Federal Jurisdiction - Younger v. Harris: A Current Appraisal of the Policy against Federal Court Interference with State Court Proceedings

Thomas J. Reed

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol21/iss2/9

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
On September 20, 1966 John Harris, Jr., who had been advocating the aims of the political party to which he belonged through the distribution of pamphlets on the steps of the Los Angeles County Courthouse, was indicted in the California State Court and charged with violation of the California Criminal Syndicalism Act. Harris was unsuccessful in the California Superior Court in his suit for a dismissal of the

---

1. CAL. PEN. CODE §§ 11400-11401 (West Supp. 1970), also known as the CALIFORNIA CRIMINAL SYNDICALISM ACT:

"§ 11400. Definition

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

"§ 11401. Offense; punishment

"Any person who:

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

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

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

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

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

"Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than 14 years."
indictment against him on the grounds of the unconstitutionality of the Act. Next, he petitioned for writs of prohibition in the California Court of Appeals and the California Supreme Court to prevent the trial of the pending criminal action. These petitions were denied without opinion and without hearing. Finally, Harris sued in a federal district court to enjoin the District Attorney of Los Angeles County, Evelle Younger, from prosecuting him, alleging that the prosecution and even the presence of the Act inhibited him in the exercise of his rights of free speech and press, as guaranteed by the first and fourteenth amendments.2

Intervening as plaintiffs in the suit were Jim Dan and Diane Hirsch, who claimed that the prosecution of Harris would inhibit them as members of the Progressive Labor Party from peacefully advocating the program of their party, which was the substitution of socialism in place of capitalism and the abolition of the profit system of production in this country. A third intervening plaintiff Farrel Broslawsky, a history instructor at Los Angeles Valley College, stated that he was uncertain as to whether his normal practice of teaching his students about the doctrines of Karl Marx and reading from the Communist Manifesto and other revolutionary works might subject him to prosecution for violation of the Act. All of the plaintiffs asserted that they would suffer irreparable injury unless a federal injunction was issued. Specifically they contended that the pending prosecution and the prospect of future enforcement of the Act subjected them to a deprivation of their constitutional rights under 42 U.S.C. §1983 (1970).3

A three-judge federal district court was convened pursuant to 28 U.S.C. §22844 and held that the California Criminal Syndicalism Act was void for vagueness and overbreadth in violation of the first and fourteenth amendments. Accordingly, the court restrained the district attorney from further prosecution of the pending action against Harris for alleged violation of the Act.5 The case came before the United States Supreme Court on appeal by Mr. Younger, the State's District Attorney, pursuant


3. "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."

4. This statute provides for the composition and procedure of the three-judge district court whenever it is "in any action or proceeding required by Act of Congress."

5. Supra note 2, at 517.
to 28 U.S.C. § 1253 (1970). Younger argued, inter alia, that only Harris, who was indicted, had standing to challenge the Act, and that issuance of the injunction was a violation of a long-standing judicial policy of nonintervention and of 28 U.S.C. §2283 which provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Court agreed that only Harris had standing, but more importantly ruled that the judgment of the district court, enjoining the district attorney from prosecuting under the California Act, "must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." Younger v. Harris, 401 U.S. 37 (1971).

The significance of this decision lies as much in what the Court did not hold as in what it did. The narrow holding announced in Younger was that, in the absence of any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief, the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it. However, of equal importance is the express refusal of the Court to consider whether 42 U.S.C. §1983, the civil rights provision, falls within the exception to 28 U.S.C. §2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress."

The purpose of this note is to explore, as specifically enunciated in Younger v. Harris, the significance of the federal policy of nonintervention in state court proceedings except under extraordinary circumstances. In order to more fully understand the specific holding in the case, it is necessary to analyze the historical bases of the policy of noninterference. Accordingly, this note shall examine the judicial and statutory arguments supporting such a position, analyze Younger against this policy background, and provide a critical examination of the validity of this policy in our contemporary era. This analysis and critical examination will hopefully provide new insights into the future of the policy.

The historical bases of the federal policy of noninterference with state

---

6. "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."


8. Id. at 54.
court proceedings draw their support from four general areas: the principles of equity jurisprudence, the notion of comity, the doctrine of abstention, and the implications of 28 U.S.C. §2283, the anti-injunction statute. It is difficult to clearly distinguish between the impact of each of these areas on the overall policy of noninterference, as commentators and judges alike have obfuscated their meanings in applying their principles to specific cases and topics. Consequently, the contribution of each area shall be analyzed and evaluated in relation to the others.

The issue of whether or not a federal court should abstain from interfering in a state court proceeding arises where an individual fears that the state courts will not be as conscious of his constitutional rights as the federal courts might be. Accordingly, he petitions the federal court to declare the law, under which he fears criminal prosecution, to be unconstitutional and enjoin the enforcement of that law. Since the prayer seeks injunctive relief, the court is immediately confronted with the principles of equity jurisprudence. Under these principles, in order for equity to exercise its discretionary powers, the petitioner must have standing for equitable relief. His remedy at law must be inadequate and the denial of equitable relief under the circumstances must result in great and irreparable injury. These principles evolved under circumstances peculiar to the English judicial system and are generally not applicable in this country. However, as the Court in Younger notes:

[the] fundamental purpose of restraining equity jurisdiction... is equally important under our Constitution, in order to prevent the erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

Intimately intertwined with the evolution of these equitable principles is the notion of comity which is based upon the respect of one court for the decisions of another. Its objective is the promotion of a harmonious relationship between courts of different jurisdictions. The principle of comity evolved from the English common law which held that no court should interpose its process to take out of the hands of another coordinate

13. Supra note 7, at 44.
court a res or cause of which the latter had taken prior jurisdiction.14 Although the principle of comity has long been recognized, it was not until the end of the nineteenth century that the United States Supreme Court specifically addressed itself to the limitations of that principle. "[C]omity is not a rule of law, but one of practice, convenience and expediency. Comity persuades; but it does not command."15 The policy of comity underlies much of the reasoning behind congressional legislation against federal court interference with state court proceedings. This is true to such an extent that some courts have interpreted 28 U.S.C. §2283 as being merely a codification of the principle of comity. As a result many federal courts have treated the anti-injunction statute as not mandatory but permissive.16 Although the effect of 28 U.S.C. §2283 (the anti-injunction statute) has frequently been debated, there is little doubt that the notion of comity was greatly responsible for the congressional legislation culminating in §2283. It is to the history of this legislation that we now turn.

