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COMMENTS

THE CIVIL RIGHTS ACT AS A STATUTORY EXCEPTION TO THE ANTI-INJUNCTION STATUTE

I INTRODUCTION

Officially sanctioned harassment of political minorities has been contended to be a fact existent in various areas of the United States.¹ To secure protection and relief, civil rights workers have sought federal assistance in the form of prosecutions under civil rights statutes, in some instances requesting manpower to enforce federally guaranteed rights, and petitioning federal courts to enjoin sham state criminal prosecutions.² But federal reluctance, rather than compliance, has been the dominant theme.

The American scheme of dual sovereignties of nation and state has served as support for this general attitude of the federal courts. States' rights activists and advocates of federalism urge federal deference to state sovereignty,³ while others, including many victims of official harassment, contend that such deference amounts to a failure to protect federally guaranteed rights.

To implement this dual sovereignty concept, the federal courts have generally relied upon three bases in refusing to en-

¹ For a collection of popular and official accounts of racial intimidation, see Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, n. 1 (1966).

² See generally Burns, *The Federal Government and Civil Rights*, in SOUTHERN JUSTICE 228; 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 (1965); Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963).

³ See *Screws v. United States*, 325 U.S. 91, 138-61 (1945) (Frankfurter, Jackson, Roberts, JJ., dissenting); *Monroe v. Pape*, 365 U.S. 167, 202-59 (1961) (Frankfurter, J., dissenting); *Harrison v. NAACP*, 360 U.S. 167 (1959) (Harlan, J.); B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* (1964). Former Assistant Attorney General Burke Marshall, the author of the last text cited, expresses the fear that federal activism produces harm to federalism. He states that "civil rights issues cut into the fabric of federalism," and that they "cut most deeply where police power is involved." *FEDERALISM AND CIVIL RIGHTS* 81.

See also Kurland, *The Supreme Court, 1963 Term, Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143 (1964), where the author sees federal action on behalf of civil rights conflicts as the demise of the federal system. *Id.* at 144. This notion, according to the author, has particular force in the desegregation cases, the sit-in cases, and the reapportionment cases. *Id.* at 162-63.

The theory articulated by Frankfurter and Jackson that the purpose of federalism is to preserve the delicate balance of political power between the federal and state governments serves as a basis for the belief that civil rights and federalism enjoy competing values. See, e.g., Comment, *Federal Injunctions and State Enforcement of Invalid Criminal Statutes*, 65 COLUM. L. REV. 647 (1965). Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1285, 1287 (1953).

Some writers feel that while demands for federal intervention present a

join state prosecutions: abstention,⁴ comity,⁵ and the federal anti-injunction statute.⁶ These are tools for federal inhibition, but they are not without qualification. Indeed, the anti-injunction statute contains three congressionally stated exceptions. The first of these exceptions, namely, "... except as expressly authorized by Act of Congress..."⁷ seems to enjoy the most diverse

conflict between federalism and individual rights, the latter should prevail over the former. Sobeloff, *Federalism and Civil Liberties — Can We Have Both?*, 1965 WASH. U.L.Q. 296, 297; Van Alstyne, Book Review, 10 VILL. L. REV. 203, 208 (1964); Wasserstrom, Book Review, 33 U. CHI. L. REV. 406, 413 (1966).

For an assessment of the various arguments espoused in the literature cited in this note, see Note, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007 (1966).

⁴ [The doctrine of abstention] 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.

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501 (1941).

Abstention is a judge-fashioned vehicle for according appropriate deference to the respective competence of the state and federal court systems. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964).

The doctrine of abstention is equitable in its origins.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 328 (1964).

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.

Baggett v. Bullitt, 377 U.S. 360, 375 (1964).

(T)he abstention doctrine is inappropriate for cases . . . where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.

Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965). For exhaustive studies on the doctrine, see Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *The Abstention Doctrine: A Problem of Federalism*, 17 VAND. L. REV. 1246 (1964); Comment, *Constitutional Law — Abstention — Unconstrained State Registration Statute Basis for Court Abstention Where Federal Jurisdiction Invoked Under Civil Rights Acts*, 14 RUTGERS L. REV. 185 (1959); Comment, *The Doctrine of Equitable Abstention*, 2 RACE REL. L. REP. 1222 (1957); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684 (1960); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978 (1950); Comment, *The Abstention Doctrine*, 40 TUL. L. REV. 578 (1966).

See also 20 Am. Jur. 2d Courts §14 (1965); 32 Am. Jur. 2d *Federal Practice and Procedure* §13 (1967).

⁵ See *Reconstruction Fin. Corp. v. Zimmerman*, 76 F.2d 313, 316 (4th Cir. 1935); *In re Potell*, 53 F.2d 877, 880 (E.D.N.Y. 1931); *Mercantile Trust Co. v. Binford*, 6 F.2d 285, 287 (N.D. Texas 1925); *Wise v. Pacific States Life Ins. Co.*, 11 F. Supp. 895 (E.D. Ill. 1935); *Rothwell v. Knight*, 37 Wyo. 11, 24, 258 P. 576, 580 (1927); 21 C.J.S. Courts §528 (1940); 20 Am. Jur. 2d Courts §128 (1965).

⁶ 28 U.S.C. §2283 (1964):

Stay of State court proceedings.

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.

⁷ *Id.*

judicial interpretation and lends itself least to any definitive categorization. Victims of intimidation by state officials have sought federal injunctions generally under the Civil Rights Act⁸ and have been required to show how their claim escapes the ban of the anti-injunction statute. Typically, the first exception has been the desired escape valve. This comment will explore the considerations in treating the Civil Rights Act as within this exception.

