300 U.S. 414, 428 (1937). *See also* FED. R. CIV. P. 13(a), (b), (g), (h), 14.

146. Glens Falls Indem. Co. v. United States, 229 F.2d 370, 373-74 (9th Cir. 1956).

147. Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969); Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720, 723 (4th Cir. 1943).

148. Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720 (4th Cir. 1943). The court in describing ancillary jurisdiction stated, "Ancillary jurisdiction exists in order that the court may do *complete justice* in the chief controversy." *Id.* at 723 (emphasis added).

149. 292 U.S. 234 (1934).

150. *Id.* at 239.

151. *See* Wichita R.R. & Light Co. v. Public Util. Comm'n., 260 U.S. 48, 54 (1922); Note, 11 OKLA. L. REV. 326 (1958).

152. *See, e.g.*, Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720 (4th Cir. 1943); Dillion v. Berg, 347 F. Supp. 517 (D. Del. 1972); Wilgus v. Peterson, 335 F. Supp. 1385 (D. Del. 1972).

153. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1331(a) (1970).

154. *See, e.g.*, Dugas v. American Surety Co., 300 U.S. 414, 428 (1937); Hoffman v. McClelland, 264 U.S. 552, 558 (1924). *See also* Note, *The Ancillary Concept & The Federal Rules*, 64 HARV. L. REV. 968 (1951); Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963).

155. *See* Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969); Walmac v. Isaacs, 220 F.2d 108 (1st Cir. 1955).

In *Morrow v. District of Columbia*,[156] the court acknowledged the importance of extending ancillary jurisdiction to insure that its decision, as well as those of all federal courts, be given their "full effect."[157] In so doing, the court established four broad criteria for determining the circumstances in which the exercise of ancillary jurisdiction was appropriate: first, if the ancillary matter arose from, or was an integral part of the main matter; second, if the collateral claim could be determined without a substantially new fact finding proceeding; third, if determination of the ancillary matter would not deprive a defendant of his procedural or substantive rights; and fourth, if settling the ancillary matter would protect the integrity of the main proceeding or insure that its disposition would not be frustrated.[158] Other federal courts, while using criteria similar to those discussed in *Morrow,* have limited the application of the doctrine to more narrowly defined situations—first, one in which the proceeding may affect property already in the possession or control of a federal court, and second, where the subject matter is concerned with procedures used by the court to expedite litigation.[159]

The exercise of ancillary jurisdiction by federal courts is often found where claims are made against property involved in a federal controversy. In order for such a claim to be regarded as ancillary, it must bear a direct relation to property or assets, actually or constructively drawn into the court's possession by the principal suit.[160] In the absence of this relationship, any attempt to have the property issue considered along with the main cause of action will be declared void.[161] Further, the Supreme Court has held that a claim made upon property must be entertained on independent jurisdictional grounds if the court has not yet obtained the requisite control.[162]

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156. 417 F.2d 728 (D.C. Cir. 1969).

157. *Id.* at 740.

158. *Id.* at 740. *See generally* Wilgus v. Peterson, 335 F. Supp. 1385, 1388-89 (D. Del. 1972).

159. *E.g.*, Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720, 723 (4th Cir. 1943).

160. *See* Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925); Oils Inc. v. Blankenship, 145 F.2d 354, 356 (10th Cir. 1944), *cert. denied,* 323 U.S. 803 (1945); Barnett v. Mayes, 43 F.2d 521, 527 (10th Cir. 1930).

161. *See* Hoffman v. McClelland, 264 U.S. 552 (1924); Oils Inc. v. Blankenship, 145 F.2d 354 (10th Cir. 1944), *cert. denied,* 323 U.S. 803 (1945).

162. Hoffman v. McClelland, 264 U.S. 552 (1924). The Court, however, explained that:

> It is settled that where in the progress of a suit in a Federal Court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property
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> . . . .

Id. at 558. *See also* Oklahoma v. Texas, 258 U.S. 574, 581 (1922); Krippendorf v. Hyde, 110 U.S. 276, 281 (1884); Dery v. Wyer, 265 F.2d 804, 807 (2d Cir. 1959); McComb v. McCormack, 159 F.2d 219, 226 (5th Cir. 1947).

One of the first cases to illustrate the application of ancillary jurisdiction over the property or *res* was *Freeman v. Howe*.[163] Plaintiff, a resident of New Hampshire, brought an action in federal court to recover a debt against defendant railroad company, a corporation based in Massachusetts. Pending judgment, Freeman, a United States marshal, attached a number of defendant's railroad cars as security for the debt. At the same time, the mortgagees of the railroad company, who were also citizens of Massachusetts, brought suit in state court to recover the attached property. The state court judge issued a writ ordering Freeman to surrender the railroad cars and Freeman appealed.[164] The United States Supreme Court concluded that a state court has no jurisdiction over property previously attached by a federal court.[165] It specifically emphasized that other courts are powerless to adjudicate any claim which may interfere with or invade the possession of such property.[166] To alleviate any undue hardship which may otherwise occur, the court lawfully acquiring such property has the authority to adjudicate all questions with respect to its title, possession and control.[167]

The most significant aspect of the decision in *Freeman* was the Court's response to the mortgagees' argument that denial of state court intervention would amount to a denial of their only form of equitable relief.

> The principle is, that a bill filed in the equity side of the court to restrain or regulate judgments or suits at law in the same court . . . is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.[168]

Here the parties to the second suit failed to obtain the required diversity of citizenship necessary to invoke the original jurisdiction of a federal court. By filing a bill on the equity side of the federal court from which the process of attachment issued, however, the exercise of ancillary jurisdiction would have been justified by the need to provide an adequate and imme-

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163. 65 U.S. (24 How.) 450 (1860).

164. *Id.* at 453.

165. *Id.* at 457-58.

166. *Id.* at 457-58.

167. *Id.* at 457. In *Freeman* the Court also quoted from Mr. Justice Grier in Peck v. Jenness, 48 U.S. (7 How.) 612, 624-25 (1849),

> It is a doctrine of law too long established to require citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court.

See Murphy v. John Hofman Co., 211 U.S. 562 (1909); Wabash R.R. v. Adelbert College, 208 U.S. 38 (1908); Oliver v. United States, 156 F.2d 281 (8th Cir. 1946). *See generally* Jacobs v. De Shetler, 465 F.2d 840 (6th Cir. 1972); Chicago R.I. & P. Ry. v. City of Owatonna, 120 F.2d 226 (8th Cir. 1941).

168. Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860).

diate forum for a claim against property already within the court's lawful control.[169]

In addition to the exercise of ancillary jurisdiction over the *res*, several procedural devices require the employment of ancillary jurisdiction to facilitate the complete and equitable disposition of cases by the federal courts. Although this aspect of ancillary jurisdiction lacks any specific foundation in prior statutory law, several of the Federal Rules of Civil Procedure have, for all practical purposes, provided the necessary framework.[170] The most frequently used devices intended to smooth procedural matters are those regulating compulsory counterclaims,[171] cross-claims,[172] joinder of parties[173] and impleaders.[174]

Rule 13(a) involving compulsory counterclaims[175] requires a party to plead a counterclaim against a plaintiff if such claim arises from the same occurrence or transaction.[176] The scope of Rule 13(a) has been defined by the courts[177] on the basis of an expansion of ancillary jurisdiction as set out by the decision in *Moore v. New York Cotton Exchange*.[178] In *Moore*, the plaintiff, president of the Odd-Lot Cotton Exchange of New York, brought suit against defendant alleging certain anti-trust violations. The defendant filed a compulsory counterclaim seeking injunctive relief.[179] The lower court dismissed the federal claim on its merits, and also dismissed defendant's counterclaim because such action was typically a state remedy.[180]

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169. *See, e.g.*, Walmac Co. v. Isaacs, 220 F.2d 108, 114 (1st Cir. 1955); Cooperative Transit Co. v West Penn. Elec. Co., 132 F.2d 720, 723 (4th Cir. 1943).

170. *See* Brandt v. Olson, 179 F. Supp. 363, 370 (N.D. Iowa 1959).

171. FED. R. CIV. P. 13(a).

172. FED. R. CIV. P. 13(g).

173. FED. R. CIV. P. 13(h).

174. FED. R. CIV. P. 14.

175. FED. R. CIV. P. 13(a) states that:

> A pleading shall take as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

176. *See* Local No. 11, Electrical Workers v. G.P. Thompson Elec. Inc., 363 F.2d 181 (9th Cir. 1966).

177. Brandt v. Olson, 179 F. Supp. 363, 370 (N.D. Iowa 1959). Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383 (1963).

178. 270 U.S. 593 (1926).

179. *Id.* at 603. Plaintiff contends that New York Cotton Exchange was a monopoly and was using unfair business practices. Defendant in his answer denied plaintiff's allegations and counterclaimed that plaintiff's activities were impairing the value of defendant's property and sought to enjoin plaintiffs from decreasing the value of this property.

180. Moore v. New York Cotton Exch., 291 F. 681, 683 (S.D.N.Y. 1923).

In reversing the lower court's decision as to the claim for injunctive relief, the Supreme Court stressed that a compulsory counterclaim must be adjudicated on its merits and not be dismissed for lack of jurisdiction.[181]

Rule 13(b) governs permissive counterclaims—those which do not arise out of the same transaction or occurrence as the principal claim.[182] Unlike compulsory counterclaims, permissive counterclaims must be supported by independent jurisdictonal grounds.[183] In *Industrial Equipment & Marine Services, Inc. v. M/V Mr. Gus*,[184] a federal district court in Texas formulated a three-fold test to determine whether a counterclaim is compulsory or permissive: First, are the issues of fact and law arising from both the main and collateral issues largely the same; second, is the doctrine of res judicata applicable; and finally, will the same evidence support or refute the claims of either party.[185] If the tests can be answered affirmatively, the cause of action is compulsory, rather than permissive, and is therefore ancillary to the original cause of action.

The courts have, however, recognized a limited exception whereby permissive counterclaims may be adjudicated without a finding of jurisdiction on independent grounds.[186] The exception arises where the permissive counterclaim is in the nature of a set-off, interposed merely to defeat or reduce the opposing party's claim, for which, however, affirmative relief is *not* sought. The application of this exception is evident in *Frazier v. Astra Steamship Corp.*,[187] wherein an injured seaman sought to hold defendant

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181. Moore v. New York Cotton Exch., 270 U.S. 593, 607-08 (1926). *See* Binderup v. Pathé Exch., Inc., 263 U.S. 291 (1923), where the Court stated:

> Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. In that event the claim of federal right under the statute is a mere pretence [sic] and, in effect, is no claim at all.

Id. at 305, 306 (citations omitted).

182. FED. R. CIV. P. 13(b) provides that "a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

183. *See* Camper & Nicholson's Ltd. v. Yacht "Fountainblew II", 292 F. Supp. 734, 735 (S.D. Fla. 1968). *See also* O'Connell v. Erie Lackawanna R.R., 391 F.2d 156, 163 (2d Cir. 1968), *vacated, ordered dismissed as moot,* 395 U.S. 210 (1969); Lesnik v. Public Indus. Corp., 144 F.2d 968, 975-76 (2d Cir. 1944); Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 226 (N.D. Iowa 1952).

184. 333 F. Supp. 578 (S.D. Tex. 1971).

185. *Id.* at 581, *quoting* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1410 (1969).

186. *See, e.g.*, Frazier v. Astra S.S. Corp., 18 F.R.D. 240, 242 (S.D.N.Y. 1955).

187. *Id.*

shipowner liable under the Jones Act. Defendants counterclaimed for the liquidated amount of their damages caused by plaintiff in another transaction. In permitting such a set-off, the court recognized that any permissive counterclaim, not only damage claims, can be adjudicated without establishing independent jurisdictional grounds.[188]

Rule 13(g) allows an action to be asserted by one party against his co-party for liability arising from the same transaction.[189] This action may be permitted against a co-defendant, who is or may be liable to the claimant for all or part of the claim against him.[190] In applying Rule 13(g), one federal court has stated:

> [S]ince the adoption of the Federal Rules it has been suggested that whenever the rules permit the filing of a cross-claim under rule 13(g) it is by definition "ancillary" to the principal action and thus, under long established principles, needs no independent jurisdictional grounds to permit its litigation in federal court.[191]

Finally, Rule 14 dealing with third party practice[192] was created to allow a defendant to implead a third party who may be accountable to the plaintiff in his claim against defendant.[193] Jurisdiction under Rule 14 is generally considered to be ancillary, but the court may exercise discretion in determining if such claim may merit adjudication.[194] In commenting on

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188. *Id.* at 242-43.

189. FED. R. CIV. P. 13(g); *see* Elkel v. States Marine Lines Inc., 473 F.2d 959 (5th Cir. 1973); Stahl v. Ohio River Co., 424 F.2d 52, 53 (3d Cir. 1970); W.L. Hiley & Co. v. County of Niagara, 388 F.2d 746, 749 (2d Cir. 1967); Childress v. Cook, 245 F.2d 798 (5th Cir. 1957); Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968, 972-73 (1951).

190. Schwab v. Eire Lackawanna R.R., 438 F.2d 62, 64 (3d Cir. 1971).

191. Childress v. Cook, 245 F.2d 798, 803 (5th Cir. 1957). For examples of the "long established principles" mentioned in this case *see* Mitchell v. Maurer, 293 U.S. 237 (1934); Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Fulton Nat'l Bank v. Hozier, 267 U.S. 276 (1925); Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 79 (N.D. Ala. 1968).

Another procedural rule used by the courts is Rule 13(h). Titled, "Joinder of Additional Parties," this rule provides for the joinder of "Persons other than those made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." *See* Reynolds v. Maples, 214 F.2d 395, 399 (5th Cir. 1954); Lanier Business Prods. v. Graymar Co., 342 F. Supp. 1200, 1202 (D. Md. 1972). *See also*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: §§ 1434, 1435 (1971).

192. FED. R. CIV. P. 14.

193. *See generally* United States Fidelity & Guar. Co. v. Perkins, 388 F.2d 771 (10th Cir. 1968); Noland Co. v. Grarer Tank & Mfg. Co., 301 F.2d 43 (4th Cir. 1962); United States v. Edward R. Marden Corp., 294 F. Supp. 21 (D.R.I. 1968); United States v. Munroe Towers Inc., 286 F. Supp. 92 (D.N.J. 1968). Note, *The Ancillary Concept and the Federal Rules*, 64 HARV. L. REV. 968, 973 (1951); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

194. *See* Stemler v. Burke, 344 F.2d 393, 395-96 (6th Cir. 1965), where lack of diversity between the parties was not a bar to applying Rule 14, since the court had ancillary jurisdiction over the claim. *See also* Sheppard v. Atlantic States Gas Co., 167 F.2d 841, 845 (3d Cir. 1948). For a complete analysis of Rule 14 as it applies to ancillary and pendent jurisdiction, see Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265 (1971).