The origin of the present anti-injunction statute, 28 U.S.C. §2283, can be traced back to §5 of the Act of March 2, 1793 which 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. . . ."17 Numerous reasons have been postulated as to the policy behind the Act. Some commentators have theorized that the report of Attorney General Edmund Randolph to the House of Representatives on desirable changes in the Judiciary Act of 1789 was responsible.18 Randolph recommended that "no injunction in equity shall be granted by a District Court to a judgment at law of a State Court."19 He based this proposal upon two major considerations. First, he expressed aversion to the practice of splitting a cause of action "by throwing the common-law side of the question into the State Courts, and the equity side into the federal courts."20 Second, the Attorney General pointed to the fatiguing

17. Act of March 2, 1793, ch. 22 § 5, I Stat. 334, 335 [hereinafter cited as the 1793 Act].
20. Id. at 34.
activities of circuit-riding. This latter consideration was later echoed in a letter from Chief Justice Jay and his associates to the President. Other commentators suggest that the statute was a reflection of the contemporary dislike for unwarranted intrusion of federal courts upon state sovereignty. This dislike intensified as a result of Chisholm v. Georgia, decided less than two weeks before the anti-injunction provision was enacted into law. The case extended the scope of federal jurisdiction by declaring that a state might be sued in the federal courts by a citizen of another state. Finally, and probably more accurately, the Act of March 2, 1793 has been thought to be the result of prevailing dislike for chancery practice in general. Justice Frankfurter, in discussing the trends that merged in the 1793 Statute in Toucey v. New York Life Insurance Company, points to strong prejudices against equity jurisprudence exhibited by Senator Oliver Ellsworth, later to become Chief Justice and the principal draftsman of both the 1789 and 1793 Judiciary Acts. No matter what the reasons were behind the enactment of the 1793 Act, the policy expressed therein is clear and without qualification—federal courts cannot enjoin state court proceedings. The objective is nearly identical to that of comity: "to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process." These early ideas of comity and the policy behind the 1793 Act expressed in its debates comprise the concept described by some as "Our Federalism." This concept represents what the Court in Younger called:

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.

The concept of "Our Federalism" will be evaluated in greater detail


22. 2 U.S. (2 Dall.) 419 (1793).

23. This case resulted in the adoption of the eleventh amendment to the Constitution.


26. Supra note 7, at 44.
later in this note. However, for now it is important to observe the early ideas of federalism and to examine the evolution of §2283 to the present.

In the first case arising under the 1793 Act, Diggs & Keith v. Wolcott,27 the Supreme Court affirmed the unqualified prohibitory language of the Act, and held that a circuit court of the United States had no power to enjoin proceedings in a state court. Following this initial affirmation of the 1793 Act there was a lull of sixty-five years during which no cases under the provision were before the Supreme Court. However, a new danger arose during this period which proved to be more of a threat than the peril of federal intervention. This was the illegal assumption of power by the state courts over federal officials and federal judicial proceedings.28

During the period between 1872 and 1920 the Supreme Court frequently cited the 1793 Act in declaring federal injunctions void.29 Nevertheless, it was during this same period that limitations were woven into the force and language of the Act. In the 1874 case of French v. Hay,30 the Supreme Court held, for the first time, that exceptions to the absolute statute might be made. There the defendant, in a Virginia state court, had removed the suit to federal court after judgment and sought to enjoin further proceedings on the judgment by the plaintiff in a Pennsylvania state court. The Supreme Court held that the federal court had prior and exclusive jurisdiction of the case and the injunction could be granted in order to protect the prior jurisdiction of the federal court.31

In 1878 Congress authorized a federal court in bankruptcy proceedings to issue injunctions to state courts in order to protect the federal court's jurisdiction.32 The bankruptcy provision, enacted under the Revised Statutes of 1874, represented the first legislative change in the Act of 1793. It was incorporated into the Judicial Code of 1911 and remained substantially the same until the enactment of the Judicial Code of 1948

27. 8 U.S. (4 Cranch) 179 (1807).
28. See Comment, The Civil Rights Act As a Statutory Exception To the Anti-Injunction Statute, 4 John Marshall J. of Prac. and Proc. 55, 58 (1970); For a comprehensive history of the cases in this period see Thompson, Abuses of the Writ of Habeas Corpus, 18 Am. L. Rev. 1 (1884).
30. 89 U.S. (22 Wall.) 250 (1874).
31. Id. at 253.
when it was replaced by the general provision covering all exceptions "as expressly authorized by Act of Congress." In addition to the Bankruptcy Act there are ten other federal statutes which are recognized as congressionally authorized exceptions to Section 2283: The Act of 1851 limiting the liability of shipowners,\textsuperscript{33} the federal removal provision,\textsuperscript{34} the Interpleader Act of 1926,\textsuperscript{35} the Frazier-Lemke Farm Mortgage Act,\textsuperscript{36} the federal Habeas Corpus Act,\textsuperscript{37} the Emergency Price Control Act of 1942,\textsuperscript{38} the Fair Labor Standards Act,\textsuperscript{39} the National Labor Relations Act,\textsuperscript{40} the Public Utility Holding Act,\textsuperscript{41} and Title II of the 1964 Civil Rights Act §§201-207.\textsuperscript{42}

It is beyond the scope of this note to analyze in depth the express exceptions to §2283.\textsuperscript{43} For purposes of this study it is sufficient to understand the trends resulting from these exceptions viewed in a judicial, rather than congressional setting. After analyzing numerous cases involving the anti-injunction statute the authors of one study had this to say:

The cases which have been examined are a startling revelation of the fate of a statute which does not command the respect of the courts. Although sweeping and unqualified in its terms, it does not limit the jurisdiction of the federal courts, but only their equity powers; it does not bind them prior to the institution of state suits, nor after judgment therein; if deemed necessary to make effective their own jurisdiction, it is ignored altogether. . . . To say that the statute merely enacts a doctrine of comity which already existed, and that the limitations on that doctrine may therefore be enforced though not in terms included in the enactment, is little more than a circumlocution announcing that the statute will be departed from whenever, in the judgment of the court, necessity or convenience invites departure.\textsuperscript{44}

\begin{itemize}
  \item 34. 28 U.S.C. §§ 1441-1450 (1970).
  \item 40. \textit{See} N.L.R.B. v. Bachelder, 120 F.2d 574 \textit{cert. denied} 314 U.S. 647 (7th Cir. 1941).
  \item 41. \textit{See} Okin v. S.E.C., 161 F.2d 978, 980 (2nd Cir. 1947).
  \item 42. \textit{See} Dilworth v. Riner, 343 F.2d 226, 230 (5th Cir. 1965).
  \item 43. For comprehensive analysis of these legislative exceptions to section 2283 \textit{see} 1A MOORE, \textit{FEDERAL PRACTICE} 2318-2418 (1965); Comment, \textit{How a Federal Court May Enjoin State Infringement Upon Civil Liberties Within the Confines of the Atlantic Coast Line Decision}, 5 U.S.F. L. REV. 291, 296-97 (1971); Note, \textit{Incompatibility—the Touchstone of Section 2283's Express Authorization Exception}, 50 U. VA. L. REV. 1404, 1405 (1964).
  \item 44. Taylor and Willis, \textit{supra} note 18, at 1194 (1933).
\end{itemize}
A contrary view of the anti-injunction statute was expressed by Justice Frankfurter in 1941 in *Toucey v. New York Life Insurance Company.* Therein the Court (by a 6-3 margin) repudiated the doctrine of relitigation which states that the federal court has the power to enjoin a proceeding in a state court when the claim has previously been litigated in federal court. After examining the background and legislative history of the statute, Justice Frankfurter, speaking for the majority, said:

"The purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court."

In 1948 Congress enacted the present anti-injunction statute which provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Commenting on the new section, the revisers stated that "the revised section restores the basic law as generally understood and interpreted prior to the Toucy [sic] decision." This position was to stand for only a short time. Again it was Justice Frankfurter who reinstated the stringent prohibition against federal interference:

We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. . . . By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.

Chief Justice Warren, with whom Justices Black and Douglas concurred in the dissent, criticized the position taken by Justice Frankfurter:

Contrary to the suggestion of the majority opinion, § 2283 is not broader in scope than its predecessor, § 265. Indeed, the express purpose of § 2283 was to contract— not expand—the prohibition of § 265. . . . The only substantive change noted by the Revisers was on the overruling of this Court's decision in *Toucey.* . . . By enacting § 2283, Congress thus rejected the *Toucey* decision and its philosophy of judicial inflexibility. . . . To read § 2283 literally—as the majority opinion does—ignores not only this legislative history but also over a century of judicial history.

---

45. *Supra* note 25.
46. *Supra* note 25, at 132.
50. *Id.* at 523 (dissenting opinions of Warren, C.J., joined by Black and Douglas JJ.)
The subsequent history of the anti-injunction statute can be viewed as a struggle between these two positions: the strict interpretation expressed by Justice Frankfurter and the more liberal view expressed by Chief Justice Warren and Justice Douglas. However, for purposes of this study, these cases will be examined in light of all the factors influencing federal court interference with state court proceedings. The anti-injunction statute is but one of these factors. Also to be considered are the already discussed principles of equity jurisprudence and the notion of comity.

Another doctrine which the federal courts have used in refusing to intervene in state court proceedings is abstention—a term used rather loosely to mean that the federal courts will refuse to intervene in the state court proceedings under any circumstances. However, the term "abstention" also has a more specific meaning: "a more limited doctrine [which] militates against premature and unnecessary federal decision-making with respect to statutes whose meaning has not been clarified by state tribunals." The doctrine has been contrasted with the notion of comity in that the latter is more general and militates against all forms of interference with the state courts. No matter how narrowly it is defined, abstention overlaps with the areas already discussed. Nevertheless, it is important to examine the specific contributions and development of the doctrine before looking to its more general application.

It was not until nearly the middle of the twentieth century that the doctrine of abstention was specifically formulated. However, antipathy for the notions later incorporated in the doctrine was expressed early by Chief Justice Marshall in the frequently cited case of *Cohens v. Virginia.*

The Judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. 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.

It is doubtful that this dictum, though strong, ever represented a uniform rule in the federal courts. However, even if it did, such a rule obviously does not represent the law today. Considerations of federalism, the maxim that unnecessary constitutional adjudications are to be avoided, and the pattern of increased state regulations of economic and social

53. *Id.* at 404.
life have occasioned another rule whereby federal courts will abstain from interfering with the state courts except under extraordinary circumstances.54

There have been a number of different approaches in applying the doctrine of abstention. These approaches can be viewed as different abstention doctrines55 or as distinct types of cases giving rise to abstention.56 The first approach is where the federal court is confronted with an issue of unsettled state law. In this type of case the court has ordered the trial court to abstain, while retaining jurisdiction, pending state adjudication of the state law involved.57 The rationale of the court is that: "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."58 A second type of abstention is that invoked by the federal courts to avoid unwarranted intrusion into a state's administration of internal affairs. Here, dismissal rather than a stay is proper, leaving the parties to seek review in the Supreme Court of any infringement in the state court action.59 Other types of abstention involve dismissal or a stay by the federal courts in order to ease the congestion of their dockets60 and the type applied is a routine diversity case, uncomplicated by constitutional issues or overriding state policy, in which the federal court is faced solely with the question of unclear state law.61

Certainly these different types of abstention overlap a great deal. However, they do share an underlying policy expressed most articulately by Justice Frankfurter in the famous case of Railroad Commission of Texas v. Pullman Company.62 These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. . . . This use of equitable power is a contribution of the courts in furthering the harmonious re-

58. Id. at 500. For a further discussion of cases involving this type of abstention see 1 Barron & Holtzoff, Federal Practice and Procedure § 64, at n. 51 (Wright ed. 19—).
61. Supra note 56, at 248.
62. Supra note 57.
lation between state and federal authority without the need of rigorous congressional restriction of those powers. 