II HISTORY OF THE ANTI-INJUNCTION STATUTE

An examination of 2283's birth and subsequent revisions will aid in attaching cogent interpretations to its provisions. The statute's life has been long and deserving of inspection.⁹

The Judiciary Act of 1789¹⁰ included no express grant of power to federal courts to issue writs of injunction; however, no one denied that this power was inherent in the United States courts by virtue of the general grant of judicial power. On December 27, 1790, Attorney General Edmund Randolph reported to the House of Representatives on desirable changes in the 1789 Act, and recommended that the Act provide that "No injunction in equity shall be granted by a District Court to a judgment at law of a State Court."¹¹ His reasoning showed a distaste for splitting a cause of action and allotting it between different court systems.¹² Congress reflected its approval of this recommendation in 1793 by appropriate legislation.¹³ Here revealed is the early apprehension by Congress of the danger of invasion into state court jurisdiction by the federal courts.

The first application of this statute came fourteen years after its passage, where it was held that the federal court had

⁸ 42 U.S.C. §1983 (1964):

Civil action for deprivation of rights.

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.

⁹ See *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964); *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

¹⁰ 1 Stat. 73 (1789).

¹¹ Am. State Papers, I Misc. No. 17.

¹² This clause will debar the district court from interfering with the judgments at law in the State courts; for if the plaintiff and defendant rely upon the State Courts, as far as the judgment, they ought to continue there as they have begun. It is enough to split the same suit into one at law, and another in equity, without adding a further separation, by throwing the common law side of the question into the State Courts, and the equity side into the federal courts. *Id.* at 34, n. 8.

¹³ Act of March 2, 1793, ch. 22, §5, 1 Stat. 334.

no power to enjoin a law suit pending in the state court.¹⁴ The Supreme Court did not decide another case under the 1793 Act until sixty-five years later.¹⁵ During the interim, a number of events produced a paradoxical situation. The fear of unwarranted federal interference with state sovereignty, which spawned the statute of 1793, seemed to be unfounded. The danger of federal intervention in state court proceedings was proving not nearly as real as that of the illegal assumption of power by the state courts over federal officials and federal judicial proceedings. The fervor of states' rights was running high, and the frequent use of *habeas corpus* writs by state courts over federal officials provoked much antagonism between the national and state governments.¹⁶ This delicate issue of conflict of jurisdictions was not resolved legislatively, for no federal statute was forthcoming. Thus, two judicially created doctrines evolved: (1) the freedom of federal courts and officials from state interference was required for the preservation of the system of dual sovereignties, and (2) "... on the principle of comity derived from the old English common law, no court should interpose its process to take out of the hands of another coordinate court a *res* or cause of which the latter had taken prior jurisdiction."¹⁷ Both doctrines, while eventually enduring judicial and legislative mollification in the twentieth century, were firmly established by the Supreme Court of the United States by 1872.¹⁸

The entrenchment of these two judicial doctrines, however, did not serve to totally deprive the Act of 1793 of its potency over the following half-century. Between 1872 and 1920 the Act was invoked to render void federal injunctions in at least ten cases.¹⁹ But the Act itself was not immune from judicial and statutory modification. The first such softening of its terms came from

¹⁴ *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 179 (1807). Here, a bill in equity in a state court to enjoin a suit at law in another court of the state had been removed to the federal circuit court.

¹⁵ *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

¹⁶ *In re Roberts*, 2 Hall's Am. L.J. 192 (1809); *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809); *Review of Olmstead's Case*, 3 Hall's Am. L.J. 197 (1810); *In re Stacy*, 10 Johns. 328 (N.Y. 1813); *Ex parte Pleasants*, 19 F. Cas. 864 (No. 11,225) (C.C.D.C. 1833); *In re Booth*, 3 Wis. 1 (1854); *In re Dobbs*, 21 How. Pr. 68 (N.Y. 1861); *Disinger's Case*, 12 Ohio St. 256 (1861); *Ex parte Anderson*, 16 Ia. 595 (1864); *Ex parte McCarey*, 2 Am. L. Rev. 347 (1867); *In re Shirk*, 5 Phila. 333 (Pa. 1863); and many more. See Thompson, *Abuses of the Writ of Habeas Corpus*, 18 Am. L. Rev. 1 (1884).

¹⁷ Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930).

¹⁸ *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

¹⁹ *Haines v. Carpenter*, 91 U.S. 254 (1876); *Dial v. Reynolds*, 96 U.S. 340 (1877); *Citizens' Bank v. Board of Liquidation*, 98 U.S. 140 (1878); *Lawrence v. Morgan's R.R.*, 121 U.S. 634 (1887); *In re Sawyer*, 124 U.S. 200 (1888); *United States v. Parkhurst-Davis Mercantile Co.*, 176 U.S. 317 (1900); *Mutual Reserve Fund-Life Ass'n v. Phelps*, 190 U.S. 147 (1903); *Hull v. Burr*, 234 U.S. 712 (1914); *Essanay Film Mfg. Co. v. Kane*, 258 U.S. 358 (1922); *Riehle v. Margolies*, 279 U.S. 218 (1929).

the bench of the Supreme Court in 1874.²⁰ There it was held that a federal court may enjoin a state court from proceeding on a matter over which federal jurisdiction had theretofore been obtained. This injunction was to be used only when necessary to render efficacious prior federal jurisdiction. The theory underlying this decision was that the case was taken out of the ban contained in the Act of 1793 by virtue of the federal court obtaining jurisdiction before it vested in the state court.²¹ The next step was taken by Congress itself in 1878 when it authorized a federal court sitting in bankruptcy to issue injunctions to state courts in aid of the former's jurisdiction.²² The force of the prohibition contained in the Act was further diluted in 1881 when the Supreme Court held that a federal court may "protect its jurisdiction" by enjoining a state court from attempting to enforce the latter's judgment in a case which was properly removed to the federal court.²³ The holding of the Supreme Court in 1891 that an inferior federal court may enjoin a defendant from proceeding to enforce judgments fraudulently obtained in a state court constituted yet another break from the dictates of the Act.²⁴ These judicially created exceptions to the Act's prohibitive provision seem to be necessary, and logically ensue from the structure of the American system of jurisprudence.²⁵

²⁰ *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874).