Rule 14, one court has held that "a third party complaint may be maintained only in cases in which the third-party defendant would be *liable secondarily to the original defendant*, in the event the latter is held liable to the plaintiff."[195]

In the application of procedures authorized by both Rules 13 and 14, it should be borne in mind that the guidelines governing federal power may "be settled or evaded by the compromises of one generation, only to reappear in the next."[196] If the present legal generation is to profit from the actions of those in the past, a first step would be to end "sterile jurisdictional disputes"[197] arising from an arbitrary and rigid interpretation of these rules. By construing liberally the concept of ancillary jurisdiction,[198] the practical needs inherent in our judicial system—the avoidance of multiple claims, and the prevention of piecemeal litigation—would be satisfied.[199]

PENDENT JURISDICTION

Article III of the United States Constitution expressly confers upon federal courts the authority to adjudicate "cases" and "controversies."[200] As an implied element of this power, federal courts have joined, at their discretion, federal and state claims where necessary to carry out this constitutional mandate.[201] This implied authority, later designated as the "pendent" jurisdiction of a federal court, was first exercised in 1824. In *Osborn v. Bank of the United States*,[202] the plaintiff bank, chartered under a federal act, sought to enjoin a state auditor from collecting a tax alleged to be un-

195. United States v. Munroe Towers Inc., 286 F. Supp. 92, 96 (D.N.J. 1968). The court also suggests that Rule 14 should not be invoked simply because the third party *may* be liable to the plaintiff. *Id.* at 96. Further, because a claim relates to the primary cause of action does not necessarily permit the impleading of a third party. *Id.* at 96.

196. *See* Frankfurter, *Distribution of Jurisdiction Power between United States and State Courts*, 13 CORNELL L.Q. 499, 500 (1928).

197. Dery v. Wyer, 265 F.2d 804, 809 (2d Cir. 1959).

198. *See* United States v. Heyward-Robinson Co., 430 F.2d 1077 (2d Cir.), *cert. denied*, 450 U.S. 102 (1970); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); United States Fidelity & Guar. Co. v. Perkins, 388 F.2d 771 (10th Cir. 1968); Childress v. Cook, 245 F.2d 798 (5th Cir. 1957); United Artists Corp. v. Masterpiece Prod., 221 F.2d 213 (2d Cir. 1955); Walmac v. Isaacs, 220 F.2d 108 (1st Cir. 1955); Cooperative Transit Co. v. West Penn. Elec. Co., 132 F.2d 720 (4th Cir. 1943); Dillion v. Berg, 347 F. Supp. 517 (D. Del. 1972); Lanier Business Prod. v. Graymar Co., 342 F. Supp. 1200 (D. Md. 1972); Wilgus v. Peterson, 335 F. Supp. 1385 (D. Del. 1972); Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

199. *See* P.J. Brunswick v. Regent, 463 F.2d 1205, 1207 (5th Cir. 1972); Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961); United States v. Edward R. Maden Corp., 294 F. Supp. 21 (D.R.I. 1968); Frazier v. Astra S.S. Corp., 18 F.R.D. 240 (S.D.N.Y. 1955).

200. U.S. CONST. art. III § 2; 28 U.S.C. § 1331(a) (1970).

201. *See* Note, *Problems of Parallel State & Federal Remedies*, 71 HARV. L. REV. 513 (1958).

202. 22 U.S. (9 Wheat.) 738 (1824).

constitutional. Although the facts raised issues relating to both federal and state law, Chief Justice John Marshall determined that all issues were properly maintained in federal court.

> When a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it.[203]

On the basis of this observation, the doctrine of pendent jurisdiction was later extended to include suits wherein the federal question was eventually dismissed,[204] omitted[205] or even decided adversely to the party asserting it.[206] In *Siler v. Louisville & Northern Railroad*,[207] plaintiff alleged that a state railroad commission order was unconstitutional and further that a rate increase which the commission order imposed was unauthorized by state law. Upon the trial court's rejection of the federal issue, there was a refusal to even consider plaintiff's second allegation.[208] The Supreme Court reversed and held that the issue concerning the alleged violation of state law was within the trial court's pendent jurisdiction and should have been litigated upon its individual merits.[209] A federal court's refusal to adjudicate the action would seriously impair the preservation of judicial economy.[210] Pursuant to the decisions in *Osborne* and *Siler*, however, it became evident that the exercise of pendent jurisdiction could have an overly expansive effect upon the authority of a federal court.[211] It also became apparent that

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203. *Id.* at 823. *See generally* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 COLUM. L. REV. 1018 (1962); Note, *Scope of Federal Jurisdiction Obtained Through Existence of a Federal Question,* 40 HARV. L. REV. 298 (1926).

204. *See, e.g.*, Hurn v. Oursler, 289 U.S. 238, 240 (1933); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933).

205. *See, e.g.*, Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969); Salganik v. Mayor & City Council, 192 F. Supp. 897, 902 (D. Md. 1961).

206. *See, e.g.*, Siler v. Louisville & N.R.R., 213 U.S. 175 (1909); Katz Mfg. Co. v. Chesebrough-Pond's Inc., 211 F. Supp. 815, 822-24 (S.D.N.Y. 1962).

207. 213 U.S. 175 (1909).

208. *Id.* at 177-78.

209. *Id.* at 191. In *Siler* the Court stated,

> The Federal questions, as to the invalidity of the state statute . . . gave the circuit court jurisdiction, and having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

Id. at 191. *See* Lincoln Gas & Elec. Light Co. v. City of Lincoln, 250 U.S 256, 264 (1919).

210. Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909).

211. *See* Sterling v. Constantin, 287 U.S. 378 (1932); Davis v. Wallace, 257 U.S. 478, 482 (1922); Louisville & Nash. R.R. v. Greene, 244 U.S. 522 (1916); Louisville & Nash. R.R. v. Garrett, 231 U.S. 298 (1913). *But see* United States Expansion Bolt Co. v. H.G. Kroncke Hardware Co., 234 F. 868, 872-73 (7th Cir. 1916); Planten v. Gedney, 224 F. 382 (2d Cir. 1915).

a standard insuring uniform application of pendent jurisdiction was needed to direct any further development.[212]

The Supreme Court, in three major decisions, provided the basis of the evolution of pendent jurisdiction to its present status. The first of these cases, *Levering & Garrigues v. Morrin*,[213] was decided in 1933. In a complex fact situation, federal jurisdiction was originally invoked on the grounds of diversity of the parties' citizenship and of the federal character of plaintiff's primary claim—that defendant's boycotting activities unlawfully interefered with interstate commerce and violated federal anti-trust laws.[214] In light of earlier cases which characterized such activities as local, rather than federal in nature, the Supreme Court held that plaintiff's principal allegations did not constitute a substantial federal question. The Court reasoned that when a federal question is obviously without merit or is closely related to the prior adjudicated state decision the federal court will not grant jurisdiction. This reasoning established two criteria for measuring the substance of a federal claim.[215]

Shortly thereafter, in *Hurn v. Oursler*,[216] the Court further delineated the standards to be applied in determining whether the exercise of pendent jurisdiction had been appropriately invoked. *Hurn* invloved alleged violations of both the federal copyright laws and certain state laws proscribing unfair business practices and unlawful competition. Specifically, plaintiffs attempted to prove that they had written two plays, one of which had been copyrighted under the laws of the United States and that they had given both scripts to defendant producers for their consideration. Instead of producing either work, however, it was alleged that defendants incorporated a major feature of plaintiff's copyrighted play into one of their own. When plaintiffs discovered the infringement, they brought an action in federal district court to restrain the play's performance. After trial on the merits, the lower court found no copyright violation, denied the injunction, and dismissed the claims related to state law for want of jurisdiction.[217] The Court of Appeals for the Second Circuit affirmed the entire judgment,[218] however, the Supreme Court, upon submission of the case, questioned whether the issues of unfair business practices and unlawful competition had been properly dismissed.[219] In concluding that dismissal was improper the Court's discussion revealed a

212. *See, e.g.*, Mallinson v. Ryan, 242 F. 951, 953 (S.D.N.Y. 1971); Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co., 182 F. 832 (N.D.N.Y. 1910).
213. 289 U.S. 103 (1933).
214. Levering & Garrigues Co. v. Morrin, 61 F.2d 115 (2d Cir. 1932).
215. 289 U.S. 103, 105 (1932).
216. 289 U.S. 238 (1933).
217. *Id.* at 239-40.
218. Hurn v. Oursler, 61 F.2d 1031 (2d Cir. 1932) (per curiam).
219. Hurn v. Oursler, 289 U.S. 238, 240 (1933).

two-step standard to be applied in seeking the appropriate exercise of pendent jurisdiction.

The first step reiterated the declaration of *Levering*: to determine whether the case as a whole presents a "substantial federal question."[220] Because the lower court had thoroughly reviewed this issue and found the allegations of state law violations to be inseparable from the federal question, on appeal, this determination was accepted without dispute.[221] Although the language in *Levering* was not repeated in *Hurn*, it was apparent from the Court's discussion that the problem was considered but in this instance, deemed to be resolved.[222]

Once the facts of a case have satisfied the preliminary requirement of substantiality, the second step is to determine whether the relationship between the federal and state issues alleged is sufficient to support a single cause of action. The Court established this step or the "cause of action test" by contrasting permissible and nonpermissible exercises of federal court jurisdiction over state claims.

> The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal *ground*; in the latter it may not do so upon the nonfederal *cause-of-action*.[223]

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220. *Id.* at 243-44. It was determined in *Hurn* that a substantial federal question is essential to a federal jurisdiction in the absence of diversity. *See, e.g.,* Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388 (1920); Katz Mfg. Co. v. Chesebrough-Pond's Inc., 211 F. Supp. 815 (S.D.N.Y. 1962).

221. Hurn v. Oursler, 289 U.S. 238, 242 (1933).

222. *Id.* at 246-47.

223. *Id.* at 246 (Court's emphasis). Another test applied by the courts in determining whether a "substantial federal question" exists is the "introduction of evidence test." *See* Robinson v. Stanley Home Prod. Inc., 272 F.2d 601 (1st Cir. 1959); Massachusetts Universalists Convention v. Hildrath & Rodgers Co., 183 F.2d 497 (1st Cir. 1950). *See also* Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 COLUM. L. REV. 1018, 1025 (1962); Note, 59 YALE L.J. 978 (1950).

The basic premise underlying this test is that a federal court should use its discretion in the adjudication of related state claims. *See* American Auto. Ins. Co. v. Freundt, 103 F.2d 613 (7th Cir. 1939). This court expressed the view that "under the decisions of the United States Supreme Court the existence of jurisdiction over the subject matter of a class of cases does not impose upon a court an *absolute duty* to exercise its jurisdiction whenever invoked . . . ." *Id.* at 617 (emphasis added). The indication of court discretion was further discussed in Walters v. Shari Music Publishing Corp., 193 F. Supp. 307 (S.D.N.Y. 1961), wherein the court stated, "For the dog would be wagged by his tail if plenary trial of an ancillary claim was compelled by a primary claim which [was] disposed of [prior to trial]." *Id.* at 308, *quoting* H. HART & H. WECHSLER, FEDERAL COURTS & THE FEDERAL SYSTEM 808 (1953).

Further, if the state claim is found to constitute a separate but parallel ground for relief which nevertheless is inextricably linked to the federal claim, a single cause of action exists even though the facts upon which each ground is based are dissimilar.[224] "The facts are merely the means and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear."[225]

The complex and ill-defined requirements established in *Levering* and *Hurn* created problems of interpretation which plagued the lower federal courts for many years.[226] In 1966, however, the Supreme Court remedied the confusing situation by discarding the "cause of action" standard. In *United Mine Workers v. Gibbs*,[227] the plaintiff, Gibbs, was employed by Grundy Coal Company to organize the opening of a new mine. When a labor dispute arose among members of the United Mine Workers union, Gibbs hired members of a rival union to complete the contract. The United Mine Workers boycotted his work site, and forcibly prevented him from fulfilling his contractual obligation. Gibbs lost his job and soon after, began losing other contracts with companies in the area. On the basis of the secondary boycott, he brought suit in federal court against the United Mine Workers for violation of the Taft-Hartley Act.[228] Additionally, he sought damages for United Mine Workers' alleged interference with his contract of employment.[229] The Court of Appeals for the Sixth Circuit affirmed the decision of the lower federal court that it had jurisdiction over both actions, even though plaintiff's second allegation was typically

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224. Hurn v. Oursler, 289 U.S. 238 (1933). In *Hurn* the Court noted: "[T]he claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than equivalent of different epithets to characterize the same group of circumstances." *Id.* at 246.

225. Hurn v. Oursler, 289 U.S. 238, 246 (1932), *quoting* Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). *See* Kleinman v. Betty Dain Creations, 189 F.2d 546 (2d Cir. 1951) where the court stated:

> Dependent jurisdiction existed to decide a single cause of action upon a non-federal ground recovery on the federal ground having failed, but that jurisdiction did not exist to adjudicate a non-federal claim merely because it was joined with a federal one unless there was substantial identity in the facts to be proved to support each of the two.

Id. at 548. *But see* Manosky v. Bethlehem-Hingham Shipyard Inc., 177 F.2d 529 (1st Cir. 1949). Here, it would seem that there was not a substantial federal question for litigation. *Id.* at 531-32. *See also* Foster D. Snell Inc. v. Potters, 88 F.2d 611 (2d Cir. 1937); J. MOORE, FEDERAL PRACTICE § 2.06(5), at 369 (2d ed. 1970).

226. *See* Robinson v. Stanley Home Prods. Inc., 272 F.2d 601 (1st Cir. 1959); Massachusetts Universalists Convention v. Hildrath & Rodgers Co., 183 F.2d 497 (1st Cir. 1950); American Auto. Ins. Co. v. Freundt, 103 F.2d 613 (7th Cir. 1939); Walters v. Shari Music Publishing Corp., 193 F. Supp. 307 (S.D.N.Y. 1961); Salganik v. Mayor & City Council, 192 F. Supp. 897 (D. Md. 1961).

227. 383 U.S. 715 (1966).

228. 29 U.S.C. § 141 (1970).

229. Gibbs v. United Mine Workers, 220 F. Supp. 871 (E.D. Tenn. 1963).

pursued at the state level.[230] The Supreme Court agreed, predicating its holding on two considerations: that both actions must arise from "a common nucleus of operative facts" and also that both actions are such as would normally be tried in one proceeding.[231]

The Court, aware that this decision replaced the "cause of action" test established in *Hurn*, justified the holding by distinguishing *Hurn* as being decided "before the unification of law and equity by the Federal Rules of Civil Procedure"[232] and criticizing the use of the term "cause of action" because it lacked definition and was the subject of constant dispute.[233] The "impulse" should now be "toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies . . . ."[234] This language from *Gibbs* has commonly been used when referring to ancillary jurisdiction, not pendent jurisdiction.[235] Have the paths of the two separate doctrines, ancillary and pendent, met?