In these few words, Justice Frankfurter capsulized a doctrine upon which subsequent courts were to place a great deal of emphasis in a variety of factual circumstances. The most significant of these factual circumstances to which the new doctrine was to be applied was the rising wave of civil rights cases following the Second World War. It is only within the framework of these cases that any sort of penetrating analysis of Younger can be achieved.

There is no better setting in which to view the merger of the principles discussed earlier than the area of civil rights litigation. The principles of equity jurisprudence, the notion of comity, the implications of the anti-injunction statute, and the doctrine of abstention have all been utilized in varying degrees by the courts in refusing to interfere with state court proceedings. In applying these principles to particular cases the courts have frequently deviated from the path of consistency and, in doing so, have created a number of important exceptions. A brief analysis of the cases creating these exceptions is essential to an understanding of the holding in Younger.

Prior to 1908 federal injunctions of state criminal prosecutions were not granted because such an action was thought to be prohibited by the eleventh amendment which forbade a suit against a state by a citizen of that state. However, in Ex Parte Young the Supreme Court granted an injunction on the grounds that the state's prosecuting officer was seeking to enforce an unconstitutional statute and, as such, was acting outside the scope of his authority. Consequently, this was not an action against the state, but rather was a suit to enjoin the state's prosecuting officer. In allowing the injunction, though, the Court was careful to draw a distinction between threatened and pending prosecutions.

Although the case was followed by strong criticism in both the courts and Congress, the principle that federal courts can enjoin threatened

63. Supra note 57, at 501.
64. 209 U.S. 123 (1908).
65. Id. at 155-56, 162, 163.
66. Supra note 55, at §§ 48 and 49.
state court proceedings in special circumstances is still recognized. A further clarification of the principle came in the 1926 case of Fenner v. Boykin, cited by the Supreme Court in Younger:

Ex Parte Young, 209 U.S. 123, and following cases have established the doctrine that when 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. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.

In the 1935 case of Spielman Motor Sales Co. v. Dodge the Supreme Court again recognized that a federal court could enjoin state court proceedings, but failed to find the special circumstances necessary for such interference. Later, in 1941, the Supreme Court dealt more specifically with the problem of what constitutes special circumstances. Although they refused to enjoin enforcement of a state criminal prosecution in Beal v. Missouri Pacific Railroad, there was some language to the effect that multiple prosecutions brought in bad faith under an unconstitutional statute would constitute the special circumstances necessary to obtain an injunction. However, the Court also cautioned that:

No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.

Similarly in the case of Watson v. Buck the Court addressed itself to the problem of multiplicity of prosecutions and the special circumstances necessary for injunctive relief.

A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such

---

67. 271 U.S. 240 (1926).
68. Id. at 243-244, cited by the Court in Younger, supra note 7, at 45.
69. 295 U.S. 89 (1935).
70. Supra note 57.
71. Supra note 57, at 50.
72. Supra note 57, at 49.
73. 313 U.S. at 387 (1941).
manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified.  

Prior to the civil rights cases of the 1960's the most significant case dealing with federal court interference with state court proceedings was *Douglas v. City of Jeannette.* There, members of the Jehovah's Witnesses sought to enjoin the city from prosecuting them for violating an ordinance banning Sunday solicitations on grounds that such an ordinance violated the constitutional guarantees of speech, press and religion. The case is significant for several reasons. First, the Supreme Court differentiated between the jurisdiction of a federal court to hear the question of the constitutionality of the ordinance and the decision not to grant an injunction because the plaintiffs did not state a claim in equity. Second, the Court held that although the federal court had jurisdiction the injunction could not be issued because there was no showing that the plaintiff would suffer irreparable harm. Finally, the case is important, for it summarizes, and somewhat clarifies the earlier decisions regarding the circumstances necessary for federal interference.

No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. . . . Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the 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 on a showing of danger of irreparable injury "both great and immediate."  

From *Douglas* and the cases preceding it, a number of important propositions emerged. Primary among them was the rule that state criminal prosecutions could be enjoined only under exceptional circumstances. One of these circumstances is the institution of a criminal action in bad faith under an unconstitutional state statute. However, the Supreme Court often reiterated that the mere allegation of a prosecution brought

---

74. *Id.* at 400.  
75. 319 U.S. 157 (1943).  
76. *Id.* at 163-64.  
77. *Id.* UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965).
in bad faith would not of itself support federal equitable intervention. Rather to justify federal interference, the plaintiff must show specifically the irreparable harm that would occur if an injunction were not granted. In effect, the Court was weighing on the one hand, the harm that would be incurred by the individual litigant if the state prosecution were allowed to continue, and on the other, the harm inflicted upon federal-state relations by federal interference in the state action.

The history of the cases up to the middle of the twentieth century involving federal-state relations largely resulted in the rights of the individual litigant taking second place to the rights of the state to decide how and when to conduct criminal prosecutions. The reasons for such a priority can be seen in the principles discussed earlier and in the underlying belief that the rights of the individual litigant could be protected equally as well in state or federal court. However, the rigidity of such a priority was sharply, and sometimes successfully, attacked during the active phase of the civil rights movement in the 1960's. During these years a new priority was thought to be needed in order to rectify the evils of a racism too long ignored in American society. The assumption that the rights of the individual could be as well protected in state courts as federal courts proved to be invalid. Gradually, the Supreme Court, reflecting the mood of the nation, became more responsive to the needs in the civil rights area. Exceptional circumstances, allowing federal interference in state court proceedings, were beginning to be formulated in terms of the need to emphasize the protection of civil rights. Simultaneously, the rights guaranteed by the first amendment were given special treatment as they were the most utilized vehicle on which the other rights depended.