²¹ To hold otherwise, said Mr. Justice Swayne:

[T]he result would have shown the existence of a great defect in our Federal jurisprudence, and have been a reproach upon the administration of justice. . . . Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice.

Id. at 253.

²² Rev. Stat. §720 (1878), 28 U.S.C. §379 (1926), 28 U.S.C. §379 (1940), 28 U.S.C. §2283 (1964).

²³ *Dietzsch v. Huidekoper*, 103 U.S. 494 (1881).

²⁴ *Marshall v. Holmes*, 141 U.S. 589 (1891).

²⁵ See Mr. Justice Van Devanter's opinion in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920):

The provision has been in force more than a century and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity and like that rule is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from . . . maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts . . . or prevent them from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.

The cases heretofore discussed involved the problem of a conflict of state and federal judicial institutions over civil matters. State criminal prosecutions have not been devoid of this same confrontation between nation and state. In the 1898 case of *Harkrader v. Wadley*,²⁶ the Supreme Court held invalid an injunction issued by a federal court enjoining a pending state prosecution of bank officers for embezzlement. The opinion reflected the states' rights viewpoint.²⁷ The Act of 1793 was applied by the Court in reaching its decision.²⁸

Ten years later, a very famous case limited the application of *Harkrader* to injunctions against *pending* criminal actions, and upheld the doctrine authorizing the issuance of injunctions against state officers to prevent them from *initiating* prosecutions.²⁹ Thus, the distinction was drawn between the power to enjoin a state officer from pursuing a *threatened* prosecution and the power to enjoin a state court from exercising its jurisdiction *already invoked* — the former being necessary to protect the constitutional rights of litigants under certain circumstances, and the latter being potentially violative of the scheme of dual sovereignties.³⁰

From the foregoing, it is clear that while the genesis of the anti-injunction statute saw itself as a categorical absolute, vindication of federally protected rights commanded a qualification of the statutes' strict dictate.

III. WHEN WILL INJUNCTION LIE?

Requirements for federal injunctive relief from state prosecutions have been stated in various forms by various courts. Since an injunction is an equitable remedy, petitioner must have standing for equitable relief.³¹ This means, generally, clean hands, inadequate legal remedy,³² and great and irreparable injury.³³ It is also said that before a federal court will enjoin a

Id. at 183.

²⁶ 172 U.S. 148 (1898).

²⁷ Speaking for the Court, Mr. Justice Shiras said that the apportionment of judicial power by the Constitution among the national and state sovereignties "left to the States the right to make and enforce their own criminal laws," and the highest court in the land has the duty "to guard the States from any encroachment upon their reserved rights by the General Government or the courts thereof."

Id. at 162.

²⁸ 172 U.S. at 164-70.

²⁹ *Ex parte Young*, 209 U.S. 123 (1908).

³⁰ *Id.* at 168.

³¹ *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943).

³² *Beal v. Missouri Pac. R.R.*, 312 U.S. 45, 50 (1941); *Fenner v. Boykin*, 3 F.2d 674, 676 (N.D. Ga. 1925), *aff'd*, 271 U.S. 240 (1926); *McCormack Bros. Co. v. City of Tacoma*, 201 F. 374, 376 (W.D. Wash. 1913). *See also* *Keegan v. New Jersey*, 42 F. Supp. 922, 925 (D.N.J. 1941).

³³ *A.F.L. v. Watson*, 327 U.S. 582, 595 (1946); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 451 (1927); *Fenner v. Boykin*, 271 U.S. 240, 243 (1926); *Dobbins v. City of Los Angeles*, 195 U.S. 223, 241 (1904); *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 297, 218 (1903).

state prosecution, exceptional circumstances must exist.³⁴ Finally, the case must involve either a statute which is unconstitutional on its face,³⁵ or one that is valid on its face but unconstitutional as applied.³⁶ In such a case, a "chilling effect" on freedom of expression is said to exist which warrants a federal court in granting an immediate hearing into the merits of the claim.³⁷

A further distinction exists: threatened prosecution as opposed to pending prosecution.³⁸ The distinction has its origin in the early twentieth century³⁹ and, indeed, many cases have turned on this question alone.⁴⁰ Basically, if the prosecution sought to be enjoined is one merely threatened, the petitioner in federal court does not come within the ban of 2283 and may qualify for his desired remedy, whereas if the prosecution from which relief is sought is pending in the state court, federal action is precluded by virtue of 2283 (unless the claim falls within one of its exceptions) or the abstention or comity doctrines.⁴¹ Various rationales in support of the distinction have been advanced. To enjoin pending prosecutions would be tantamount to federal supervisory control over state courts.⁴² The threatened-pending dichotomy may be justified on the basis of comity.⁴³ Also, it has been urged that the *in personam* nature of an injunction precludes the staying of pending prosecutions because a court is not amenable to *in personam* process.⁴⁴ This last argument appears weak. Even if a federal court grants an injunction against a pending state prosecution pursuant to an exception to 2283, it is still in effect enjoining the court, or enjoining the state legal process. Others

³⁴ *Beal v. Missouri Pac. R.R.*, 312 U.S. 45, 50 (1941); *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95 (1935); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 451 (1927); *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965); *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964); *Fenner v. Boykin*, 3 F.2d 674 (N.D. Ga. 1925), *aff'd*, 271 U.S. 240, 243 (1926); *Wilson v. Simon*, 299 F. Supp. 305, 313 (N.D. Ill. 1969); *Landry v. Daley*, 288 F. Supp. 200, 208-09 (N.D. Ill. 1968).