The ramifications of the *Gibbs* decision have generated much discussion among the legal community.[236] Authorities in commenting on this new thrust of pendent jurisdiction contend that federal courts may now lawfully intrude upon areas which perhaps should remain within the jurisdiction of a state court.[237] Supporters, however, suggest that *Gibbs'* reliance on the Federal Rules of Civil Procedure in fact expanded the doctrine of pendent jurisdiction, but to its desired extent.[238]

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230. Gibbs v. United Mine Workers, 343 F.2d 609 (6th Cir. 1965).

231. United Mine Workers v. Gibbs, 383 U.S. 715, 722 (1966).

232. *Id.* at 722.

233. *Id.* at 722.

234. *Id.* at 724. In *Gibbs* the Court stated:

> If considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Id. at 725 (court's emphasis). *See* Roberts v. Williams, 456 F.2d 819, 828-29 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); Elberti v. Kunsman, 254 F. Supp. 870, 871 (E.D. Pa. 1966); United States v. P.J. Carlin Constr. Co., 254 F. Supp. 637, 639-40 (E.D.N.Y. 1966). *But see* Moor v. Madigan, 458 F.2d 1217, 1221 (9th Cir. 1972); Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969), where the court stated, "Joinder of claims, not joinder of parties, is the object of the doctrine." Other cases have extended jurisdiction where there is a "common nucleus of operative facts." Wilson v. American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Pennsylvania v. Brown, 260 F. Supp. 323, 335 (E.D. Pa. 1966); Lewis v. Penington, 257 F. Supp. 815, 864 (E.D. Tenn. 1966). *See generally* Comment, *Pendent Jurisdiction in Diversity Cases*, 30 U. PITT. L. REV. 607 (1969).

235. *See* cases cited note 234 *supra.*

236. *See The Supreme Court 1965 Term*, 80 HARV. L. REV. 91, 223 (1966). The Federal Rules of Civil Procedure have helped to codify the evasive term, "a single cause of action." *See* Note, 44 TEXAS L. REV. 1631, 1635 (1966).

237. *See* Fortune, *Pendent Jurisdiction—The Problem of Pendenting Parties*, 30 U. PITT. L. REV. 1 (1972); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968); Note, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973).

238. In analyzing the *Hurn* and *Gibbs* decisions, both cases adjudicated matters in

FEDERAL COURT ACTIONS TO RESTRAIN STATE OFFICERS

The 11th Amendment to the United States Constitution prohibits a suit against a state by a citizen of another state or foreign country without the defendant state's consent.[239] This restriction has also been construed as barring suit by citizens against their own state.[240]

In 1887, the United States Supreme Court provided a method to circumvent, under certain conditions, the effect of the 11th amendment. *In re Ayers*[241] involved a petition for a writ of habeas corpus by certain state officials who had been jailed for contempt when they violated an injunction granted by a federal court. The petitioners contended that since the suit was against state officials to enjoin performance of their official duties, it was an action against the state and therefore prohibited by the 11th amendment. The court agreed, but went on to say that:

> An unconstitutional law will be treated by the courts as null and void.
> . . . .
> . . . If, therefore, an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States,

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which federal and state claims were made against the same defendant. Most courts interpreted this as a restriction of pendent jurisdiction, and have denied jurisdiction where it involves a claim against a co-defendant, or joinder of parties to the pendent claim. The following cases have denied pendent jurisdiction in those cases involving third parties: Moor v. Madigan, 458 F.2d 1212, 1221 (9th Cir. 1972); Wojtas v. Village of Niles, 334 F.2d 797, 799-800 (7th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965); New Orleans Pub. Belt R.R. v. Wallace, 173 F.2d 145, 148 (5th Cir. 1949); Pearce v. Pennsylvania R.R., 162 F.2d 524, 528 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947); Jennings v. Davis, 339 F. Supp. 919 (W.D. Mo. 1972); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).

In 1971 Judge Friendly of the Court of Appeals for the Second Circuit wrote three opinions based on the standards of pendent jurisdiction as stated in *Gibbs*. These cases are Almenares v. Wyman, 453 F.2d 1075, 1083-84 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971); Astor-Honor Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629-30 (2d Cir. 1971). For an analysis of these cases *see* Note, *Federal Pendent Subject Matter Jurisdiction—The Doctrine of United Mine Workers v. Gibbs Extended to Persons Not Party to the Jurisdiction-Conferring Claim*, 73 COLUM. L. REV. 153 (1973). These decisions allowed an extension of pendent jurisdiction to those cases in which additional parties have entered the litigation. *Id.* at 160-63.

In these cases Judge Friendly determined that as long as the same nucleus of operative facts governs the claim, the court should adjudicate the entire matter. Almenares v. Wyman, 453 F.2d 1075, 1083-84 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972); Leather's Best Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 (2d Cir. 1971); Astor-Honor Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627, 629-30 (2d Cir. 1971). In extending the doctrine of pendent jurisdiction, Judge Friendly has given notice to other federal jurisdictions that a pendent claim should be adjudicated so long as the case is based on identical claims.

239. U.S. CONST. amend. XI.

240. Hans v. Louisiana, 134 U.S. 1 (1890).

241. 123 U.S. 443 (1887).

> he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct.[242]

This reasoning provided direct support for the subsequent decision in the landmark case of *Ex parte Young*[243] although the Court in *Young* recognized it as a fiction.[244] The *Young* case dealt with a Minnesota legislative enactment that greatly reduced railroad rates, and provided harsh penalties for violators. Before the provisions went into effect, stockholders of the railroad successfully filed suit in federal court to enjoin enforcement of the Act, alleging that its rates and penalties were so unreasonable that they amounted to a deprivation of property without due process. The Minnesota Attorney General, in violation of the injunction, initiated proceedings in state court to compel compliance with the new rates. The Attorney General was taken into custody for contempt and in his petition for habeas corpus contended that the temporary injunction was illegal by virtue of the 11th amendment.

On appeal, the United States Supreme Court found the Minnesota statute to be unconstitutional on its face.[245] The Court was then confronted with a dilemma. On the one hand, the petitioner objected to the jurisdiction of the federal court on the basis that such action amounted to a suit against a state, without its consent; a prohibition of the 11th amendment. On the other hand, the stockholders of the railroad alleged deprivation of property without due process of law, an act forbidden by the 14th amendment. The Court could have resolved this conflict by construing the 14th amendment as a limitation on the prohibition contained in the 11th amendment.[246] The Court instead resorted to the fiction supplied by *Ayers* for the basis of its opinion:

> [T]he use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of . . . the State in its sovereign . . . capacity . . . . [T]he officer . . . is in that case stripped of his . . .representative character and is subjected . . . to the consequences of his individual conduct.[247]

The reasoning in *Young* has subsequently been applied in many other areas of litigation. Examples may be found in desegregation cases which seek to force state and county officials to provide integrated educational facilities;[248] in welfare cases which seek to compel equal distribution of

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242. *Id.* at 506-07.
243. 209 U.S. 123 (1908).
244. *Id.* at 173-74.
245. *Id.* at 147. In explaining this decision the Court reasoned that where the penalties for disobedience were so enormous and severe as to intimidate the company and officers from resorting to the courts to test the validity of the legislation, the acts were unconstitutional on their face.
246. *See* note 13 *supra.*
247. *Ex parte* Young, 209 U.S. 123, 159-60 (1908).
248. Griffin v. County School Bd., 377 U.S. 218, 228 (1964).

welfare funds;[249] in the administration of federal-state aid programs for the aged, blind, and disabled which seek to coerce timely processing of applications for benefits;[250] and, in criminal cases, against judges and prosecuting attorneys to prevent racial discrimination in the application of penal statutes.[251] It is apparent that the decision in *Young*, though based on a fiction, nevertheless is an extremely important tool that may be employed to secure constitutionally guaranteed rights.

While the removal statutes, the related doctrines of ancillary and pendent jurisdiction, the unsettled theory of protective jurisdiction, and the federal cases restraining state officers all tend to enlarge federal jurisdiction by varying degrees, an opposite intent is inherent in the Anti-Injunction Statute and the operation of the abstention doctrine.

FEDERAL COURT ACTIONS TO RESTRAIN STATE COURT PROCEEDINGS

Congress, in 1793, drafted and enacted into law the Anti-Injunction Statute. It provided: "[N]or shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state . . . ."[252] The purpose of this statute was to prevent unnecessary friction between state and federal courts.[253] The existence of certain requirements and conditions, however, gives rise to exceptions wherein a federal court will entertain a suit in equity to enjoin a state court proceeding.

In general, the basis for equitable intervention is lack of an adequate remedy at law.[254] The Anti-Injunction Statute, however, limits federal equitable jurisdiction in that it expressly prohibits federal injunctions against state court proceedings even though plaintiff's remedy at law be inadequate.[255] Therefore, before an injunction will issue, in addition to satisfying general equitable principles, the facts of the case must also bring it within one of the exceptions to the statute.[256]

The first exception to be generally recognized by the courts was established in 1874, in *French v. Hay*.[257] In an earlier hearing of *French v. Hay* on the issue of removal, the Court held that the cause had been prop-

249. Rothstein v. Wyman, 467 F.2d 226, 241 (2d Cir. 1972).

250. Jordan v. Weaver, 472 F.2d 985, 993 (7th Cir. 1973) (where the court provided for retroactive benefits if there was unreasonable delay).

251. Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972).

252. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

253. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 8-9 (1940).

254. *E.g.*, Younger v. Harris, 401 U.S. 37 (1971); Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932); Grand Chute v. Winegar, 82 U.S. (15 Wall.) 373 (1872). *See generally* J. POMEROY, EQUITY JURISPRUDENCE §§ 132, 173, 176, 180, 216-22, 295 (5th ed. 1941).

255. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

256. *Id.* at 287.

257. 89 U.S. (22 Wall.) 250 (1874).

erly removed to federal court.[258] In this subsequent case, which was ancillary to the removal issue, the Court affirmed a decree granting an injunction to stay state court proceedings thereby allowing the federal court to protect the jurisdiction it had acquired by virtue of the removal act.[259]

A second early exception permitted federal courts to enjoin state proceedings upon issues which had been fully litigated in federal court.[260] This exception is illustrated in *Supreme Tribe of Ben-Hur v. Cauble*.[261] Suit had been filed here against a fraternal society, organized under the corporate laws of Indiana, on certain certificates that the corporation had issued. Jurisdiction was vested in the federal district court in Indiana since the plaintiffs, certificate holders, were not Indiana citizens. The in-state certificate holders were not joined as party plaintiffs in this action. A decree was rendered for the defendant in the initial suit; however, a subsequent action was brought in the state court against the fraternal organization by the in-state certificate holders on the issues previously litigated. The plaintiffs in this second action contended that because they had not joined in the prior suit, the decision was not res judicata as to their complaint.[262] The defendant organization sought an injunction in federal court to stay the second suit. The district court determined that it did not have jurisdiction and an appeal was taken.[263] The United States Supreme Court reversed, holding that since the appellants were members of the class whose rights had been fully adjudicated, the district court had jurisdiction to enjoin the state proceedings in order to prevent the issues from being relitigated.[264]

Another type of case which falls within the ambit of the "relitigation" exception is one which is ancillary to another proceeding already within the jurisdiction of the federal court. In *Local Loan Co. v. Hunt*,[265] a federal district court had adjudicated Hunt to be bankrupt. Included in the schedule of liabilities presented to the court was a debt owed to the Local Loan

258. French v. Hay, 89 U.S. (22 Wall.) 238, 249-50 (1874).

259. French v. Hay, 89 U.S. (22 Wall.) 250, 252-53 (1874), where the Court held that the jurisdiction obtained by the federal court by virtue of the removal act in effect at the time (Act of March 2, 1867, ch. 167, 14 Stat. 558) was entitled to injunctive protection.

260. Root v. Woolworth, 150 U.S. 401, 411-12 (1893), wherein it is stated: "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions . . . in order to avoid the relitigation of questions once settled between the same parties, is well settled." It should be noted, however, that in this case the court was speaking of equity courts in general, and made no reference to the Anti-Injunction Statute.

261. 255 U.S. 356 (1921).

262. Supreme Tribe of Ben Hur v. Cauble, 264 F. 247, 248 (D. Ind. 1920).

263. *Id.* at 249, where the court stated: [The in-state certificate holders] not being parties to the original bill, this proceeding . . . is an original bill of an Indiana corporation against Indiana citizens, and this court is without jurisdiction.

264. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

265. 292 U.S. 234 (1934).

Company. Subsequently, the loan company sued Hunt in state court to enforce an assignment of his wages which had been made to secure the debt. This latter proceeding was enjoined to preserve the judgment rendered when the federal court adjudged Hunt to be bankrupt.[266]

It is therefore apparent that before an injunction may issue to prevent relitigation, the parties and issues must be the same in both suits. It is also clear that the court must look to the substance of the pleadings rather than to their form in order to determine if in fact the parties[267] and issues[268] were the same in both suits.

Another exception allowing injunctions against state court proceedings occurs in an in rem action where a federal court has previously acquired jurisdiction of the *res*. The Court in *Kline v. Burke Construction Co.*[269] explained this exception and its necessity:

> Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached.[270]

It should be noted that the authority to enjoin in rem proceedings lies with the court that first acquired jurisdiction,[271] and that the power of the state courts in this respect is co-equal with that of the federal courts.[272] By way of contrast, in personam proceedings may be pursued simultaneously in both state and federal courts.[273]

In addition to these judicially-created exceptions to the Anti-Injunction Statute, which seem only to help to effect the federal courts' control as provided by removal and pendent jurisdiction, there developed statutory exceptions as well which may be viewed as implied legislative amendments to the Anti-Injunction Statute.[274] The Interpleader Act[275] was one of the few

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266. *Id.* at 244-45.

267. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

268. Local Loan Co. v. Hunt, 292 U.S. 234 (1934).

269. 260 U.S. 226 (1922).

270. *Id.* at 229. *Accord,* Holmes v. Dowie, 177 F. 182, 183 (7th Cir. 1910); Farmers' Loan & Trust Co. v. Lake St. Elevated R.R., 177 U.S. 51, 61 (1900).

271. Kline v. Burke Constr. Co., 260 U.S. 226, 235 (1922), where the Court stated:

> The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply.

272. *Id.* at 229-30.

273. *Id.* at 230. *Accord,* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295 (1970); Hunt v. New York Cotton Exch., 205 U.S. 322, 339 (1907); Ungar v. Mandell, 471 F.2d 1163 (2d Cir. 1972). *Contra,* Looney v. Eastern Texas R.R., 247 U.S. 214, 221 (1918).