In his dissent in *Harrison v. NAACP*, Justice Douglas foresaw the incompatibility of the Civil Rights Act and the doctrine of abstention. He suggested that the doctrine of abstention was inapplicable when a federal court is asked to protect civil rights secured by federal legislation. In so doing, Justice Douglas re-evaluated the doctrine of abstention in light of the Civil Rights Act.

The rule invoked by the Court to require the Federal District Court to keep hands off this litigation until the state court has construed these laws is a judge-made rule... It has indeed been extended so far as to make the presence in federal court litigation of a state law question a convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court...
With all due deference, this case seems to me to be the most inappropriate one of all in which to withhold the hand of the Federal District Court. . . . From the time when Congress first implemented the Fourteenth Amendment by the comprehensive Civil Rights Act of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people. . . .

Several years later this position was partially adopted by the majority in *Monroe v. Pape*, where the Court refused to abstain in a damage suit arising under the Civil Rights Act. In *McNeese v. Board of Education*, it was again Justice Douglas who expounded on the conflict between the abstention doctrine and the Civil Rights Act.

The purposes of 42 U.S.C. § 1983 were severalfold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. . . ." At the same time that special treatment was being given to civil rights cases the Supreme Court was also grappling with the problem of the first amendment and the doctrine of abstention. The Court in *NAACP v. Button* summarized this line of cases in the following way.

The argument is advanced that in all these situations, the need for immediate and effective protection of First Amendment rights outweighs the values embodied in the doctrines of comity and abstention, since First Amendment liberties are particularly "delicate and vulnerable, as well as supremely precious in our society." In the 1964 case of *Baggett v. Bullitt*, the Supreme Court declared unconstitutional a Washington statute requiring the taking of loyalty oaths by state employees. There the Court refused to apply the doctrine of abstention and, in the process, shed new light on the force of the doctrine.

[The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the "special circumstances," prerequisite to its application must be made on a case-by-case basis. . . . Abstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . . a result quite costly . . . where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser."]

81. Supra note 79, at 179-80.
82. 365 U.S. 167 (1961).
84. Id. at 671-72.
86. Id. at 433.
88. Id. at 375, 378-79.
Prior to *Younger* the most significant and controversial case concerning federal injunctions against state prosecutions was *Dombrowski v. Pfister*.\(^8\) There the plaintiffs were members of the Southern Conference Educational Fund (SCEF), an organization "active in fostering civil rights for Negroes in Louisiana and other States of the South."\(^9\) Their activities mainly involved the distribution of pamphlets, books and newspapers and the sponsoring of speakers in order to communicate understanding between Negro and white citizens. On October 4, 1963, law enforcement officials arrested plaintiffs and charged them with a violation of the *Subversive Activities and Communist Control Law*,\(^9\)\(^1\) and the *Communist Propaganda Control Law*.\(^9\)\(^2\) These criminal statutes made it a felony for anyone remaining in the state longer than five days to fail to register as a member of a "Communist front organization." After a very thorough and destructive "search" of the SCEF offices,\(^9\)\(^3\) the arrest warrants were summarily vacated and a motion to suppress the evidence was granted. At this point Representative Pfister, Chairman of the Louisiana Joint Legislative Committee on Un-American Activities, demanded prosecution of the plaintiffs. Whereupon the plaintiffs filed a complaint in federal district court seeking declaratory and injunctive relief, alleging that the statutes were invalid on their face and that the threats to enforce them were made only to discourage plaintiffs from continuing their civil rights activities. A three-judge district court was convened and dismissed the complaint for failure to state a claim upon which relief could be granted, stating that this was an appropriate case for abstention since a possible narrowing construction by the state courts would avoid unnecessary decision of constitutional questions.\(^9\)\(^4\) On appeal, the United States Supreme Court reversed, finding sufficient irreparable injury to justify equitable intervention in the impairment of freedom of expression that would result if it were necessary to await disposition of the criminal action in the state courts.\(^9\)\(^5\) The Court noted that "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospect of its success or failure."\(^9\)\(^6\) In overcoming the obstacle of the doctrine

89. 380 U.S. 479 (1965).
90. *Id.* at 482.
94. *Id.* at 562-63.
95. *Supra* note 89, at 485-86.
96. *Supra* note 89, at 487.
of abstention the Court simply stated:

[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.]

Although the Court experienced some difficulty, albeit minimal, in overcoming the restraints on federal intervention present in the doctrine of abstention and the principles of equity, there was no difficulty in disposing of §2283 and the accompanying notion of comity. The Court simply stated that the anti-injunction statute, §2283, only applies to injunctions against pending prosecutions and does not bar an injunction against the initiation of state proceedings in the future.

The scope of the holding in Dombrowski, sometimes referred to as the "Dombrowski doctrine," has been the subject of a great deal of controversy. One author has stated that the historic discussion "threatens to place the jurisdictional relationship between federal and state courts upon a new footing, one designed to encourage state judges to see eye-to-eye with their federal counterparts on civil rights issues." At the same time another commentator has described Dombrowski as "merely an extension of well-established legal principles to a peculiar fact situation . . . not the establishment of any broad new legal doctrine." No matter which position is adopted there can be little debate as to the impact of the decision on the subsequent cases in this area. The history of these cases from 1965 to the present is, for the most part, a series of attempts to define the meaning of Dombrowski.