³⁵ *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968).

³⁶ See cases cited in note 35 *supra*. See also *Douglas v. City of Jeanette*, 319 U.S. 157 (1943), where the Court states that there is a presumption of good faith application of the statute.

³⁷ Defense in a state criminal prosecution is not sufficient to remove this "chill" because it leads to piecemeal construction which resolves only the doubts of the defendant with no likelihood of obviating similar uncertainty for others, [and bad faith prosecutions] serve notice on the community that the exercise of these rights may be an expensive proposition.

Landry v. Daley, 288 F. Supp. 200, 216-17 (N.D. Ill. 1968).

³⁸ See Note, *Federal Injunctions Against State Criminal Proceedings*, 4 STAN. L. REV. 381 (1952).

³⁹ *Ex parte Young*, 209 U.S. 123 (1908).

⁴⁰ See text at note 30 *supra*.

⁴¹ See material cited in note 4 *supra*.

⁴² *International Longshoremen's & Ware. Union v. Ackerman*, 82 F. Supp. 65 (D. Hawaii 1948), *rev'd*, 187 F.2d 860, 867 (9th Cir. 1951).

⁴³ See material cited in note 5 *supra*.

⁴⁴ *Ex parte Young*, 209 U.S. 123, 163 (1908). But a law enforcement officer is amenable to *in personam* process.

rely on the express terms of the anti-injunction statute and the policy underlying it.⁴⁵ The Supreme Court, in *Dombrowski v. Pfister*,⁴⁶ sees a distinction between pending and threatened suits. The dissent by Mr. Justice Harlan in this case agrees with the majority on this particular point.⁴⁷ Previous cases before the Supreme Court have prompted cautionary rhetoric against interfering with state court criminal prosecutions.⁴⁸ And, "[w]here a prosecution is pending, one basic equitable principle may disappear from plaintiff's claim. He may now have an adequate remedy at law in the state court."⁴⁹ In opposition to the distinction, one court has reasoned that if the controlling factor is considerations of states' rights — the cogency of any such distinction is lost, because the interference with sovereignty is the same whether the injunction issues before or after the prosecution has commenced.⁵⁰

⁴⁵ [S]ection 2283, by its terms, is limited to "proceedings in a State Court," and when one considers the purpose of the statute and the judicial policy of forbearance, i.e., harmony between the federal and state courts, the distinction becomes more real. Interfering with a pending prosecution is much more likely to disrupt state-federal relations than prohibiting one that is merely threatened.

Wilson v. Simon, 299 F. Supp. 305, 312 (N.D. Ill. 1969).

⁴⁶ 380 U.S. 479 (1965). The court stated, referring to 2283: "This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted." *Id.* at 484, n. 2.

⁴⁷ "If the state criminal prosecution were instituted first, a federal court could not enjoin the state action," citing 28 U.S.C. §2283. 380 U.S. at 499, n. 1.

⁴⁸ *Cleary v. Bolger*, 371 U.S. 392 (1963):

Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle "is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue." (citing *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). It has been manifested in numerous decisions of this Court involving a State's enforcement of its criminal law. . . . The considerations that have prompted denial of federal injunctive relief affecting state prosecutions were epitomized in the *Stefanelli* case, in which this Court refused to sanction an injunction against state officials to prevent them from using in a state criminal trial evidence seized by state police in alleged violation of the Fourteenth Amendment:

"[W]e would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law — with its far-flung and undefined range — would invite a flanking movement against the system of State courts by resort to the federal forum with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court — all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

371 U.S. at 397.

⁴⁹ *Wilson v. Simon*, 299 F. Supp. 305, 312 (N.D. Ill. 1969). See cases cited in note 32 *supra*, and accompanying text.

⁵⁰ *Fenner v. Boykin*, 3 F.2d 674, 676 (N.D. Ga. 1925), *aff'd*, 271 U.S. 240 (1926).

Another problem arising under the threatened-pending distinction is determining when a prosecution is actually pending. An example of how this can arise is grand jury deliberations. Are they "proceedings" sufficient to come within the ban of 2283?

In *Society of Good Neighbors v. Groat*,⁵¹ the petitioner corporation sought to enjoin the deliberations of a one-man grand jury, on the ground that the Michigan statute authorizing such a grand jury was unconstitutional. Recognizing that it could not enjoin any pending state proceedings, the court reasoned that since the grand jury had subpoena and other powers, it was acting in a judicial capacity and thus its deliberations constituted "proceedings" which the court was powerless to enjoin. In *Fenner v. Boykin*,⁵² the petitioner sought to enjoin the institution of a criminal prosecution against him on the ground that the statute he allegedly violated was repugnant to various provisions of the Constitution. At the time petitioner filed suit for injunction, the grand jury was investigating the possibilities of indicting him. The court held that since the injunction was sought against the prosecution via the state prosecuting officers, and since the grand jury investigation was not a prosecution, neither the grand jury nor the court of which it is a part will ever be enjoined if the injunction should issue. Thus, whether the grand jury deliberations were "proceedings" or not, they would not bear on the question of whether the injunction should be granted. The closest the Supreme Court ever came to deciding this question was in *Cobbledick v. United States*.⁵³ The issue was not squarely presented, but the Court, through Justice Frankfurter, talked of grand jury deliberations as part of the judicial process and thus a judicial inquiry. This would lend credence to deeming state grand jury investigations "proceedings" sufficient to preclude injunctive relief, without confronting the dilemma directly.