274. Note, *Federal Power to Enjoin State Court Proceedings,* 74 HARV. L. REV. 726, 730 (1961).

275. 28 U.S.C. § 2361 (1970).

statutes which expressly provided that a federal district court could enjoin state court proceedings. Most statutes which gave rise to exceptions to the Anti-Injunction Statute conferred on the federal courts original and/or exclusive jurisdiction of an action arising under their authority.[276] Thus, Congress intended that the Anti-Injunction Statute should not apply in these instances.[277] In the area of bankruptcy, for example, it is provided by statute that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."[278]

In 1941, the Supreme Court, in *Toucey v. New York Life Insurance Co.*,[279] significantly restricted the power of federal courts to issue injunctions against state proceedings.[280] Toucey brought an action against the defendant insurance company in federal court, alleging fraudulent cancellation of a policy. Judgment was rendered in favor of the insurance company, and 2 years later, Toucey's assignee brought suit on the same cause of action in a state court. The insurance company sought injunctive relief in federal court, contending the issue was res judicata. The petition for an injunction was denied. While the Court did recognize five statutory exceptions,[281] it held the in rem exception[282] to be the only valid judicially-created exception.[283] Consequently, it was held that a federal court had no power to stay a state court proceeding simply because the matter in controversy had previously been adjudicated in federal court.[284] This decision had the effect of completely emasculating the "relitigation" exception.

Seven years after the *Toucey* decision, the first significant revision of the Anti-Injunction Statute was effected.[285] It prohibited federal injunctions of

276. *E.g.*, Bankruptcy Act, 28 U.S.C. § 1334 (1970).

277. Note, *Federal Power to Enjoin State Court Proceedings,* 74 HARV. L. REV. 726, 731 (1961).

278. 28 U.S.C. § 1334 (1970).

279. 314 U.S. 118 (1941).

280. *Id.* at 137-39. The Court did not recognize the validity of the "relitigation" exception.

281. The five statutory exceptions to the Anti-Injunction Statute were set down by Mr. Justice Frankfurter in *Toucey* as: (1) Bankruptcy Act, 11 U.S.C. § 29 (1970); (2) Frazier-Lemke Act, 11 U.S.C. § 203 (1970); (3) Interpleader Act, 28 U.S.C. § 1335 (1970); (4) Removal Act, 28 U.S.C. § 1441 (1970); (5) Limitation of Shipowner's Liability, 46 U.S.C. § 185 (1970); Toucey v. New York Life Ins. Co., 314 U.S. 118, 132-34 (1941).

282. Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922). In stating the in rem exception the Court said: "It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court."

283. Toucey v. New York Life Ins. Co., 314 U.S. 118, 139 (1941). In discussing the "relitigation" cases, the Court said: "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." *Id.* at 139.

284. *Id.* at 139.

285. 28 U.S.C. § 2283 (1970), *formerly* Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162 (1911).

state proceedings, with three exceptions: first, as expressly authorized by act of Congress; second, where necessary in aid of federal jurisdiction; and third, to protect or effectuate federal judgments.[286] These broad exceptions were designed to reinstate the judicial exceptions recognized prior to the *Toucey* decision.[287] Therefore, if an injunction is to issue today, it must be granted on the basis of one of these statutory exceptions.[288]

In examining this revision of the Anti-Injunction Statute, an initial concern is what has been determined to be an expressly authorized exception.

> [I]n order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding.[289]

An act, in order to be recognized as an "expressly authorized" exception, need not refer to the Anti-Injunction Statute;[290] indeed, only a few such measures explicitly authorize an injunction to issue under their authority.[291] Other statutes which have been held to be "expressly authorized" usually provide a suit in equity as a means of redress,[292] or that all other proceedings should cease upon compliance with the requirements of the statute.[293]

The second exception provided by the revised act, "in aid of its jurisdiction," allows a federal court to protect jurisdiction it has properly acquired. Cases removed to federal court come within this exception.[294] Once removed, a case is no longer subject to litigation in the state courts, and any proceeding thereon may be enjoined.[295] In rem proceedings also fall under this exception.[296] The necessity for the in rem exception was even recognized by the restrictive decision in *Toucey*.[297]

The third exception, "to protect or effectuate its judgments," was designed

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286. *Id.*

287. *Id.* (Revisor's Note).

288. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970).

289. Mitchum v. Foster, 407 U.S. 225, 237 (1972).

290. *Id.* at 237.

291. *E.g.*, Bankruptcy Act, 11 U.S.C. § 29 (1970); Habeas Corpus Act, 28 U.S.C. § 2251 (1970); Interpleader Act, 28 U.S.C. § 2361 (1970).

292. *E.g.*, Civil Rights Act, 42 U.S.C. § 1983 (1970) was held to be an expressly authorized exception to the Anti-Injunction Statute by the Court in Mitchum v. Foster, 407 U.S. 225, 242 (1972).

293. *E.g.*, Limitation of Shipowner's Liability, 46 U.S.C. § 185 (1970) was held to be an expressly authorized exception to the Anti-Injunction Statute in Beal v. Waltz, 309 F.2d 721, 724 (5th Cir. 1962).

294. Anti-Injunction Statute, 28 U.S.C. § 2283 (1970) (Reviser's Note); *accord*, Brown v. Seaboard Coast Line R.R., 309 F. Supp. 48 (N.D. Ga. 1969).

295. *See* Brown v. Seaboard Coast Line R.R., 309 F. Supp. 48 (N.D. Ga. 1969).

296. Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 735 (1961).

297. Toucey v. New York Life Ins. Co., 314 U.S. 118, 139 (1941).

to allow a federal court to enjoin a state court proceeding on issues which had been previously litigated in the federal forum.[298] Such injunctive relief saves "the defendants in the state proceedings the inconvenience of pleading and proving *res judicata*."[299]

In order for an injunction to issue in aid of the court's jurisdiction or to effectuate its judgments, something more is required than the mere relation of the requested injunction to the court's jurisdiction or judgment.[300] Both of these latter exceptions set out in the revision require such interference "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."[301] However, this is not true where the United States Government itself seeks injunctive relief. The rationale for this rule lies in the very purpose of the act itself—the prevention of conflict between federal and state courts.[302] This policy has been stated to be "much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict . . . than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest."[303] The potential harm from frustration of national interests would far outweigh any benefits derived from including the United States within the coverage of the statute.[304]

THE ABSTENTION DOCTRINE

Abstention, a doctrine virtually unknown at early common law, has often been invoked over the last 50 years by many federal courts in refusing to accept jurisdiction.[305] The essence of the abstention doctrine[306] is a realization by the federal judiciary that there are particular circumstances in which a federal court should refrain from exercising its jurisdiction, even though it clearly has potential jurisdiction over the matter in controversy.[307]

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298. Anti-Injunction Statute, 28 U.S.C. § 2283 (1970) (Reviser's Note).

299. Toucey v. New York Life Ins. Co., 314 U.S. 118, 129 (1941).

300. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295 (1970).

301. *Id.* at 295.

302. *See* Leiter Minerals v. United States, 352 U.S. 220, 225 (1957).

303. *Id.* at 225-26.

304. *Id.* at 226.

305. The Civil Rights Act of 1964, 42 U.S.C. § 1983 (1970), has had a profound impact on the application of abstention. The landmark decisions of Dombrowski v. Pfister, 380 U.S. 479 (1965), and Younger v. Harris, 401 U.S. 37 (1971), together with Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), reflect the difficulties of fashioning a test for proper abstention. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

306. "Abstention doctrines" is a more proper phrase to refer to the phenomenon of abstention, in the authoritative opinion of Professor Wright, because it more precisely implies that there are various circumstances under which a court will choose to abstain. C. WRIGHT, FEDERAL COURTS § 52, at 196 (2d ed. 1970).

307. *Caveat*: Reference to the abstention doctrine in this article is to the situations where the court *does* abstain from accepting jurisdiction. This act of abstaining

The early foundation for the doctrine was fashioned from a conglomeration of sources: the principle that equity demands exhaustion of available state remedies;[308] the admonitions of the 11th amendment, limiting the judicial power of the federal courts under specified circumstances;[309] the principle of comity, under which the federal courts, out of deference and respect, grant effect to the judicial processes of the states;[310] and the policy of noninterference with a sovereign state's affairs, which is part of the grand scheme occasionally referred to as "Our Federalism."[311] The concern over preserving the sovereign nature of the several states was reflected in an Act of 1793,[312] the precursor of our present Anti-Injunction Statute,[313] which generally prohibits the issuance of federal injunctions to stay state proceedings.

Although most of the decisions in the 19th century applied the above policies when refusing to invoke federal jurisdiction,[314] an early case in this century forced an exception to the considerations surrounding comity and the demands of the 11th amendment. In *Ex parte Young*[315] the Supreme Court granted plaintiffs an injunction against a state officer to prevent his enforcement of an unconstitutional state statute.[316] The fact that proceed-

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must be distinguished from "abstention" in the broadest sense, sometimes used in opinions to indicate application by the court of the "abstention doctrine" in determining *whether* to accept, or to abstain from accepting, jurisdiction over the case.

308. *See, e.g.*, Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972).

309. U.S. CONST. amend. XI states: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

310. *See, e.g.*, Morrissey v. Brewer, 443 F.2d 942, 964 (8th Cir. 1971) (dissenting opinion), *rev'd*, 408 U.S. 471 (1972).

311. In Younger v. Harris, 401 U.S. 37, 44 (1971), Mr. Justice Black remarked:

> What ["Our Federalism"] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

312. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335 which read in part: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ."

313. 28 U.S.C. § 2283 (1970). Note the distinction between cases involving *pending* state proceedings in which the Anti-Injunction Act generally forbids federal injunctive relief, and between those other cases dealing with *threatened* state proceedings not yet begun, to which the principle of comity applies its force.

This "threatened-pending" dichotomy is one which rears its persistent head in matters of *abstention* as well. The Court in Younger v. Harris, 401 U.S. 37 (1917), recognizing the dichotomy, chose to ignore the "threatened proceedings" situation since it was not at issue in that case. The distinction is obviously one of considerable significance in the abstention area.

314. *See, e.g.*, Fitts v. McGhee, 172 U.S. 516 (1899) (refusal to voluntarily grant equitable relief in interference with pending or threatened state proceedings); *In re* Sawyer, 124 U.S. 200 (1888) (refusal to interfere with state's enforcement of an unconstitutional criminal statute).

315. 209 U.S. 123 (1908).

316. In so doing, the Court conjured up a fiction which has been severely criticized.

ings were *threatened* and not *pending* was cited in the opinion as being of great importance, since comity and federalism consideratons would apparently dictate a different result in a pending proceedings situation.[317]

Young established the unique precedent that a federal court may, under "special circumstances," enjoin threatened state proceedings, despite the persuasion of comity. This novelty caused a great furor concerning the powers of federal court judges, and Congress introduced a tempering measure in the form of the Three Judge Court Act.[318] Another decision, decided the same year, tended to limit the scope of *Young* and made it clear that the equity principle of exhaustion of state remedies was still a viable proposition.[319] It was through the post-*Young* reaffirmance of the policy in favor of avoiding interference with state proceedings that the concept of "abstention" crept into our jurisprudence.[320]

The term "abstention" first distinctly appeared in the 1941 landmark opinion of *Railroad Commission v. Pullman Co.*[321] A group of black porters employed by Pullman Company joined a railroad company in attacking a regulation of the Texas Railroad Commission which required that all Pullman cars be continuously in the charge of an employee having the rank and position of a Pullman conductor. Since it was well known that all such

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See C. WRIGHT, FEDERAL COURTS § 48, at 184-85 (2d ed. 1970). The opinion sidestepped the effect of the 11th amendment by reasoning that a suit against a state officer is only a suit against the state *if* that officer was acting in an official capacity and within his official duties; that the state official in this case was trying to enforce an unconstitutional statute; that such attempted enforcement is out of the scope of his official duties; and that herefore the suit was against him personally.

Another basis for the decision was the finding by the Court that property rights were being endangered, in that the state statute at issue contained penalties which included monetary fines.

On the matter of property rights as a basis for federal action, see Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When no State Prosecution is Pending*, 72 COLUM. L. REV. 874, 876-77 (1972).

317. *Ex parte* Young, 209 U.S. 123, 155-56 (1908).

318. 28 U.S.C. § 2281 (1970) provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

319. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). *Prentis*, together with Bacon v. Rutland R.R., 232 U.S. 134 (1914), established the general rule that a litigant must "normally" exhaust a state's "legislative" or "administrative" remedies before bringing an action to review the matter in federal court, though he need not "normally" exhaust a state's "judicial" remedies before seeking federal review. *See generally* C. WRIGHT, FEDERAL COURTS § 49, at 187-88 (2d ed. 1970).

320. Indeed, Professor Wright designates the whole concept of abstention as one of four areas constituting restrictions on *Ex parte* Young. C. WRIGHT, FEDERAL COURTS § 48, at 186 n.23 (2d ed. 1970).

321. 312 U.S. 496 (1941).

conductors were white persons, the black porters alleged that the state regulation was discriminatory in violation of their 14th amendment rights. The Supreme Court of Texas had not dealt with the constitutionality of the regulation and, on appeal, the United States Supreme Court elected to abstain. The decision, written by Mr. Justice Frankfurter, made it clear that federal courts should avoid resolving constitutional questions if there are accompanying questions of state law which might be dispositive of the case.[322] The "*Pullman* doctrine" was the first to focus clearly on a definitive situation in which the federal court should abstain from exercising its jurisdiction, and it has been followed unerringly in proper cases.[323] It is not always evident, however, when resolution of the state issues will be appropriate to the disposition of the case. Abstention is not applicable, for example, where the state issues are well-settled,[324] or where the state statute in question is patently unconstitutional.[325]

In the years following *Pullman*, most of the decisions involving abstention were based on the considerations of comity and state sovereignty which are inherent in "Our Federalism."[326]

The basis of the doctrine seems to be the special problems which

322. 312 U.S. 496, 500-01 (1941), *citing* Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64 (1935); Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935); Pennsylvania v. Williams, 294 U.S. 176 (1935); Hawkes v. Hamill, 288 U.S. 52 (1933); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929); Fenner v. Boykin, 271 U.S. 240 (1926); Cavanaugh v. Looney, 248 U.S. 453 (1919). The distinguished Justice thereupon commented:

> These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state government" and for the smooth working of the federal judiciary. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.
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> . . . .
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> Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. . . . In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.

Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

323. *See* Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959); Albertson v. Millard, 345 U.S. 242 (1953); A.F. of L. v. Watson, 327 U.S. 582 (1946); Spector Motor Serv. Inc. v. McLaughlin, 323 U.S. 101 (1944); City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); *cf.* Elder v. Rampton, 360 F. Supp. 559 (D. Utah 1972), *aff'd*, — U.S. —, 93 S. Ct. 3062, 37 L. Ed. 2d 1020 (1973).

324. Lindsey v. Normet, 405 U.S. 56 (1972); Zwickler v. Koota, 389 U.S. 241 (1967); Public Utilities Comm'n v. United States, 355 U.S. 534 (1958); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

325. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Harman v. Forssenius, 380 U.S. 528 (1965); Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973).