In the 1967 case of Zwickler v. Koota, the Supreme Court was again faced with the doctrine of abstention where the constitutionality of a state statute prohibiting anonymous election literature was being challenged. At the time plaintiff commenced his action under the Civil Rights Act and the Declaratory Judgment Act there was no action pending or even immediately threatened in the state court. Thus, the three-judge federal court was not confronted with the problems arising from the anti-injunction statute. Nevertheless, the lower court did apply

---

97. Supra note 89, at 489-90.
98. Supra note 89, at 484-85 (dicta).
100. Maraist, supra note 16, at 565.
102. Supra note 3.
the doctrine of abstention on the grounds that plaintiff failed to show any exceptional circumstances that would warrant equitable relief.\textsuperscript{104} On appeal, the United States Supreme Court reversed, stating that the district court had the duty of adjudicating the request for a declaratory judgment regardless of its conclusion as to the propriety of an injunction; for as \textit{Dombrowski} made clear, the questions of declaratory and of injunctive relief are not the same.\textsuperscript{105}

Another important decision in this area was \textit{Cameron v. Johnson}\textsuperscript{106} decided in 1968. In that case the appellants were being prosecuted for violations of the Mississippi Anti-Picketing Law and sought declaratory and injunctive relief in federal district court. Although the district court refused to enjoin enforcement of the statute in the absense of bad faith, a declaratory judgment was entered stating that the statute was valid on its face. The lower court also held that the anti-injunction statute, §2283, barred injunctive relief because criminal proceedings were already pending in the state court. On appeal, the Supreme Court affirmed the decision of the district court, but refused to pass upon the effect of §2283 on the ground that it was unnesecary to the decision of the case.\textsuperscript{107}

The view expressed by the lower court in \textit{Cameron} has not been unanimously accepted. The debate over the general force of the anti-injunction provision has been discussed earlier. Specifically however, a head-on clash specifically between 28 U.S.C. §2283 and 42 U.S.C. §1983, the civil rights provision, has posed special problems. The conflict is obvious. The anti-injunction statute spells out a flat prohibition against federal injunctions of pending state actions with a general limitation being “except as expressly authorized by Act of Congress.” 42 U.S.C. §1983 provides that “Every person who, under color of any statute . . . of any State . . . subjects . . . a person . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” Certainly the latter would seem to qualify as an Act of Con-

\textsuperscript{104} 261 F. Supp. 985 (E.D.N.Y. 1966).
\textsuperscript{105} Supra note 101, at 252-55. After the district court had entered a declaratory judgment in accordance with this decision, a second appeal was taken. This time, in \textit{Golden v. Zwickler}, 394 U.S. 103 (1969), the Supreme Court held that there was no longer an actual controversy and that the district court should have refused to give a declaratory judgment. Finally, in a case decided the same day as \textit{Younger}, the Court held that where an injunction would be impermissible under the equitable principles in \textit{Younger}, declaratory relief should ordinarily be denied as well. \textit{Samuels v. Mackell}, 401 U.S. 66 (1971).
\textsuperscript{106} 390 U.S. 611 (1968).
\textsuperscript{107} Id. at 613 n.3.
gness within the exception noted above. In Dombrowski the Court said that under the circumstances of the case it was "unnecessary to resolve" the conflict.\textsuperscript{108} Similarly, the Court in Younger v. Harris avoided both the civil rights exception and the applicability of §2283 (the anti-injunction statute) to declaratory judgments, stating:

[T]he Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U.S.C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983.\textsuperscript{109}

Although the United States Supreme Court has shied away from the conflict presented, the lower federal courts have not been nearly as hesitant. As early as 1950, the third circuit held that §1983 is within the "expressly authorized" exception.\textsuperscript{110} However, in a later line of cases the fourth, fifth and seventh circuits have interpreted §2283 more strictly and have not recognized §1983 as an exception.\textsuperscript{111} This disharmony, though indeed very important, is not central to the analysis attempted here; for the Supreme Court in Younger chose to avoid this controversy. Thus, any further discussion would amount only to speculation of what will be the reconciliation at a future date.\textsuperscript{112} Nevertheless, it is relevant to keep in mind the controversy during this analysis, because the future resolution of the §2283-§1983 conflict will necessarily emerge from all the policy considerations discussed in the note. Perhaps it is pertinent here to briefly note the possible significance of the express refusal by the Court in Younger to deal with the problem. In Younger there were proceedings under way, indictments had been returned, yet the Court curiously chose not to base its decision to refuse injunctive relief on the statutory provision. The mere silence of the Court here betrays a lack of confidence to place its holding on the strength of §2283. Instead, the Court elected to consider all of the other policy arguments and base its decision on the longstanding judicial policy against federal interference with state court proceedings.

\textsuperscript{108} Supra note 89, at 484 n.2.
\textsuperscript{109} 401 U.S. 37, 55 (1971).
\textsuperscript{110} Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950).
\textsuperscript{112} For a further discussion see Brewer, supra note 99, at 97-103; Boyer, Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights, 13 How. L.J. 51 (1967); Maraist, supra note 16, at 535; Comment, supra note 28, at 55; Comment, supra note 43, at 291.
The debate over the proper scope of the *Dombrowski* holding has continued to the present. Yet the Court in *Younger v. Harris* did answer some of the questions that have arisen concerning the propriety of the issuance of injunctions against state court proceedings where fundamental civil rights and first amendment freedoms are involved. At the same time the Court also revealed valuable insights into the proper role of federal courts within our system of federalism.

In holding the doctrine of abstention inapplicable under the circumstances of *Harris v. Younger*, the three-judge federal district court relied heavily on *Dombrowski*. Specifically the court noted the language in the case stating that “the abstention doctrine is inappropriate . . . where . . . statutes are justifiably attacked on their face as abridging free expression or as applied for the purposes of discouraging protected activities.” Thus, the lower court construed *Dombrowski* as allowing injunctive relief, even in the absence of bad faith or harassment, where a state statute was found to be unconstitutionally vague or overbroad. In reversing, the Supreme Court disregarded this language in *Dombrowski* although they did recognize “that there are some statements in the *Dombrowski* opinion that would seem to support this argument.”