IV. RELIEF FROM PROSECUTIONS UNDER STATUTES REGULATING EXPRESSION — SUPREME COURT DECISIONS

A great number of state prosecutions from which federal injunctive relief is sought are for alleged violations of statutes and ordinances which regulate expression. A few have reached the Supreme Court.

In *Douglas v. City of Jeannette*,⁵⁴ the Supreme Court held that a federal district court should not enjoin, under the Civil Rights Act, an ordinance prosecution in a state court even though

⁵¹ 77 F. Supp. 695 (E.D. Mich. 1948).

⁵² 3 F.2d 674 (N.D. Ga. 1925), *aff'd*, 271 U.S. 240 (1926).

⁵³ 309 U.S. 323, 327 (1940).

⁵⁴ 319 U.S. 157 (1943).

the ordinance involved had already been held unconstitutional by a federal court. Summarizing the principles involved, the Court said:

Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states — though they might otherwise be given — should be withheld if sought on slight or inconsequential grounds. . . .

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."⁵⁵

It is clear that this decision is based on the underlying assumptions that state judicial officials would observe constitutional limitations and that the normal adjudication of constitutional defenses during a state prosecution adequately vindicate constitutional rights.

The assumptions underlying *Douglas* were dealt a blow in *Dombrowski v. Pfister*.⁵⁶ This case involved threatened prosecutions, so the petitioners did not have to cope with the dictates of 2283. Southern Conference Educational Fund (SCEF) was an organization "active in fostering civil rights for Negroes in Louisiana and other States of the South."⁵⁷ James Dombrowski was SCEF's Executive Director. Benjamin Smith and Bruce Waltzer, attorneys in New Orleans, were active in the field of civil rights, Smith being Treasurer of SCEF. On October 4, 1963, police officers arrested Dombrowski, Smith, and Waltzer under two Louisiana statutes commonly referred to as "anti-subversion laws." One was entitled "Subversive Activities and

⁵⁵ *Id.* at 163-64.

⁵⁶ 380 U.S. 479 (1965).

⁵⁷ *Id.* at 482.

Communist Control Law,"⁵⁸ the other was entitled "Communist Propaganda Control Law."⁵⁹ The arrests of Smith and Waltzer took place during a session of an interracial lawyers' conference held in New Orleans.⁶⁰ The warrants were summarily vacated upon the ground that "there are no facts whatsoever to justify this Court binding these three defendants over for trial. . . ." ⁶¹

Notwithstanding this quashing of the warrants, Representative Pfister, Chairman of the Louisiana Joint Legislative Committee on Un-American Activities, publicly demanded that the anti-subversion laws be enforced against Dombrowski, Smith, Waltzer, and SCEF. Counsel for Dombrowski and SCEF then filed a complaint in the local federal district court seeking: (1) a declaratory judgment; (2) an interlocutory injunction preventing further prosecution; and (3) a permanent injunction to the same effect — all upon the ground that (a) the anti-subversion laws were unconstitutional on their face and as applied to plaintiffs, and (b) those laws were also superseded by federal legislation covering the same subject matter.⁶² The majority of the court in its written opinion dismissed the action for failure to state a claim.⁶³ Thereafter, the state grand jury in New Orleans returned a set of indictments against the individual plaintiffs.⁶⁴

On appeal to the Supreme Court, the dismissal below for failure to state a claim narrowed the Court's necessary adjudicatory boundaries. But the Court went further than was needed and concluded that a claim *was* stated and the claim was not only substantial but also valid without further consideration of proof

⁵⁸ LA. REV. STAT. ANN. §§14:358-374 (Supp. 1964).

⁵⁹ LA. REV. STAT. ANN. §§14:390-390.8 (Supp. 1964).

⁶⁰ Official activities related to the arrests were described by Judge Wisdom of the Fifth Circuit Court of Appeals as follows:

At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from "racial agitation." An able, experienced, and independent-minded district judge of the Criminal District Court for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests.

Dombrowski v. Pfister, 227 F. Supp. 556, 573 (E.D. La. 1964) (dissent). Judge Wisdom sat as a member of the three-judge district court.

⁶¹ Brief for Appellants and Appellants-Intervenors, at 7, *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (quoting Judge J. Bernard Cocke of the Criminal Court for the Parish of Orleans).

⁶² See Complaint No. 14019, *Dombrowski v. Pfister*, (E.D. La. 1963).

⁶³ *Dombrowski v. Pfister*, 227 F. Supp. 556 (E.D. La. 1964). See 380 U.S. at 482-83, for Mr. Justice Brennan's remarks as to the district court's opinion.

⁶⁴ Justice Brennan describes the indictments in 380 U.S. at 492-93.

being necessary with respect to the excessive vagueness of certain provisions of the statutes.⁶⁵ The guidelines espoused by the Court in *Dombrowski* have been stated as follows:

Thus, certain basic principles can be said to emerge from . . . *Dombrowski*. . . . Where a federal district court is faced with an attack upon the good-faith enforcement of a statute regulating expression, it must adjudicate the claim. Such an adjudication, however, does not entail the determination of the guilt or innocence of the plaintiff. The court need only hold a hearing to determine whether or not there is sufficient or probable cause for good faith prosecution. If it should then appear that the application of the statute is in bad faith for the purpose of discouraging protected activities, federal injunctive relief is justified. If not, no further federal intervention is warranted.⁶⁶

It would seem that the *Dombrowski* decision dilutes the rigidity of the "good faith" presumption set forth in *Douglas*.⁶⁷

The second federal-state injunction case to come before the Supreme Court after *Dombrowski* was *Cameron v. Johnson*.⁶⁸ There, civil rights demonstrators sought an injunction against a state prosecution for allegedly violating a recently enacted Mississippi anti-picketing statute.⁶⁹ The statute had been narrowly drafted to test the limits of recent Supreme Court decisions, thus *Cameron* met neither of *Dombrowski*'s prerequisites for injunction. The statute was not vague on its face,⁷⁰ nor could the defendants show that the particular prosecution was instituted in bad faith, since the constitutionality of their conduct was a close question.⁷¹ The Court, in a five to four decision, reversed the district court's denial of relief, and remanded the case directing the district court to reconsider its dismissal "in light of criteria

⁶⁵ Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction.
380 U.S. at 491.