326. *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157 (1943).

> beset a federal union. In some cases where jurisdiction is granted it should not be exercised in order to avoid unnecessary conflict with important state functions or a needless prediction as to matters on which the states speak with final authority.[327]

Accordingly, the doctrine has been specifically applied to insure non-interference by the federal courts with a state's administrative agencies.[328] In general application of the doctrine, some decisions point to the "local" nature of the determinations to be made, with the court abstaining to avoid "special" matters of a particular locality.[329] The prerogatives of state sovereignty are said to be of overriding concern where such "local" matters are before state courts. But even a subject so clearly "local" in nature as eminent domain has resulted in conflicting decisions. Abstention was *invoked* in one case because of the intimate involvement of eminent domain with sovereign prerogative,[330] and *refused* in another because eminent domain was felt to be no more a matter involving sovereign prerogative than those in other situations when the court refused to abstain.[331]

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327. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 64, at 340 (Wright ed. 1960).

328. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (federal court should abstain from issuing declaratory judgments in matters of state taxation); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940); Pennsylvania v. Williams, 294 U.S. 176 (1935) (abstention proper in receivership proceeding where state has its own procedure for liquidation of the corporation involved); Hawks v. Hamill, 288 U.S. 52 (1933) (diversity action, seeking injunction against state officials to restrain interference with alleged perpetual franchise to operate toll bridge, dismissed to avoid unnecessary friction with state officials); Simmons v. Jones, 478 F.2d 321 (5th Cir. 1973) (abstention proper in suit to compel county jury commissioners to perform their official duties in accordance with state statute); Liggett v. Green, 188 F.2d 817 (8th Cir. 1951); Dresser Industries, Inc. v. Insurance Co. of N. America, 358 F. Supp. 327 (N.D. Tex.), *aff'd*, 475 F.2d 1402 (5th Cir. 1973). *See* Martin v. Creasy, 360 U.S. 219 (1959) (abstention proper in state condemnation case); Morgan v. Equitable Life Assurance Soc. of United States, 446 F.2d 929 (10th Cir. 1971) (abstention proper where matters of state probate proceedings are at issue); Creel v. City of Atlanta, 399 F.2d 777 (5th Cir. 1968); Duggins v. Hunt, 323 F.2d 746 (10th Cir. 1963) (abstention dismissing requested declaratory judgment proper where federal action would interfere with state's administration of assets of insolvent insurer).

But see, e.g., United States v. Nevada Tax Comm'n, 439 F.2d 435 (9th Cir. 1971 (federal court need not abstain from deciding matters of state use tax where availability of state court determination of the matters was in doubt).

329. *See* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (abstention proper where state commission's order regarding regulation of railroad could have been appealed to a state court more familiar with the chiefly local factors involved); Buford v. Sun Oil Co., 319 U.S. 315 (1943) (federal court should abstain and dismiss suit where specialized issue of proration orders in area of mineral rights was a matter of purely local regulation).

330. Louisiana Power & Light Co. v. City of Thibodeaux, 360 U.S. 25 (1959) (court abstained by staying federal action pending state court construction of state condemnation statute). *Accord*, Crawford v. Courtney, 451 F.2d 489 (4th Cir. 1971); Creel v. City of Atlanta, 399 F.2d 777 (5th Cir. 1968); Euge v. Trantina, 298 F. Supp. 873 (E.D. Mo. 1969), *aff'd*, 422 F.2d 1070 (8th Cir. 1970); Joiner v. City of Dallas, 329 F. Supp. 943 (N.D. Tex.), *aff'd*, 447 F.2d 1403 (1971).

331. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) (federal

Another possible basis for the application of the abstention doctrine, though one whose uncertain existence is in need of clarification, is that of abstention to avoid difficult questions of state law.[332] Since this means of justifying abstention touches aspects of both the *Pullman* doctrine[333] and the policy of non-interference with a state's agencies and local affairs,[334] there is considerable doubt whether it exists independently at all. This is particularly true in light of *Meredith v. City of Winter Haven*,[335] involving a bondholders' diversity action that challenged the city's power to issue bonds without referendum to its voters. Although the state law in question was uncertain, the Court refused to abstain.[336] Apart from the application of the "*Meredith* doctrine,"[337] where the state law in question has not been construed or ruled upon,[338] the *Pullman* decision provides authority for invoking abstention.

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court should not abstain from accepting diversity case filed pursuant to a state statute allowing actions of ouster to challenge validity of the condemnation taking); *accord*, Myrick v. Union Oil Co., 418 F.2d 135 (9th Cir. 1969).

The leading cases in this area have been the subject of considerable discussion. For an attempt to reconcile the holdings in *Thibodeaux* and *Allegheny*, see Comment, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 240-50 (1959). *See also* Note, 69 YALE L.J. 643 (1960).

332. *See* C. WRIGHT, FEDERAL COURTS § 52, at 202 (2d ed. 1970).

333. *See, e.g.*, City of Chicago v. Fieldcrest Dairies Inc., 316 U.S. 168 (1942) (abstention proper in an action for injunction to prevent city's unconstitutional interference with plaintiff's use of a particular kind of milk container where state law was unclear regarding whether city actually had power to prohibit containers).

334. *See, e.g.*, Thompson v. Magnolia Petrol. Co., 309 U.S. 478 (1940) (abstention proper in bankruptcy proceeding where questions of state property raised by trustee could have been resolved in state court).

335. 320 U.S. 228 (1943); *accord*, McNeese v. Board of Educ., 373 U.S. 668 (1963). *See* Wohl v. Keene, 476 F.2d 171 (4th Cir. 1973); AFA Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210 (4th Cir. 1973). *See also* Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir. 1973).

336. 320 U.S. 228, 234 (1943). *See* Harman v. Forssenius, 380 U.S. 528, 534-36 (1965); McNeese v. Board of Educ., 373 U.S. 668, 673 n.5 (1963); Sutton v. Leib, 342 U.S. 402, 410 (1952). *But see* Garfinkle v. Wells Fargo Bank, 483 F.2d 1074 (9th Cir. 1973); Warren v. Government Nat'l Mtge. Ass'n, 443 F.2d 624 (8th Cir.), *cert. denied*, 404 U.S. 886 (1971).

337. This oft-cited opinion has become known as announcing the "*Meredith* doctrine." Meredith v. City of Winter Haven, 320 U.S. 228 (1943). As stated therein:

> In the absence of some recognized public policy of defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

Id. at 234-35 (citations omitted).

338. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) (court abstained where Michigan water pollution statute had not been construed by state courts); Harrison v. NAACP, 360 U.S. 167 (1959) (abstention proper where state statute af-

An adjunct to the abstention doctrine was established by the use of a certification procedure first applied in *Clay v. Sun Insurance Office Ltd.*[339] The certification procedure applied in this action at law was pursuant to a Florida statute[340] allowing a federal court of appeals to certify questions of Florida law to the Florida Supreme Court. The United States Supreme Court held that the court of appeals should, "where a federal constitutional question might be mooted thereby, [abstain and] . . . secure an authoritative state court's determination of an unresolved question of its local law."[341] Despite initial enthusiasm over the certification procedure,[342] it raises problems of expense and delay, of rendering quasi-advisory opinions, and of dealing abstractly with concrete factual questions.[343] These difficulties have caused one authority to comment:

> [C]ertification is an undesirable innovation if it will lead to abrogation of the Meredith doctrine. If a federal court must defer to the state

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fecting association seeking injunction had not yet been construed by state courts); A.F. of L. v. Watson, 327 U.S. 582 (1946) (abstention proper where state right-to-work law not yet construed by state court); *cf.* Lee v. Bickell, 292 U.S. 415 (1934) (federal court, without deciding constitutional issues raised, sustained injunction against a state tax that was authorized by a state statute); Glenn v. Field Packing Co., 290 U.S. 177 (1933) (federal court, without deciding on federal question, granted injunction of state tax statute, holding it unconstitutional as construed by state courts).

339. 363 U.S. 207 (1960).

340. FLA. STAT. ANN. § 25.031 (1957). The statute provides:

> The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

341. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960). Other states have since established procedures similar to that found in Florida. *See, e.g.*, ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1973); HAWAII REV. STAT. §§ 602-36, 602-37 (1968); WASH. REV. CODE ANN. §§ 2.60.010-2.60.030 (Supp. 1972).

342. *See* Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Import on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962); Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A.L. REV. 888 (1971); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 U. MAINE L. REV. 33 (1964). *But see* Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. U.L. REV. 419 (1960); Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211, 221-23 (1961); Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

343. *See* discussions in 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 64, at 323 (Wright ed., Supp. 1971); C. WRIGHT, FEDERAL COURTS § 52, at 204 (2d ed. 1970).

court whenever a state issue in a case is difficult, the federal judiciary will no longer be able to function as a court.[344]

Federal courts have resorted to abstention in a variety of other circumstances.[345] While many of these decisions have been based on solid procedural grounds,[346] other cases "go beyond anything that has been sanctioned by the Supreme Court, and beyond anything required by the demands of federalism that are at the heart of the abstention doctrines."[347] To allow the courts to exercise wide discretion in the area of abstention is undesirable, particularly where the discretionary decision invokes abstention.[348] For it has been deemed the *duty* of the federal courts, whenever their jurisdiction is properly invoked, to decide those questions of law necessary to the rendition of a proper judgment.[349]

In addition to this general rule regarding jurisdiction, extensive delay is often an undesirable ramification created by abstention.[350] It may be true

344. C. WRIGHT, FEDERAL COURTS § 52, at 204 (2d ed. 1970).

345. *Compare* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947) (dismissals based on forum non conveniens), *with* Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939); Amar v. Garnier Enterprise, Inc., 41 F.R.D. 211 (C.D. Cal. 1966) (abstention where state court had already taken in rem jurisdiction), *and* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942) (court should abstain from granting declaratory judgment where state action already pending in which all issues can be decided).

346. *See, e.g.*, Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1939), wherein the Court announced "the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other . . . ." *Accord*, O'Hare Internat'l Bank v. Lambert, 459 F.2d 328 (10th Cir. 1972).

347. C. WRIGHT, FEDERAL COURTS § 52, at 205 (2d ed. 1970). The quotation refers to Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949) (stay of federal court action, pending state court decisions on similar actions), and P. Beiersdorf & Co. v. McGohey, 187 F.2d 14, 16 (2d Cir. 1951) (stay of federal court action ordered, because of crowded docket, pending state court declaratory judgment in a suit involving same issues).

348. *Cf.* Turner v. City of Memphis, 369 U.S. 350 (1962). *See* Comment, *Federal Jurisdiction: Problems Involved in the Discretionary Use of the Abstention Doctrine*, 1961 WIS. L. REV. 450. *But see* Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 825-27 (1959).

349. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 824 (9th Cir. 1963). *See* Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964); Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9th Cir.), *cert. denied*, 368 U.S. 835 (1961).

350. A natural result of abstention is prolonged litigation. One case took 9 years for final adjudication. England v. Louisiana State Bd. of Medical Examiners, 246 F. Supp. 993, 994 n.1 (E.D. La. 1965), *aff'd*, 384 U.S. 885 (1966). Other cases involving lengthy litigation include Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) (7 years); City of Thibodeaux v. Louisiana Power & Light Co., 373 F.2d 870, 871 n.2 (5th Cir.), *cert. denied*, 389 U.S. 975 (1967) (10 years).

Another case lasted 5 years before it was dismissed for failure to state a justiciable controversy. *See* Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957). For the dismissal on remand, see American Fed'n of State,

that the policy "demands of federalism" are sufficient justification for the delay and expense which frequently result from abstention;[351] but as a rule, it is considered wiser policy to abstain only when the proper "special circumstances" exist.[352]

Although the various doctrines of abstention previously considered never have achieved any singular notoriety, the landmark cases of *Pullman* and *Meredith*, and the principles they established, continue to have an indisputable influence on matters of abstention. There is, however, a plethora of civil rights decisions from the past decade that have given rise to more recent grounds for abstention *vel non*. Two major contemporary decisions[353] are being subjected to constant scrutiny and interpretation.[354] These cases are significant currents in a great stream of litigation, much of which is in the area of criminal law, and nearly all of which involves assertions of constitutional rights.[355] Where constitutional rights are being argued in a judicial proceeding, it almost follows a fortiori that the constitutionality of some law is being attacked in that proceeding. The problem then, for courts determining whether to accept jurisdiction, is that of balancing individual constitutional rights against the policies inherent in "Our Federalism." And anyone who would knowledgeably witness these classic confrontations between the individual and the state must be familiar with the brief record of the past.

The fountainhead of these civil rights rumblings was unquestionably *Ex parte Young*.[356] Although the Court enjoined the threatened proceedings, it was carefully noted in the opinion that "the Federal court cannot, of

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County & Municipal Employees v. Dawkins, 104 So. 2d 827 (Ala. 1958); *cf.* Leiter Minerals, Inc. v. United States, 329 F.2d 85, 88-89 (5th Cir. 1964), *vacated as moot*, 381 U.S. 413 (1965).

351. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 64, at 344 (Wright ed. 1960).

352. Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964); Silverman v. Browning, 359 F. Supp. 173, 176 (D. Conn. 1972), *aff'd*, — U.S. —, 93 S. Ct. 1927, 36 L. Ed. 2d 406 (1973).

353. Dombrowski v. Pfister, 380 U.S. 479 (1965), was the earlier of the two decisions. Probably the best work on the implications of this case is Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535 (1970).

Younger v. Harris, 401 U.S. 37 (1971), the more recent decision, is one of six cases, all handed down the same day, which dealt with matters of abstention. The others are: Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971). *See* Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972).

354. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Zwickler v. Koota, 389 U.S. 241 (1967); Cameron v. Johnson, 381 U.S. 741 (1965).

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

356. 209 U.S. 123 (1908). *See* notes 315-17 *supra*.

course, interfere in a case where the proceedings were already pending in a state court."[357] The *Young* rule was acknowledged in many subsequent decisions,[358] but was found inapplicable in *Douglas v. City of Jeannette*,[359] where the Court refused equitable relief in a *Young* situation. Plaintiffs were Jehovah's Witnesses who, threatened with criminal prosecution, brought suit to contest a city ordinance which prohibited solicitation of orders for merchandise without first procuring a license and paying a tax. The Court had jurisdiction but refused to invoke it, finding that plaintiffs failed to establish a cause of action in equity.[360] The opinion attempted to clarify the circumstances under which relief would be granted by emphasizing an "irreparable injury"[361] test which, in this case, plaintiffs had failed to meet.

The *Douglas* decision, however, had little deterrent effect on the civil rights cases[362] which began to evolve after the monumental decision of *Brown v. Board of Education*.[363] Although it was unclear as to what circumstances were necessary to obtain equitable relief from the federal courts, it was at least apparent that the protection of individual constitutional rights was more important than strict adherence to precedence in the abstention

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357. *Id.* at 162.