Despite the fact that the *Younger* Court acknowledged “the chilling effect” of a criminal prosecution under a statute regulating expression, they held this “chilling effect” by itself did not justify federal intervention. In its narrow reading of *Dombrowski*, the Court limited its holding to the facts of the case which involved bad faith and harassment. In the absence of these unusual circumstances, the Supreme Court held that “the injury Harris faces is solely ‘that incidental to every criminal proceeding brought lawfully and in good faith,’ [citing *Douglas v. City of Jeanette*] and therefore, under the settled doctrine we have already described, he is not entitled to equitable relief ‘even if such statutes are unconstitutional’ [citing *Buck v. Watson*].” After citing numerous cases and policy considerations, discussed earlier, the Supreme Court turned to a consideration of several historical arguments. The first argument advanced from this latter area was the concept of “Our Federalism.” This notion has been defined earlier, but briefly, Justice Black, speaking for the majority, described it as “a continuance of the belief that

113. Supra note 2.
114. Supra note 89, at 489-90.
115. Supra note 109, at 50.
116. Supra note 109, at 50-51.
117. Supra note 109, at 50-51.
118. Supra note 26 and accompanying text.
the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."\(^{119}\) The Court went on to speak of the "highly important place" occupied by this concept and its dominant place in the thinking of the Framers of our Constitution.\(^{120}\) Another historical argument advanced by the Court was based on "the separation of branches" principle. The Court viewed federal court intrusion into state court proceedings, as apparently contemplated by *Dombrowski*, as being "fundamentally at odds with the function of the federal courts in our Constitution."\(^{121}\) Basically, the Court held that such a procedure for testing the constitutionality of a statute "on its face" would amount to a usurpation of the legislative prerogative, for "it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process."\(^{122}\)

In the application of these historical arguments to the holding of the case and in the majority's final word on *Dombrowski*, Justice Black stated:

> For these reasons, fundamental not only to our federal system but also to the basic functions of the Judicial Branch of the National Government under our Constitution, we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions.\(^{123}\)

Following this holding the Court made some interesting comments indicating that it might be possible to show irreparable injury sufficient to justify federal intervention even in the absence of bad faith and harassment. The Court cited one such circumstance, mentioned in the case of *Buck v. Watson*,\(^{124}\) where it was said 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."\(^{125}\) In concluding the majority opinion, Justice Black refrained from elaborating on other circumstances that might justify equitable intervention and reiterated the Court's avoidance of the §2283 controversy.

Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be. It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitu-

---

119. *Supra* note 109, at 44.
120. *Supra* note 109, at 44-45.
121. *Supra* note 109, at 52.
122. *Supra* note 109, at 53.
123. *Supra* note 109, at 53.
124. *Supra* note 73.
125. *Supra* note 73, at 402.
tionality of a statute "on its face" does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of any other unusual circumstance that would call for equitable relief. Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case. 126

The concluding remarks of Justice Black are a stark reminder that Younger v. Harris has only resolved a fraction of the problems arising from the general issues of whether or not a federal court may interfere with a state court proceeding, and if so, under what circumstances it may do so. The Court in Younger stood for the proposition that a federal court cannot properly enjoin enforcement of a state statute solely on the basis of a showing that the statute "on its face" abridges first amendment rights. At the same time the Court stated that extraordinary circumstances justifying federal intervention could be shown even in the absence of bad faith or harassment. However, the Court refused to designate what these unusual situations might be. Finally, the Court significantly chose not to base its decision on §2283, but on equitable principles and the longstanding judicial policy of nonintervention supported by historical arguments. These views expressed by the majority disclose a shaky belief that state courts are equally as able to vindicate constitutional rights as the federal courts. It is arguable whether or not this belief is justified in view of the abuses in civil rights and first amendment cases in the last few decades. However, it should be readily apparent that, at the least, this belief in equal treatment, formulated in the early case of Douglas v. City of Jeanette, 127 was severely shaken by the abuses wrought by certain state courts in this area. Attesting to the instability of this assumption in our era is the number of litigants still seeking better treatment in federal courts as well as the hesitancy by the Supreme Court to approach the §2283-§1983 controversy in order to leave this avenue open should it become necessary to correct abuses in the future.

The majority opinion is a narrow one in the sense that it strictly construes the holding in Dombrowski. However, in another sense, it is a very broad opinion, because it discusses all the policy considerations and historical arguments pertinent to this area of federal-state relations. The historical approach conveys a somewhat static view of federalism. The majority opinion stresses the important nature of the concept known as

126. Supra note 109, at 54.
127. Supra note 75.
"Our Federalism" and its high priority in the minds of the Framers and the important place it occupies presently in our nation's history. This view of federalism is vigorously objected to by Justice Douglas in his dissent. His dynamic concept of the history of federalism in this nation relates a much more meaningful analysis of American history. Particularly his analysis of the change in emphasis on civil rights and the later preferred treatment afforded the first amendment.

In his dissent, Justice Douglas also took an historical approach to the problem surrounding the policy of nonintervention. While he agreed with the majority's view of federalism at the time of the enactment of the first anti-injunction statute in 1793, Justice Douglas emphasized the change that took place after the Civil War.

Whatever the balance of the pressures of localism and nationalism prior to the Civil War, they were fundamentally altered by the war. The Civil War Amendments . . . especially § 5 of the Fourteenth Amendment, cemented the change in American federalism brought on by the war. Congress immediately commenced to use its new powers to pass legislation. Just as the first Judiciary Act, 1 Stat. 73, and the "anti-injunction" statute represented the early views of American federalism, the Reconstruction statutes, including the enlargement of federal jurisdiction, represent a later view of American federalism.

One of the jurisdiction-enlarging statutes passed during Reconstruction was the Act of April 20, 1871 . . . 17 Stat. 13 . . . now codified as 42 U.S.C. § 1983. . . .