⁶⁶ *Landry v. Daley*, 288 F. Supp. 200, 219 (N.D. Ill. 1968).

⁶⁷ See text at note 55 *supra*. See note 36 *supra*, and accompanying text.

⁶⁸ 381 U.S. 741 (1965).

⁶⁹ It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.
MISS. CODE ANN. §2318.5(1) (Supp. 1964). Cf. *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1964). For the legislative history of the statute, see Cheigny, *A Busy Spring in the Magnolia State*, in SOUTHERN JUSTICE 13, 26-27 (1965).
⁷⁰ 381 U.S. 741, 745 (1965) (Black, J., dissenting); *id.* at 757 (White, J., dissenting).

⁷¹ See 380 U.S. 479, 487-88 (1965). Cf. Mr. Justice White's dissent in *Cameron v. Johnson*, 381 U.S. 741, 755-56; Note, *The Supreme Court: 1964 Term*, 79 HARV. L. REV. 105, 170-71 (1965).

set forth" in *Dombrowski*.⁷² On remand, the district court held that 2283 prohibited the court from enjoining or abating the criminal prosecutions initiated against the appellants prior to the filing of the federal suit⁷³ and further that the Civil Rights Act creates no exception to 2283.⁷⁴

V. THE CIRCUITS CONFLICT

Since the Supreme Court has never expressly decided whether the Civil Rights Act creates an exception to the anti-injunction statute, the federal circuit courts of appeals have been relatively free to decide the question for themselves. The results are conflicting.

In *Cooper v. Hutchinson*,⁷⁵ the Third Circuit was asked to enjoin proceedings in a New Jersey state court. Petitioners, represented by court-appointed counsel, were convicted of murder and sentenced to death. Following conviction, five other lawyers were substituted in place of counsel appointed by the court. Two of these were members of the New Jersey bar and the remaining three were of the New York bar. The out-of-state lawyers were admitted *pro hac vice* in the Supreme Court of New Jersey and also in the county court where the murder charge was being prosecuted. On appeal, the Supreme Court of New Jersey reversed the conviction and remanded the case to the trial court for a new trial.⁷⁶ On remand, the five substituted lawyers proceeded with certain preliminary motions when the trial judge ordered that the out-of-state lawyers could not appear in the murder case. Petitioners then filed suit in the federal district court in New Jersey seeking to enjoin the trial judge from proceeding further in the case until he allowed the out-of-state lawyers to represent them, and to enjoin the trial judge from refusing to recognize these lawyers. The District Court dismissed the complaint.⁷⁷ On appeal, petitioners contended that Section 1 of the Civil Rights Act⁷⁸ (the forerunner of 42 U.S.C. §1983) laid the foundation for direct action against the trial judge whose official act invaded the constitutional rights of petitioners.⁷⁹ They also maintained that their right to assert a claim under the Civil Rights Act is not dependent upon the prior pursuit of relief under state law.⁸⁰ The court sustained the petitioners' contentions under the Civil Rights Act, holding:

⁷² 381 U.S. 741, 742 (1965).

⁷³ See notes 38-50 *supra*, and accompanying text.

⁷⁴ *Cameron v. Johnson*, 262 F. Supp. 873, 878 (S.D. Miss. 1966), *aff'd on other grounds*, 390 U.S. 611 (1968).

⁷⁵ 184 F.2d 119 (3rd Cir. 1950).

⁷⁶ *State v. Cooper*, 2 N.J. 540, 67 A.2d 298 (1949).

⁷⁷ *Cooper v. Hutchinson*, 88 F. Supp. 774 (D.N.J. 1950).

⁷⁸ Rev. Stat. §1979 (1875).

⁷⁹ *Cooper v. Hutchinson*, 184 F.2d 119, 122 (3rd Cir. 1950).

⁸⁰ *Id.* at 124.

We are not here governed by the rule of the habeas corpus cases to the effect that the state law processes must be exhausted before there can be resort to a federal court. *And the provision in the Judicial Code forbidding the use of the injunction against state court action has a stated exception when a federal statute allows it, as it does here.*⁸¹ (Emphasis added).

In a footnote, the court then stated:

The Civil Rights Act provision relied upon here expressly provides for a "suit in equity" by the aggrieved party.⁸²

The court denied the injunction, however, apparently to give the New Jersey state court another chance to rectify any wrongs it committed "at least until it has become apparent that state procedure cannot avert irreparable harm to these appellants."⁸³ Thus, the Third Circuit held that Section 1979 of the Revised Statutes — which is identical to Section 1983 of the present Civil Rights Act⁸⁴ — constitutes an exception to the anti-injunction statute, as "... expressly authorized by Act of Congress"⁸⁵

In *Dilworth v. Riner*,⁸⁶ the Fifth Circuit was confronted with litigation centering around sections 201-207 of Title II of the Civil Rights Act of 1964,⁸⁷ rather than Section 1983. Eighteen Negroes requested service in a public restaurant in Aberdeen, Mississippi. They were told by a waitress that they would be served only in the section of the restaurant reserved for Negroes. Upon their refusal to go to that section, they were asked to leave. They remained, were arrested, and charged with violating a breach of the peace type statute. Before the date set for trial, they filed suit in a district court seeking a temporary restraining order enjoining their further prosecution and a permanent injunction against the withholding of their rights under Title II of the 1964 Civil Rights Act. Relief was denied by the court due to §2283. On appeal, the judgment was vacated and the case remanded. The court reasoned:

We begin with the proposition that §2283 does not require that an exception to it refer specifically to §2283. Nor do we believe that the language of the authorizing statute need refer to the subject matter of federal stays of state court proceedings.