358. *See, e.g.*, Fenner v. Boykin, 271 U.S. 240 (1926) (interference by federal courts possible where state courts would not afford adequate protection); *accord*, Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935). In Hague v. CIO, 307 U.S. 496 (1939), city officials were enjoined from enforcing unconstitutional ordinances which threatened plaintiffs with criminal prosecution and deprived them of first amendment rights. There was evidence of unlawful searches and seizures and other acts indicating harassment and bad faith.

359. 319 U.S. 157 (1943); *accord*, Stefanelli v. Minard, 342 U.S. 117 (1951).

360. Douglas v. City of Jeannette, 319 U.S. 157, 165-66 (1943).

361. *Id.* at 163-64. The Court noted:

> [T]he arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only in a showing of danger of irreparable injury "both great and immediate."

The Court distinguished Hague v. CIO, 307 U.S. 496 (1939) on the absence of harassment and other "exceptional circumstances." *See also* Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941). For language presaging the "irreparable injury" criteria, see Watson v. Buck, 313 U.S. 387 (1941).

362. *See, e.g.*, Denton v. City of Carrollton, 235 F.2d 481 (5th Cir. 1956) (plaintiffs not required to pay tax before maintaining action to have an ordinance declared unconstitutional, where the combination of circumstances made the threat of real and lasting damage to the plaintiffs genuine and present); Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala.), *aff'd*, 352 U.S. 903 (1956) (court held bus segregation statutes unconstitutional and enjoined their enforcement). Later cases from the Court of Appeals for the Fifth Circuit included United States v. Wood, 295 F.2d 772 (5th 1961), *cert. denied*, 369 U.S. 850 (1962); Morrison v. Davis, 252 F.2d 102 (5th Cir.), *cert. denied*, 356 U.S. 968 (1958); Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La.), *aff'd sub nom.*, Gremillion v. United States, 368 U.S. 11 (1961). *See also* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963).

363. 347 U.S. 483 (1954).

areas. And, more to the point, first amendment rights of expression were being asserted by litigants in an overwhelming number of cases.[364]

The time was ripe[365] when *Dombrowski v. Pfister*[366] emerged from the torrent of civil rights litigation with the force of a geyser. Plaintiffs were members of a civil rights group operating in Louisiana; defendants included the chairman of a state "Un-american Activities" committee and his fellow committeemen. Following state court dismissal of arrests made pursuant to an illegal raid on plaintiffs' office and homes, plaintiffs feared, and subsequently alleged, threatened prosecutions under Louisiana's "anti-communist" state statutes.[367] Plaintiffs accordingly filed suit in federal district court shortly before the grand jury was convened,[368] challenging the constitutionality of the statutes and seeking injunctive relief. The court dismissed the complaint for failure to state a ground upon which relief could be granted.[369] The Supreme Court found the statutes to be overbroad and vague,[370] and determined that threatened prosecutions under such statutes would significantly impair, or have a "*chilling effect*"[371] upon, plaintiffs' exercise of their first amendment rights. The Court further noted that the conduct of the defendants in harassing plaintiffs presented evidence of *bad faith* in attempting to enforce the statutes.[372] Eschewing abstention,

364. For a discussion of the "super" protection afforded first amendment rights and of the landmark decisions in the area of expression, see Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 552-55 (1970).

365. In Baggett v. Bullitt, 377 U.S. 360 (1964), the Court declined to abstain in the absence of "special circumstances," holding that abstention was not justified here where the denial of constitutional rights of speech would result. *Accord*, Lindsey v. Normet, 405 U.S. 56 (1972); Garvin v. Rosenan, 455 F.2d 233 (1972); Federal Sav. & Loan Ins. Corp. v. Krueger, 435 F.2d 633 (7th Cir. 1970); Nicholson v. Board of Comm'rs State Bar Ass'n, 338 F. Supp. 48 (D.C. Ala. 1972).

366. 380 U.S. 479 (1965).

367. Subversive Activities and Communist Control Law, LA. REV. STAT. §§ 14:358-:373 (Cum. Supp. 1969); Communist Propaganda Control Law, LA. REV. STAT. §§ 14:390-:390.8 (Cum. Supp. 1969).

368. In light of a recent decision, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), the point in time separating "threatened" from "pending" proceedings becomes an important issue. In *Dombrowski*, the convening of the grand jury marked the "point of pendency" of the proceedings, and the federal district court action filed before that point in time was considered a suit to enjoin *threatened* proceedings.

369. Dombrowski v. Pfister, 227 F. Supp. 556, 564 (E.D. La. 1964).

370. Dombrowski v. Pfister, 380 U.S. 479 (1965). For a discussion of the overbreadth and vagueness concepts, see Cox v. Louisiana, 379 U.S. 559 (1964). *See also* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 555-60 (1971); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

371. Dombrowski v. Pfister, 380 U.S. 479, 487, 494 (1965). *See* Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending*, 72 COLUM. L. REV. 874, 875 n.10 (1972); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

372. Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965). This evidence in the

the Court enjoined enforcement of the unconstitutional statutes and established criteria for such relief in the future.[373]

In *Dombrowski* the majority carefully explained the decision within traditional policy considerations: *Ex parte Young* had recognized circumstances justifying federal interference in state criminal proceedings;[374] the Anti-Injunction Statute[375] applied to *pending*, not *threatened*, prosecutions;[376] and *Douglas v. City of Jeannette*[377] did not dictate otherwise since special circumstances involving threatened irreparable injury had been shown in *Dombrowski*.[378]

The Court considered the issue of abstention in broad language:

> We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.
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> . . . .
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> . . . In these circumstances, to abstain is to subject those affected to the uncertainties and vagaries of criminal prosecution, whereas the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute.[379]

It was not clear from the opinion, however, whether a justifiable attack on a statute as violative of constitutional rights would be sufficient in itself to preclude abstention, or whether a showing of bad faith harassment was also necessary to the decision. Nor was it clear whether the *Dombrowski* doctrine *could* conceivably apply even where state proceedings were already pending. What was clear, however, was that the troublesome abstention/acceptance dichotomy regarding jurisdiction was likely to be resolved in favor of acceptance where a "chilling effect" on first amendment rights was *threatened* under an existing law found to be unconstitutional on its face or unconstitutional in its application.[380]

The subsequent decisions of *Cameron v. Johnson*[381] and *Zwickler v. Koota*[382] clarified some of the problems raised in *Dombrowski*. Although

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Dombrowski case was revived and given much attention in Younger v. Harris, 401 U.S. 37 (1971).

373. Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965).

374. *Id.* at 483-84.

375. 28 U.S.C. § 2283 (1970).

376. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965).

377. 319 U.S. 157 (1943).

378. Dombrowski v. Pfister, 380 U.S. 479, 485-86 (1965).

379. *Id.* at 489, 492.

380. *Id.* at 486-87.

381. This case first came before the Supreme Court in 381 U.S. 741 (1965). On remand the lower court considered the case in light of *Dombrowski* and dismissed. 262 F. Supp. 873 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611 (1968).

382. 389 U.S. 241 (1967). On remand the lower court found plaintiff's case was still alive despite the fact that the politician who had triggered plaintiff's complaint

the Court in the *Cameron* case found no evidence of harassment and held the picketing statute in issue constitutional, they indicated that either bad faith harassment (involving a constitutionally *valid* statute) directed at limiting plaintiff's first amendment rights, or the enforcement (even *absent* bad faith) of a statute justifiably attacked as unconstitutional on its face would be grounds for equitable relief.[383] *Zwickler* demonstrated the applicability of the *Dombrowski* doctrine to cases seeking declaratory judgments, and further noted that a declaratory judgment might still be granted by a court in a suit where injunctive relief was refused.[384] One limiting aspect of these later cases was that virtually all of the lower court decisions refused to extend *Dombrowski* protection to claims other than those involving freedom of expression.[385] Yet the crucial interrelated issues remained unanswered—whether Section 1983 of the Civil Rights Act[386] was an exception to the Anti-Injunction Statute, and whether equitable relief could be granted against *pending* state proceedings.

In February of 1971, six decisions were handed down from the Supreme Court which had a "chilling effect" on the *Dombrowski* doctrine.[387] The most informative of the six, *Younger v. Harris*,[388] involved a California syndicalism statute under which one of the plaintiffs was being prosecuted in pending proceedings. Three other plaintiffs had intervened, alleging they felt "inhibited" or "uncertain" about the effect that enforcement of the statute would have on their free expression. Without regard to the alleged unconstitutionality of the statute, the Court held that abstention was proper

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was no longer in politics. Subsequently, the Supreme Court held the controversy moot. 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd sub nom.*, Golden v. Zwickler, 394 U.S. 103 (1969).

383. Cameron v. Johnson, 390 U.S. 611, 615-18 (1968).

384. 389 U.S. 241, 254 (1967). But the following year the Court affirmed *per curiam* a lower court decision which held, *inter alia*, that a court may *not* grant a declaratory judgment where injunctive relief was refused. Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967), *aff'd*, 391 U.S. 361 (1968).

385. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 580 (1970).

386. 42 U.S.C. § 1983 (1970). Because of its all-inclusive applicability, this provision of the act has been popular with more civil rights litigants than has any other section. The statute 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 proceeding for redress.

387. The cases, all decided on February 23, 1971, have been frequently referred to as the "February Sextet." *See* Le Flore v. Robinson, 446 F.2d 715 (5th Cir. 1971) (concurring opinion by Goldberg, J.). The six cases are: Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); and Byrne v. Karalexis, 401 U.S. 216 (1971).

388. 401 U.S. 37 (1971).

because "of the national policy forbidding federal courts to stay or enjoin *pending* state court proceedings except under special circumstances."[389]

Although the Court's opinion first announced a desire to avoid ruling on cases where criminal prosecution was merely *threatened* under an allegedly unconstitutional statute,[390] nevertheless it went on to restrict the criteria for relief set out in *Dombrowski.* The intervening plaintiffs were not regarded as proper parties since they had alleged no immediate threat of prosecution, and consequently there was no genuine controversy as to them.[391] Reviewing the equitable tradition of non-interference in state criminal prosecutions, together with policies of comity, the Court resurrected language from an earlier case[392] and adopted it as the touchstone of the *Younger* test:

> [W]hen absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, *except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate.*[393]

By way of example, an "irreparable injury" would involve more than "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution . . . ."[394] Additionally, the words "brought in good faith" could apparently be added to the preceding language, for the opinion noted that the existence of bad faith harassment was determinative in *Dombrowski.*[395]

The Court also discussed situations involving a finding that a statute,

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389. *Id.* at 41 (emphasis added). In a footnote to this holding, the Court added that abstention would similarly be in order where a declaratory judgment was being sought. *Id.* at 41 n.2. *See* Samuels v. Mackell, 401 U.S. 66 (1971).

390. Younger v. Harris, 401 U.S. 37, 41 (1971). The Court noted: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."

391. *Id.* at 42.

392. Fenner v. Boykin, 271 U.S. 240 (1926). Plaintiff dealers in cotton commodities, threatened with prosecution, challenged the validity of a state statute declaring unlawful certain agreements for purchase or sale, for future delivery, of certain commodities. The Court refused to enjoin, holding that plaintiffs had failed to show danger of great and immediate irreparable loss. *See* note 322 *supra.*

393. Younger v. Harris, 401 U.S. 37, 45 (1971), *quoting* Fenner v. Boykin, 271 U.S. 240, 243 (1926) (emphasis added).

394. Younger v. Harris, 401 U.S. 37, 46 (1971).

395. The Court noted:

> These circumstances [of bad faith harassment in *Dombrowski*], as viewed by the Court sufficiently establish *the kind of* irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention.

Id. at 48 (emphasis added). The words "the kind of" imply that *other* irreparable injury sufficient to warrant equitable relief may be shown, absent bad faith harassment. *See* note 398 *infra.*

unconstitutional "on its face," would have a "chilling effect" on a plaintiff's freedom of expression and noted, notwithstanding apparently contrary dicta in *Dombrowski*, that such a finding would *not* be sufficient grounds for equitable relief.[396] Having given a "flagrantly violative statute" as another example of sufficient "irreparable injury,"[397] the Court also held that the possible unconstitutionality of a statute "on its face" did not justify an injunction against good faith attempts to enforce it. Applying this to the fact situation before it, the Court found that plaintiff had failed to give evidence of bad faith harassment or any other unusual circumstance that would call for equitable relief.[398]

The other decisions making up the "February Sextet"[399] were essentially variations on the theme stated in *Younger*.[400] But of more immediate interest is the development now being heard as the federal courts at all levels interpret the theme. It is already apparent that the *Younger* cases won't dictate abstention[401] any more than *Dombrowski* dictated injunctions.[402] As will be seen, the *Dombrowski* doctrine obviously fits more situations than its "bearded, one-eyed, red-haired, man-with-a-limp" facts[403] might have suggested, and the *Younger* decision seems destined to be less than a "major retreat"[404] from *Dombrowski*.

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396. Younger v. Harris, 401 U.S. 37, 50 (1971).

397. *Id.* at 53. The Court suggested the possibility that there may be extraordinary circumstances in which the necessary irreparable injury might be shown even absent the usual prerequisites of bad faith and harassment. By way of example, the Court cited Watson v. Buck, 313 U.S. 387, 402 (1941): It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

398. Younger v. Harris, 401 U.S. 37, 54 (1971).

399. This much-used description was apparently coined by Judge Goldberg in Le Flore v. Robinson, 446 F.2d 715 (5th Cir. 1971) (concurring opinion).

400. Samuels v. Mackell, 401 U.S. 66 (1971) (applied the *Younger* holding to declaratory judgments); Boyle v. Landry, 401 U.S. 77 (1971) (held injunction should not issue where none of plaintiffs were being prosecuted or even threatened under allegedly unconstitutional statutes); Perez v. Ledesma, 401 U.S. 82 (1971) (held injunction should not issue where state officials were acting in good faith to enforce a local ordinance which was under attack); *see* Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

401. *See* note 413 *infra.*

402. *See* note 373 *supra.*

403. The implication of this phrase, coined by a recent commentator, is that the fact situation in *Dombrowski* was singular and narrow. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 536 (1970). But the recent case of Mitchum v. Foster, 407 U.S. 225 (1972) suggests that relief will be granted in "threatened"—as in *Dombrowski*—situations.

404. Professor Wright seems to feel that *Younger* represents a major retreat from *Dombrowski*. *See* C. WRIGHT, FEDERAL COURTS § 52, at 203 (Supp. 1972). *But see* notes 410-13 and accompanying text *infra.*

In the May 1972 decision of *Lake Carriers' Association v. MacMullan*,[405] owners of cargo vessels operating on the Great Lakes challenged the constitutionality of the Michigan Water Pollution Act.[406] Since the act had not been construed by any of the state courts, the Supreme Court abstained; but in dicta there was comment on the *limited* scope of the *Younger* decision.[407] The opinion revived the threatened/pending prosecution duality—the significant distinction between *Dombrowski* and *Younger*. Mr. Justice Brennan, author of the *Dombrowski* opinion, wrote for the majority in *Lake Carriers*, and the decision proved to be ominous.