A similar view was expressed by a three-judge district court in Landry v. Daley. Plaintiffs brought an action for injunctive and declaratory relief seeking to prevent the enforcement of various Illinois statutes; some of the statutes were the basis for the arrest of certain plaintiffs, and all, they claimed, were being used to intimidate them in the exercise of their first amendment rights. In denying the defendants' motions to dismiss, Judge Will spoke of the Civil War Amendments as "a constitutional revolution in the nature of American federalism." This revolution, in turn, represents a historical judgment. It emphasizes the overwhelming concern of the Reconstruction Congresses for the protection of the newly won rights of freedmen. By interposing the federal government between the states and their inhabitants, these Congresses sought to avoid the risk of nullification of these rights by the states. With the subsequent passage of the Act of 1871, Congress sought to implement this plan by expanding the federal judicial power. Section 1983 is, therefore, not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens.

128. Supra note 109, at 61-62.
130. Id. at 223.
131. Id. In a companion case, handed down the same day as Younger,
In developing this thought Justice Douglas demonstrates the preferred treatment that should be afforded to civil rights and first amendment cases. Rebutting the implied presumption of the majority that these rights no longer require this special type of federal protection, Justice Douglas discusses the contemporary era and particularly the problems that faced *Dombrowski*.

The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dombrowski v. Pfister*. . . . There we recognized that in times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.\(^{132}\)

While a sizeable number of jurists would agree with Justice Douglas in his analysis of the need for special protection of these rights at the time of the Civil War, some feel that contemporary circumstances have substantially altered this need. Such a position fails to recognize, as one scholar so concisely emphasized, that "the danger is unhappily not past."\(^{133}\) It is true that the abuses in the civil rights area were more patent at the time of the Civil War, but the fact that these same abuses exist in a latent state in our contemporary society makes them no more tolerable. Recognizing this situation, the American Law Institute formulated a revision of §2283 that would allow for greater federal jurisdiction particularly in civil rights cases. In taking into account other, already recognized, exceptions to the statute, their proposal reads:

A court of the United States shall not grant an injunction to stay proceedings in a State court, including the enforcement of a judgment of a State court, unless such an injunction is otherwise warranted, and: (1) an Act of Congress authorizes such relief or provides that other proceedings shall cease; or (2) the injunction is requested by the United States, or an officer or agency thereof; or (3) the injunction is necessary to protect the jurisdiction of the court over property in its custody or subject to its control; or (4) the injunction is in aid of a claim for interpleader; or (5) the injunction is necessary to protect or effectuate an existing judgment of the court; or (6) the injunction is sought to preserve temporarily the

\(^{132}\) the Supreme Court reversed the holding delivered by Judge Will in the lower court. The Supreme Court held that "since no appellee suffered, or was threatened with great and immediate irreparable injury and the future application of the statute to any appellee was merely speculative, the district court was not warranted in interfering with state law enforcement by the issuance of an injunction or declaratory judgment." *Landry v. Daley*, 401 U.S. 77, 80-81 (1971), accord, *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

status quo pending determination of whether this section permits grant of a perma-

nent injunction; or (7) the injunction is to restrain a criminal prosecution that

should not be permitted to continue either because the statute or other law that is

the basis of the prosecution plainly cannot constitutionally be applied to the party

seeking the injunction or because the prosecution is so plainly discriminatory as to

amount to a denial of the equal protection of the laws. 134

Such a proposal clearly goes beyond the existing law, yet it does represent

a significant response to the needs already discussed. Another suggested

approach to the problem of balancing the individual’s constitutional

rights against the federal policy of nonintervention is simply the judicial

resolution of the §2283-§1983 controversy, proposed by Justice Douglas

in his dissent.

I hold to the view that §1983 is included in the “expressly authorized” excep-
tion to §2283. . . . There is no more good reason for allowing a general statute
dealing with federalism passed at the end of the 18th century to control another
statute also dealing with federalism, passed almost 80 years later, than to conclude
that the early concepts of federalism were not changed by the Civil War. 135

Good reason or not the majority in Younger v. Harris, by expressly

refusing to deal with the above controversy, in effect did hold that

§1983, the Civil Rights Act of 1871, was controlled by §2283, the anti-
injunction provision of 1793. In so doing the Supreme Court has em-
barked upon a trend of restraint which has been criticized by a
number of commentators,136 some of whom have believed that even a
liberal reading of Dombrowski would be “insufficient, in practice, to in-
sure fully effective protection of first amendment rights.”137 In the final
analysis, though, it is only history that can fairly determine the validity
of such criticism of Younger.

Finally, it is valuable to briefly reiterate the significance of Younger. The
Supreme Court in Younger v. Harris, in a narrow holding, decided
that in the absence of bad faith, harassment or other unusual circum-
stances justifying equitable relief, federal courts may not interfere with
state court proceedings. Of broader significance, was the express re-

fusal of the Court to rely on 28 U.S.C. §2283, the anti-injunction pro-

vision, as a basis for its decision not to interfere. Instead, the Court
chose to base its decision on the “longstanding judicial policy” of nonin-
tervention supported by the four historical restraints on federal juris-

134. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FED-

135. Supra note 109, at 62.

136. See Bailey, supra note 51; Boyer, supra note 112; Lusky, Racial Dis-
crimination and the Federal Law: A Problem of Nullification, 63 COLUM. L. REV.
1163 (1963); Comment, supra note 43.

137. Supra note 51, at 69.
diction—equity jurisprudence, comity, the implications of §2283, and abstention. These historical bases of the policy of nonintervention help comprise the concept of "Our Federalism," that was so paramount in the thinking of the majority. However, such a theory betrays a fundamental misconception of the contemporary era in which our nation finds itself.

In the final analysis though, it is the dissenting view of Justice Douglas which voices a deeper understanding of the perils that threaten our society; it is his views that emerge as exceptionally meaningful from the controversy involving the circumstances under which a federal court may interfere in a state court proceeding.

The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these appellees should be made to walk the treacherous ground of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss, and debate the troubles of these days. When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is in danger.138

Thus, it is not the sophisticated issues of federalism that are jeopardized, but rather the individual's fundamental freedom of expression.

_Thomas J. Reed_

138. _Supra_ note 109, at 65.