[W]e hold these provisions of the Civil Rights Act [sections 201-207 of Title II] to constitute express authorization within the meaning of §2283 for a federal District Court to stay state courts [sic] prosecutions when the injunction would be otherwise appropriate.⁸⁸

Three of the provisions of the Civil Rights Act here held to be

⁸¹ *Id.* at 124.

⁸² *Id.* at 124, n. 11, citing Rev. Stat. §1979 (1875).

⁸³ *Cooper v. Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950).

⁸⁴ 42 U.S.C. §1983 (1964).

⁸⁵ 28 U.S.C. §2283 (1964).

⁸⁶ 343 F.2d 226 (5th Cir. 1965).

⁸⁷ 42 U.S.C.A. 2000a-1 through 2000a-7 (1964).

⁸⁸ *Dilworth v. Riner*, 343 F.2d 226, 230-31 (5th Cir. 1965).

within the first exception to the anti-injunction statute read:

Section 2000a(a)

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.⁸⁹

Section 2000a-1

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.⁹⁰

Section 2000a-3(a)

Whenever any person has engaged . . . in any act or practice prohibited by section 2000a-2 [prohibiting deprivation of rights enumerated in 2000a(a) and 2000a-1] . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved⁹¹

Section 1983 states:

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.⁹²

It is apparent that the rights involved in the provisions before the *Dilworth* court are *specific* in nature, relating to the use of public accommodations, while the rights protected in 1983 are of a *general* scope (" . . . rights, privileges, or immunities secured by the Constitution and laws . . ."). This specific-general distinction may also be applied to the means for enforcement of these rights. Thus, section 2000a-3 *specifically* provides for " . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order . . .", and 1983 *generally* provides for " . . . an action at law, suit in equity, or other proper proceeding for redress." But beyond here, their differences end. While couched in the broad phrase "suit in equity," it is difficult to perceive that section 1983 provides for any remedy exclusive of injunctive relief. Both the *Dilworth* provisions and 1983 have as their underlying policy the enforcement of civil rights in the federal courts. Both provide remedies for the deprivation of rights under color of

⁸⁹ 42 U.S.C.A. 2000a(a) (1964).

⁹⁰ 42 U.S.C.A. 2000a-1 (1964).

⁹¹ 42 U.S.C.A. 2000a-3(a) (1964).

⁹² 42 U.S.C.A. 1983 (1964).

state law. Both are directed at the violation of federally guaranteed rights by a "person," which is significant in that the *Dilworth* holding allows a state court — or, more specifically, a state legal process — to be enjoined, once set in motion.⁹³ Thus, it seems that the *Dilworth* provisions and 1983 differ only in the scope of rights protected, which does not form a cogent basis for failing to recognize the latter as a congressionally stated exception to the anti-injunction statute while the former is so recognized. And with respect to comity as precluding any injunctive relief after the state legal process has been set in motion,⁹⁴ *Dilworth* stated:

[T]he policy against interference with state criminal proceedings is simply a rule of comity, not of statutory derivation and it is "... not a rule distributing power as between the state and federal courts" It is a rule to which there may be exceptions based on genuine and irretrievable damage. It is also a rule that may be abrogated by the Congress, and we hold that it was abrogated by the enactment of Title II of the 1964 Civil Rights Act.⁹⁵

This analysis may be equally applied to 1983. The similarities and lack of any substantial difference between Title II and 1983⁹⁶ warrant their equal treatment as statutory authorizations to enjoin state prosecutions.

The Fourth,⁹⁷ Sixth,⁹⁸ and Seventh⁹⁹ Circuits have expressly declared that the Civil Rights Act is not an exception to the anti-injunction statute. *Baines v. City of Danville*¹⁰⁰ typifies the analysis behind these decisions. This was a consolidation of cases in which Negro demonstrators sought injunctions against their prosecution for violating anti-picketing and parade ordinances. In dissolving a previously issued temporary injunction, the court stated:

[The Civil Rights Act] creates a federal cause of action, but with no suggestion, explicit or implicit, that appropriate relief shall include an injunction which another Act of Congress forbids. The substantive right, in many situations, may call for equitable relief, and equitable remedies are authorized, but only by a general, jurisdictional grant. Creation of a general equity jurisdiction is in no sense antipathetic to statutory or judicially recognized limitations upon its exercise.¹⁰¹

⁹³ This would also dilute the force of the "*in personam*" argument in favor of the threatened-pending distinction. See note 44, *supra*, and accompanying text.

⁹⁴ See note 5, *supra*; note 17, *supra*, and accompanying text.

⁹⁵ *Dilworth v. Riner*, 343 F.2d 226, 232 (5th Cir. 1965). (citations omitted).

⁹⁶ See text at notes 93-95, inclusive, *supra*.

⁹⁷ *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964).

⁹⁸ *Sexton v. Barry*, 233 F.2d 220 (6th Cir. 1950).

⁹⁹ *Smith v. Village of Lansing*, 241 F.2d 856 (7th Cir. 1957); *Wojcik v. Palmer*, 318 F.2d 171 (7th Cir. 1963), cert. denied, 375 U.S. 930 (1963); *Goss v. Illinois*, 312 F.2d 257 (7th Cir. 1963).