One month later, after years of postponing decision on the issue, the Supreme Court finally ruled on the relationship between Section 1983 of the Civil Rights Act[408] and the Anti-Injunction Statute.[409] In *Mitchum v. Foster*[410] a unanimous Court agreed that the Anti-Injunction Statute, which serves as a bar to most injunctions against state court proceedings, did not apply to litigation seeking equitable relief under section 1983.[411] The Court reasoned that section 1983, "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."[412]

Through his concurring remarks in *Mitchum*, Chief Justice Burger undoubtedly sensed the aura of uncertainty which the majority's opinion seemed to leave around *Younger*:

> In the context of pending state *criminal* proceedings, we held in Younger v. Harris that these principles [of equity, comity, and federalism] allow a federal court properly to issue an injunction in only narrow class of circumstances. We have not yet reached or decided

405. 406 U.S. 498 (1972); *accord*, Hogge v. Members of City Council, 482 F.2d 575, 578 (4th Cir. 1973); *cf.* Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).

406. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 500 (1972). On the authority of Harrison v. NAACP, 360 U.S. 167 (1959), the Court vacated and remanded pending state court rulings on the statute in question. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972).

407. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972). The Court remarked: "The decisions there [in *Younger*] were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding."

408. 42 U.S.C. § 1983 (1970). For text of the statute, see note 386 *supra*.

409. 28 U.S.C. § 2283 (1970). *See also* note 313 *supra*.

410. 407 U.S. 225 (1972). The recent case of Gibson v. Berryhill, — U.S. —, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973), involved an action brought under section 1983 of the Civil Rights Act. The opinion of the Court, by Mr. Justice White, made it clear that the *Mitchum* decision "held only that a district court was not absolutely barred by statute from enjoining a state court proceeding when called upon to do so in a § 1983 suit." *Id.* at —, 93 S. Ct. at 1695, 36 L. Ed. 2d at 496. The opinion went on to reaffirm the "established principles of equity, comity and federalism" and to discuss proper circumstances for abstention.

411. Mitchum v. Foster, 407 U.S. 225, 229 (1972).

412. *Id.* at 238. This test reflects the reasoning of Mr. Justice Reed's vigorous dissent in Toucey v. New York Life Ins. Co., 314 U.S. 118, 141-54 (1941).

> exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings.[413]

Although the distinction between civil and criminal cases had occasionally been discussed before,[414] it is now apparently of greater significance,[415] and future decisions will likely mention the import of the civil or criminal nature of the action[416] on the thorny problem of whether to apply the "great and immediate irreparable harm" test.

Since the *Mitchum* decision removes the jurisdictional barrier created by the Anti-Injunction Statute in actions seeking equitable relief, it follows that where constitutional rights are being asserted under section 1983, the prohibitions of the Anti-Injunction Statute will no longer constitute independent grounds for abstention. Although the *Younger* decision is still valid, its requirements for a showing of bad faith harassment or immediate irreparable injury apparently will control only when the state court proceedings involved are both pending and criminal. In the absence of a pending state criminal prosecution, federal courts will be less willing to abstain from accepting jurisdiction in cases arising under section 1983.

Many of the decisions since *Younger* have applied the criteria established in that decision. In cases involving ongoing state criminal proceedings, equitable relief has been denied absent a showing of bad faith harassment[417] or of irreparable injury.[418] Yet other courts, finding the *Younger* criteria

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413. Mitchum v. Foster, 407 U.S. 225, 244 (1972) (citation omitted).

414. *See, e.g.*, Palaio v. McAuliffe, 466 F.2d 1230, 1232 (5th Cir. 1972), where the court said:

> We believe, however, that application of the principles of *Younger* should not depend upon such labels as "civil" or "criminal," but rather should be governed by analysis of the competing interests that each case presents.

415. *See* Cousins v. Wigoda, 409 U.S. 1201, —, 92 S. Ct. 2610, 2614, 34 L. Ed. 2d 15, 19-20 (1972).

416. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (Florida replevin statute was enjoined by federal court; dissent argued *Younger* should apply). *But see* Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972) where the court said:

> We thus pose a limited answer to the question expressly reserved in *Younger* . . . by holding that, where plaintiff is unable to prove the existence of "special circumstances," the principles of *Younger* bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.

Id. at 1233.

417. *See* Canal Theatres, Inc. v. Murphy, 473 F.2d 4 (2d Cir. 1973) (abstention ordered in suit by theatre operator for declaratory judgment regarding constitutionality of city licensing requirement); Eames v. Pitcher, 468 F.2d 905 (5th Cir. 1972) (no bad faith shown in ongoing state murder prosecution); Hodson v. Stabler, 444 F.2d 533 (3d Cir. 1971) (individual charged with flag desecration not entitled to equitable relief from allegedly unconstitutional statute); Star-Satellite, Inc. v. Rosetti, 441 F.2d 650 (5th Cir. 1971) (no injunction allowed against police seizure of films while proceedings pending for violation of obscenity laws); Eve Productions, Inc. v. Shannon, 439 F.2d 1073 (8th Cir. 1971) (injunction refused where return of seized film sought).

418. *See, e.g.*, Hunt v. Rodriguez, 462 F.2d 659 (5th Cir. 1972) (no irreparable injury shown where raided bookstores either remained open or were to be reopened soon); *cf.* Scott v. Hill, 449 F.2d 634 (6th Cir. 1971) (convict's claim, that allowing

satisfied, have issued injunctions despite pending proceedings. In *Shaw v. Garrison*[419] an injunction was granted to the plaintiff, whom defendant Garrison was prosecuting for perjury in a pending trial. The court found evidence of bad faith harassment in the continuing accusations brought upon plaintiff by defendant in the years following President Kennedy's assassination.[420]

Where there is no pending state prosecution at the time of filing a suit in federal court, many United States Courts of Appeal have not required the abstention criteria established in *Younger*. In *Anderson v. Nemetz*,[421] plaintiff was held to have standing to challenge an Arizona vagrancy statute, although he wasn't presently under arrest. Evidence showed he had previously defended himself against charges under the statute, that the state had declared an intention to continue to enforce the statute against him,

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his appeal to be heard by state appellate court, whose judges were from districts which were not properly apportioned, violated his constitutional rights, failed to allege irreparable injury). *Younger*'s proclamation of the insufficiency of a "chilling effect" was even followed where the "ongoing proceedings" were those of the military. Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). The court abstained from reviewing a transfer order which, evidence tended to show, was issued against plaintiff serviceman after plaintiff arranged for anti-war protest incidents. Noting the actual harassment found here by the trial court, the dissent remarked eloquently:

> Even a very little chill on a very big right is too much. A transfer to Texas today could be a transfer to Hue tomorrow. A transfer can be just as much "punishment" as retention in the Army.
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> . . . .
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> The majority would await a "stronger case" to intervene to protect a serviceman's First Amendment rights. I suspect that there were those who counselled waiting for a higher tax to throw the tea into Boston Harbor, or suggested to Andrew Hamilton that he wait for a client with a better case than John Peter Zenger's to argue for free expression. I would, rather, agree with Coke's aphorism: "No restraint be it ever so little, but is imprisonment, and foreign employment is a kind of honourable banishment."

Id. at 258 (citations omitted).

419. 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972). *Accord*, Krahm v. Graham, 461 F.2d 703 (9th Cir. 1972) (injunction granted where city had filed more than 100 prosecutions against plaintiffs under obscenity laws, of which 90 were still pending, despite acquittals in first 11 cases); Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971) (evidence showed district attorney maintained simple battery prosecutions against plaintiff for purposes of harassment and in bad faith). *Compare* Reed v. Giarrusso, 462 F.2d 706 (5th Cir. 1972) (plaintiffs, arrested under breach of peace ordinances, had standing to challenge ordinance notwithstanding prosecutions had been dropped, where plaintiffs alleged bad faith harassment and fear of future prosecutions).

420. The court declared in Shaw v. Garrison, 467 F.2d 113 (5th Cir. 1972) that:

> We hold, as the language of *Younger* makes clear, that a showing of bad faith or harassment is equivalent to a showing of irreparable injury for purposes of the comity restraints defined in *Younger*, because there is a federal right to be free from bad faith prosecutions. Irreparable injury need not be independently established.

Id. at 120.

421. 474 F.2d 814 (9th Cir. 1973).

and that the state had made several hundred arrests in his locality under the same statute over a 3 year period.[422] The Court of Appeals for the Ninth Circuit found that there was a sufficient "threat" to justify equitable relief.[423]

In *Wulp v. Corcoran*,[424] the Court of Appeals for the First Circuit distinguished *Younger* on the pending/threatened issue. The court found defendant city officials had threatened plaintiffs with arrests and prosecutions under a city ordinance which required registration for a permit prior to distributing printed material in the Harvard Square area of Cambridge, Massachusetts. Finding sufficient threat of impending prosecution was shown by the complaint, the court declared the ordinance unconstitutional.[425]

The future of the abstention doctrine may be more predictable today than it has been since prior to the *Dombrowski* decision in 1965. In pending criminal proceedings, the *Younger* criteria will be applied. Where prosecution is merely threatened, however, it will be a factual determination as to whether there is an acute, live case or controversy sufficient to entitle plaintiff to equitable relief. In such litigation, *Mitchum* seems to indicate that the presence *vel non* of the *Younger* criteria of bad faith, harassment, and great and immediate irreparable injury will be considerations to be weighed, but will not be conclusive in deciding whether to accept jurisdiction. Whether *Younger* will be applied to pending *civil* proceedings is presently unclear, but at least one Supreme Court decision implies that it will not be controlling in a civil action.[426]

The civil-criminal distinction has remained unanswered, but it is likely that it will be applied in future decisions[427] to avoid the rigid test required

422. *Id.* at 816. The court noted specifically: "There are sound policy reasons for holding that the abstention doctrine enunciated in *Younger* and its companion cases should not be applied in cases where no state prosecution is pending." *Id.* at 819; *accord,* Thoms v. Heffernan, 473 F.2d 478, 483 (2d Cir. 1973); Gay v. Board of Registration Comm'rs, 466 F.2d 879, 885 (6th Cir. 1972); Lewis v. Kugler, 446 F.2d 1343, 1347 (3d Cir. 1971); Hull v. Petrillo, 439 F.2d 1184, 1186-87 (2d Cir. 1971).

423. Anderson v. Nemetz, 474 F.2d 814, 820 n.2 (9th Cir. 1973).

424. 454 F.2d 826 (1st Cir. 1972).

425. *Id.* at 834. *But see* Laird v. Tatum, 408 U.S. 1 (1972).

426. Fuentes v. Shevin, 407 U.S. 67 (1972). Some jurisdictions have argued against any civil-criminal distinction, so far as application of the *Younger* principles are concerned. *See* Palaio v. McAuliffe, 466 F.2d 1230, 1232-33 (5th Cir. 1972); Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971). As a consequence, problems of what to "label" a case have arisen. In cases involving disciplinary proceedings brought against attorneys, for example, two decisions arrived at contrary appellations. *Compare* Polk v. State Bar of Texas, 480 F.2d 998, 1002 (5th Cir. 1973) (dicta indicated that proceedings by Grievance Committee of State Bar of Texas are civil in nature), *with* Erdmann v. Stevens, 458 F.2d 1205, 1209 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972) (disciplinary proceeding against a member of state's bar is comparable to a criminal rather than to a civil proceeding).

427. *See* Chief Justice Burger's quotation at note 413 and accompanying text *supra.*

by *Younger*. As a matter of policy, it is a valid distinction, for the state has a considerable investment of its resources in pending criminal prosecutions. Such an investment is entitled to the plenary protection of comity and of the other principles governing "Our Federalism."

Although the role of the federal courts has been steadily increasing during the past century,[428] the abstention doctrine still operates in recurring key circumstances to prevent improper assertion of federal powers, and to preserve the delicate balance of authority necessary to the health of our federal system.

ORDERS MADE WHILE DETERMINING JURISDICTION

It is well established that a federal court has authority to determine whether or not it may lawfully exercise jurisdiction over the parties and subject matter of the litigation.[429] There has been controversy, however, concerning the effect of injunctions and temporary restraining orders issued pending such jurisdictional determinations.[430]

In determining the ultimate validity of an order, the issue of jurisdiction of the court over the subject matter of the case by the issuing court is a vital question. Federal courts are afforded authority to determine jurisdiction, as was clearly developed in *United States v. Shipp*.[431] In 1905, Johnson, a black man from Hamilton County, Tennessee, was convicted of raping a white woman and was sentenced to death. Johnson petitioned the Court of Appeals for the Sixth Circuit, seeking a writ of habeas corpus, alleging that the proceedings in his trial were invalid because Negroes had been excluded from the grand and petit juries. The petition was denied,[432] and on appeal to the United States Supreme Court, Johnson contended that the act of excluding blacks from the jury deprived him of his constitutional rights without due process of law. The Court issued an order staying all proceedings against the prisoner pending the appeal of his conviction.

When notification of the order reached Shipp, the county sheriff who held custody of Johnson, he reacted by leaving the prisoner in the jailhouse virtually unprotected. The same evening, Johnson was removed from jail

428. *See* Mitchum v. Foster, 407 U.S. 225, 231-42 (1972).

429. Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939); United States v. Shipp, 203 U.S. 563, 573 (1906); Locke v. United States, 75 F.2d 157, 159 (5th Cir. 1935); O'Hearne v. United States, 66 F.2d 933, 936 (D.C. Cir. 1933); Schwartz v. United States, 217 F. 866, 869 (4th Cir. 1914); Brougham v. Oceanic Steam Nav. Co., 205 F. 857, 860 (2d Cir. 1913).

430. *See* Boskey & Braucher, *Jurisdiction & Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940).

431. 203 U.S. 563, 573 (1906).

432. *Id.* at 571. The petition was denied at a hearing and Johnson was ordered to be kept in the custody of the Hamilton County sheriff, pending an appeal to the United States Supreme Court.

and executed by a mob, acting with the tacit aid and support of Shipp. Because of his failure to protect the prisoner, the sheriff was charged with contempt of the order staying all proceedings. In his defense, Shipp contended that the federal court lacked jurisdiction to rule in the habeas corpus proceeding because there was no issue concerning the construction of the United States Constitution.[433] Shipp believed that exclusion of blacks from juries was not a matter involving the Constitution.

Mr. Justice Holmes, speaking for the Court in *Shipp*, refused defendant's argument and appropriately summarized the extent of a federal court's authority to determine its own jurisdiction:

> It has been held, it is true, that orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, *and if this Court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law.* It and it alone necessarily had jurisdiction to decide whether the case was properly before it. Until its judgment declining jurisdiction should be announced, it had the authority *from the necessity of the case* to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time.[434]

The real impact of the statement is that the authority to make an order staying proceedings springs from the necessity of the case.[435] Therefore, it can be inferred that Justice Holmes decided that the matter of jurisdiction should initially not interfere with an order preserving the status quo in an emergency situation, until the jurisdictional facts are resolved.