¹⁰⁰ 337 F.2d 579 (4th Cir. 1964).

¹⁰¹ *Id.* at 589.

This reasoning seems to directly conflict with that in *Dilworth*.¹⁰² *Baines* looks for authorization for an injunction in express, specific words, while *Dilworth* holds that they are not needed.

The decisions of the Sixth and Seventh Circuits¹⁰³ in accord with *Baines* lack analysis in depth. They are based principally on the assumptions inherent in *Douglas*.¹⁰⁴

VI. CONCLUSION

The interpretation of the anti-injunction statute as precluding federal injunctive relief against pending state criminal prosecutions, the adherence to the principles of federalism in furtherance of an academic scheme at the expense of stutifying federally guaranteed rights of individuals, the belief that the assumptions underlying *Douglas* are actualized universally throughout the state courts, and the failure to interpret the Civil Rights Act as a congressionally expressed exception to the anti-injunction statute all serve to abet the denial of full enjoyment of constitutionally guaranteed rights — particularly those which deal with expression.

Nothing in section 2283 sanctions the threatened-pending distinction. It is merely a judicially fashioned doctrine that adds credence to comity and federalism. The term "proceedings" in the statute¹⁰⁵ no doubt was not intended by the framers to lend itself to such an interpretation. No matter where the magical point is deemed to exist, where a threatened prosecution matures into one pending, a federal injunction will still constitute an interference with the state legal process.¹⁰⁶ Moreover, maintenance of the threatened-pending distinction results in a race between the defendant in the state prosecution and the machinery of the state legal process. If the former reaches federal court with his petition before the latter matures into a "pending" proceeding, 2283 is no bar to injunctive relief. The defendant who holds faith in state due process and waits until it is apparent that his constitutional rights are in jeopardy will find himself in the midst of a "pending" prosecution, and thus precluded from a federal remedy. The faithful and idle are punished, while the shrewd and fleet are rewarded. It seems that a greater evil has emerged than that sought to be avoided by the threatened-pending interpretation.

The attempt to preserve the respective sovereignties of nation and state is protoplasmic to the federalist view. Each sovereignty is bound to uphold the Constitution. When the state

¹⁰² See text at note 89, *supra*.

¹⁰³ See cases cited in notes 99 and 100, *supra*.

¹⁰⁴ See text between notes 74-76, *supra*.

¹⁰⁵ See note 6, *supra*.

¹⁰⁶ See note 50, *supra*, and accompanying text.

sovereignty, through sham criminal prosecutions, abridges constitutional rights of individuals it oversteps the extent of its sovereign legitimacy and unwarrantedly encroaches upon the federal domain. The equivalent of this in reverse would be a federal court "legislating" on a local issue and in the process abrogating a right enjoyed locally. The latter is prohibited by the federalist philosophy; the question is: Why is not the former? This would seem to be a distinction without a difference.

It is apparent that the constitutional rights of alleged violators of statutes regulating expression are not always protected in all state courts.¹⁰⁷ The confusion of the law discussed in this comment indeed would not exist if the converse were true.¹⁰⁸ To look askance upon the assumptions attendant in *Douglas* should not provoke shock or antagonism from the jurisprudential theorists, rather it is to merely recognize that those who administer the state judicial system are only men. While the assumptions hold true in the great majority of state courts, it would be unrealistic to blind one's eyes to its offenders.

Section 1983 provides a "suit in equity" for persons deprived of federally guaranteed rights under color of state law.¹⁰⁹ It cannot be doubted that this authorizes injunctive relief. A person whose constitutional rights are abridged by a sham state criminal prosecution is deprived of federally guaranteed rights under color of state law. Thus, standing alone, 1983 affords this person federal injunctive relief. The anti-injunction statute authorizes a federal court to enjoin a state prosecution where expressly authorized by an act of Congress.¹¹⁰ The conclusion is compelling that 1983 is such an act of Congress. The only obstacle to such a conclusion is the argument that 1983 does not expressly refer to the anti-injunction statute. To adhere to this argument is to deny protection of constitutional rights on the basis of semantical gymnastics.¹¹¹

Finally, a close inspection of the history of 2283¹¹² and the implications of *Dombrowski* militate against the failure to deem the Civil Rights Act an exception to the anti-injunction statute. The growth of the statute to its present form indicates that laws must mature with the times to cope with the exigencies of life. Philosophical though the statement may be, it finds its veracity in reality. As the need arises, laws are created, amended, qualified, and abolished. The anti-injunction statute has enjoyed revision through the years as the judiciary and Congress have

¹⁰⁷ See note 2, *supra*.

¹⁰⁸ See Part V., *supra*.

¹⁰⁹ See note 8, *supra*.

¹¹⁰ See note 6, *supra*.

¹¹¹ See quote from *Dilworth* in text at note 89, *supra*.

¹¹² See Part II, *supra*.

bowed to its inadequacy. *Dombrowski* reflects a trend in federal and state court relations. Deference to state sovereignty is not now automatic. Recognition is given to the cries of victims of official intimidation that the state forum is not *necessarily* adequate to vindicate federally protected rights. The past decade or two has been characterized as the age of dissent. Protest marches, picketing, and demonstrations indicate a change of the times. Where meaningful civil rights activities are threatened by state officials via criminal prosecutions — threatened *or* pending — the federal courts should afford those harassed injunctive relief. If the federal judiciary fears the breaking of precedent, then Congress should amend 2283 to except from its ban the Civil Rights Act. This would be instructive to those state officials who discourage protected activities, and serve as a cautioning device to the passage of vague and overly broad state statutes regulating expression.

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