Confusion remained in the area of jurisdiction to determine jurisdiction as clearly manifested by the case of *Ex parte Young*.[436] The Court in *Young* failed to consider whether any authority to determine jurisdiction lay with the court itself, and instead, discussed orders that were considered absolutely void based on a lack of jurisdiction.[437] There was a total failure to

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433. *In re* Lennon, 150 U.S. 393, 398 (1893).

434. United States v. Shipp, 203 U.S. 563, 573 (1906) (emphasis added), *citing In re* Sawyer, 124 U.S. 200 (1887); *Ex parte* Fisk, 113 U.S. 713 (1884); *Ex parte* Rowland, 104 U.S. 604 (1881) for the proposition that orders made by a court without jurisdiction may be disregarded with impunity, *and* Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379, 382 (1884) for the proposition that the court itself must make the determination if the matter is properly before it. *See Ex parte* Young, 209 U.S. 123 (1908); Locke v. United States, 75 F.2d 157 (5th Cir. 1935).

435. Justice Holmes in his opinion cited Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379 (1883). The reasoning is imperfect since *Mansfield* only discusses instances wherein jurisdiction has already been determined and gives instructions on how a court should deal with an appeal when jurisdiction has been mistakenly assumed.

436. 209 U.S. 123 (1908).

437. The Court in making that determination noted:

> Where contempt consists of violation of an order or decree of a court, the commitment will be sustained unless it is found that the order or decree was *absolutely*

even consider the doctrine espoused 3 years earlier in *Shipp*.[438] In fact, it was 1935 before the *Shipp* doctrine on jurisdiction was reaffirmed in *Locke v. United States*.[439] The Court of Appeals for the Fifth Circuit noted that if jurisdiction is *unequivocally* lacking, a temporary injunction or any other order of such a court is void. If there is merely doubtful jurisdiction, however, it is the duty of that court itself to investigate the matter and any order made to maintain the status quo of the litigants will receive *special consideration*.[440] This is clearly a restated version of the holding of *Shipp* with emphasis on an order maintaining the status of the parties receiving unique treatment. Four years later, the Supreme Court in *Treinies v. Sunshine Mining Co*.[441] noted that the rule stating a judgment is always a nullity if jurisdiction is totally lacking can no longer be broadly asserted.[442] The Court held that, except in case of plain usurpation, a court has jurisdiction to determine its own jurisdiction.[443]

With this firm rule that a federal court has jurisdiction to determine jurisdiction unequivocally established,[444] the question still remained as to how orders made by a court with self-determined jurisdiction were to be treated. A Supreme Court case, *Gompers v. Buck's Stove & Range Co.*,[445] provided the basis for contempt citations in many later cases. Justice Lamar, faced with the problem of parties disobeying an order which they felt was invalid for lack of federal jurisdiction, stated:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent and what the Constitution now fittingly calls the judicial power of the United States would be a mere mockery.[446]

Referring back to *Locke v. United States*,[447] the Court emphasized that the grant of an injunction was not to be questioned except by proper appeal and must not be tested by willful disobedience.[448] The Court emphatically

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void because the court was wholly without jurisdiction or power to make it. *Id.* at 143 (emphasis added).

438. The Supreme Court totally ignored the doctrine of *Shipp*, and based its desion on three cases that had been modified by the *Shipp* decision. *Cf. In re* Coy, 127 U.S. 731 (1888); *Ex parte* Yarborough, 110 U.S. 651 (1884); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

439. 75 F.2d 157, 159 (5th Cir. 1935).

440. *Id.* at 159.

441. 308 U.S. 66 (1939).

442. *Id.* at 78.

443. *Accord*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940); Stoll v. Gottlieb, 305 U.S. 165, 176 (1938).

444. Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); United States v. Shipp, 203 U.S. 563, 573 (1906).

445. 221 U.S. 418 (1911).

446. *Id.* at 450.

447. 75 F.2d 157 (5th Cir. 1935).

448. *Id.* at 159; *see* O'Hearne v. United States, 66 F.2d 933, 935 (D.C. Cir. 1933);

stated that such willful disobedience, of even an injunction issued by a court which was subsequently determined to be without jurisdiction, is punishable as contempt.[449]

This contempt distinction was later clarified by the decision in *United States v. United Mine Workers of America*[450] involving a Union-called strike of a nationalized coal mine. The Government brought suit and pending a determination of the workers' right to strike, the United States requested and obtained a federal district court injunction against the strike. The union contended that the injunction was void for lack of federal court jurisdiction to adjudicate the matter. The union's basis for this contention was the Norris-La Guardia Act[451] which provides that no federal court will have jurisdiction to issue a restraining order or injunction in any matter that concerns a labor dispute.[452] On this basis, the workers ignored the injunction and stopped work.

The Supreme Court, in what it termed unequivocal language[453] condemned this action, citing *Shipp* as its principal authority[454] and concluding that the disobedience of the order by the Union was punishable as criminal contempt.[455] By specifying that the punishment be for criminal contempt alone, the Court distinguished this disobedience from violations which result in civil contempt. The Court in *Nye v. United States*,[456] citing their earlier decision in *McCrone v. United States*,[457] held that "a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant and is not intended as a deterrent to offenses against

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Schwartz v. United States, 217 F. 866, 869 (4th Cir. 1914); Brougham v. Oceanic Steam Nav. Co., 205 F. 857, 860 (2d Cir. 1913).

449. Locke v. United States, 75 F.2d 157, 159 (5th Cir. 1935); *see* American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184, 211 (1921); Patton v. United States, 288 F. 812, 815 (4th Cir. 1923).

450. 330 U.S. 258 (1947).

451. 29 U.S.C. § 101 (1970).

452. The Act has been held to deny federal courts jurisdiction to issue an injunction against labor strikes. *See* Brotherhood of Locomotive Firemen v. Florida E. Coast Ry., 346 F.2d 673, 675 (5th Cir. 1965); Brotherhood of R.R. Trainmen, Local No. 721 v. Central Ry., 229 F.2d 901, 905 (5th Cir. 1956); W.L. Mead, Inc. v. International Bhd. of Teamsters, 217 F.2d 6, 9 (5th Cir. 1954); Texas Pac.-Mo. Pac. Terminal R.R. v. Brotherhood of Ry. & S.S. Clerks, 232 F. Supp. 33, 34 (E.D. La. 1964); Merchants Refrigerating Co. v. Warehouse Union, Local No. 6, 213 F. Supp. 177, 178 (N.D. Cal. 1963).

453. United States v. United Mine Workers of America, 330 U.S. 258, 290 (1947).

454. *Id.* at 290.

455. *Id.* at 293; *accord*, Howat v. Kansas, 258 U.S. 181, 183 (1922); *see* Russell v. United States, 86 F.2d 389, 392 (8th Cir. 1936); Locke v. United States, 75 F.2d 157, 159 (5th Cir. 1935); Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930); Schwartz v. United States, 217 F. 866 (4th Cir. 1914); Brougham v. Oceanic Steam Nav. Co., 205 F. 857, 860 (2d Cir. 1913). *See also* O'Hearne v. United States, 66 F.2d 933, 936 (D.C. Cir. 1933).

456. 313 U.S. 33 (1941).

457. 307 U.S. 61, 64 (1939).

the public."[458] This distinction was also drawn in *Carter v. United States*[459] which explained the contrary rulings of *In re Sawyer*,[460] *Ex parte Fisk*[461] and *Ex parte Rowland*,[462] by stating that what was involved in those cases was civil contempt which should properly be dropped when jurisdiction is found lacking.[463]

Criminal contempt proceedings are brought to preserve the authority, dignity and integrity of the court and to punish offenders for disobedience of its orders.[464] The significance of the *Mine Workers* decision was the reasoning that even if the order irself was set aside on appeal, the criminal contempt conviction would be preserved.[465] The Court went as far as to say that even if the entire action on which the case is based becomes moot, the criminal contempt will stand.[466] This portion of the *Mine Workers* decision has been applied with great consistency in recent cases.[467]

As Professor Wright notes, the long range effect of the *Mine Workers* decision is unknown.[468] A careful analysis of the litigation from *Shipp* through *Mine Workers* reveals that the doctrine espoused in *Mine Workers* can be applied with certainty only to prohibitive orders that seek to preserve the status quo.[469] The Court in *Shipp* speaks in terms of "orders to

458. Nye v. United States, 313 U.S. 33, 42 (1941). *See also* Penfield Co. v. SEC, 330 U.S. 585 (1946); Mac Neil v. United States, 236 F.2d 149, 153 (1st Cir. 1956); Walling v. Crane, 158 F.2d 80, 83 (5th Cir. 1946); Fenton v. Walling, 139 F.2d 608, 609 (9th Cir. 1943); NLRB v. Hopwood Retinning Co., 104 F.2d 302, 305 (2d Cir. 1939).

459. 135 F.2d 858 (5th Cir. 1943).

460. 124 U.S. 200 (1888). Contempt citations for this series of three cases were dismissed when it was determined that the courts involved lacked jurisdiction in the causes of action. The cases can be distinguished from Carter v. United States, 135 F.2d 850 (5th Cir. 1943) and from United States v. United Mine Workers, 300 U.S. 258 (1947) in that the parties were cited for contempt for disobeying a judgment and not an order of the court.

461. 113 U.S. 713 (1885).

462. 104 U.S. 604 (1881).

463. Carter v. United States, 135 F.2d 850, 860 (5th Cir. 1943).

464. O'Mally v. United States, 128 F.2d 676, 683 (8th Cir. 1942). *See also* Cliett v. Hammonds, 305 F.2d 565, 569 (5th Cir. 1962); United States v. Auerbach, 165 F.2d 713, 715 (2d Cir. 1948); Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946).

465. United States v. United Mine Workers of America, 300 U.S. 258, 294 (1947). *See also* Worden v. Searls, 121 U.S. 14 (1887); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F.2d 727 (2d Cir. 1936); S. Anargyros v. Anargyros & Co., 191 F. 208, 210 (C.C.N.D. Cal. 1911).

466. United States v. United Mine Workers of America, 330 U.S. 258, 294 (1947). *See also* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 451 (1911).

467. Green v. United States, 356 U.S. 165 (1958); Powell v. United States Cartridge Co., 339 U.S. 497 (1950); Maggio v. Zeitz, 333 U.S. 56 (1948); Heyman v. Kline, 456 F.2d 123, 131 (2d Cir. 1972), *cert. denied*, 409 U.S. 847 (1973); Stewart v. Dunn, 363 F.2d 591, 599 (5th Cir. 1966); United States v. Thompson, 319 F.2d 665, 667 (2d Cir. 1963). *Contra*, Donovan v. City of Dallas, 377 U.S. 408 (1964); Dunn v. United States, 388 F.2d 511, 513 (10th Cir. 1968).

468. C. WRIGHT, FEDERAL COURTS § 16, at 52 (2d ed. 1970).

469. United States v. United Mine Workers of America, 330 U.S. 258 (1947);

preserve the existing conditions,"[470] *Locke* refers to orders made "only to control the status pending the inquiry" and noted this type of order "stands upon a special basis."[471] In reaching its decision in *Mine Workers* the Supreme Court took special note of the language in *Carter v. United States*:[472] "Pending a decision on a doubtful question of jurisdiction, the District Court was held to have power to maintain the *status quo* and punish violation as contempt."[473] The Court further explicitly stated that the district court had the authority to preserve the status quo while making its own determination about jurisdiction.[474]

Two vague areas of application remain with regard to mandatory orders and the effect the rule has on state courts. Several recent Supreme Court cases have refused to extend the *Mine Workers* rule to orders issuing from state courts.[475] Additionally, one one case has allowed a criminal contempt to stand for violation of a mandatory order by a court that lacked jurisdiction.[476] It is doubtful that the doctrine should be or will be extended into either of these areas.

CONCLUSION

In conclusion it may be said that there are few, if any, simple answers to the complex issues of implied federal jurisdiction, and also to the converse issues of rejection of cases in what would seem to be instances of express federal jurisdiction. It can be noted, however, that within their limited means, the federal courts have been able to develop some jurisdictional interpretations of the Constitution which, when necessary, either expand or restrict its few and simple words. And with good reason.

Needless relitigation is avoided through the proper exercise of ancillary and pendent jurisdiction. Removal jurisdiction allows the defendant an opportunity to obtain a federal hearing when his federal rights are in issue or when he can qualify in a diversity situation. Additionally, recourse may be had in the federal courts when state officers act under invalid state laws. On the other hand, through the Anti-Injunction Statute and its judicial in-

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United States v. Shipp, 203 U.S. 563 (1906); United States v. Locke, 75 F.2d 157 (5th Cir. 1935).

470. United States v. Shipp, 203 U.S. 563, 573 (1906).

471. Locke v. United States, 75 F.2d 157, 159 (5th Cir. 1935).

472. 135 F.2d 858 (5th Cir. 1943).

473. United States v. United Mine Workers of America, 330 U.S. 258, 292 (1947). *See also* Treinies v. Sunshine Mining Co., 308 U.S. 66, 68 (1939).

474. United States v. United Mine Workers of America, 330 U.S. 258, 293 (1947).

475. Walker v. City of Birmingham, 388 U.S. 307, 315 (1967); *In re* Green 369 U.S. 689, 692 (1962); Amalgamated Ass'n v. Wisconsin Employment Relations Bd., 340 U.S. 383, 397 (1951).

476. Giancana v. Johnson, 335 F.2d 372, 376 (7th Cir. 1964). A mandatory order to testify was violated and the contempt citation was upheld even though the jurisdiction of the court was questionable.

terpretation, as well as through the courts' own development of the doctrine of abstention, a certain balance is maintained between federal and state interests.

Although the growth of federal jurisdiction has been uneven, and at times inconsistent, it must be remembered that notwithstanding all their authority to adjudicate cases, the courts are powerless to determine which cases will come before them. The courts can only decide, or refuse to decide, the cases that individuals determine to file. Lacking any general legislative power, limited to action only upon cases before them, the law, as developed by the courts, must necessarily reflect the issues considered important by the litigants.

Finally, it is interesting to note that throughout our unparalleled growth as a nation, of which the growth of our federal courts is but one reflection, our sense of individual statehood has not diminished. State governments and state courts also continue to grow and flourish. The American dual system of government continues to grow, with the courts innovating and adapting to changing conditions. While our Constitution remains a sound and viable basic law which has not significantly changed in appearance, it too, through court interpretation, has grown and adapted through the years. And in the narrow area of federal court jurisdiction discussed above in great detail, the overall developments to date appear to be in keeping with Justice Marshall's mandate not to do violence to our Constitution.[477]

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477. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).