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COMMENTARY

THE FEDERAL ANTI-INJUNCTION STATUTE IN THE AFTERMATH OF *ATLANTIC COAST LINE RAILROAD*

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LAST Term the Supreme Court rendered its decision in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers.* This case involved the present anti-injunction statute, section 2283 of Title 28, which forbids federal court injunction of state court proceedings. Mr. Justice Black, writing for the majority, traced the roots of the statute's predecessor into the "fundamental constitutional independence of the states and their courts." He hinted that the act grew out of concern for constitutional inviolability of a state court's adjudicative process. Mr. Justice Black went on to announce that the anti-injunction statute is absolute; no judicially created exceptions are to be allowed.

This Commentary will argue that the 1793 legislation in which the anti-injunction provision first appeared does not indicate that the provision enjoyed a fundamental constitutional base. Further, it will be argued that the Court's view that section 2283 is not subject to judicially created exceptions is itself subject to limits. The prohibition against injunctions is simply not applicable in some instances in which a federal court is asked to enjoin pending state court proceedings, and this concept of inapplicability survives the *Atlantic Coast Line* decision.

In section 5 of the Act of March 2, 1793, Congress enacted the predecessor of the now famous anti-injunction act, which provided that "writs of ne exeat and of injunction may be granted by any judge of the supreme court . . . but no . . . writ of injunction [shall] be granted to stay proceedings in any court of a state."[1] As Mr. Justice Frankfurter pointed out in *Toucey v. New York Life Insurance Co.*,[2] there is no

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1 Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334-35. For the complete text of section 5, see text accompanying note 18 *infra*.

2 314 U.S. 118 (1941).

recorded debate on the 1793 Act by which Congress expressed its intent about the scope and the nature of the provision.[3] Nor was it an integral part of a legislative scheme whose meaning may be sought in the purpose of the entire enactment or series of enactments. The exact reasons which led to its passage are therefore unclear.

At least three explanations have been offered. First, on the assumption that the provision was a limitation upon courts of the United States, though the act did not so state, it has been suggested that Congress was concerned with the scope of permissible intrusion upon state sovereignty that was to be allowed the federal government.[4] This view garners support from the general historical context. When the anti-injunction act was passed, Congress had only several years earlier promulgated the Bill of Rights. As a whole, the first ten amendments are "all restrictive in character, five of them aimed at the judiciary . . . ."[5] And, while the anti-injunction act was being formed, Congress proposed the eleventh amendment which forbade the entertainment of a suit against a state in the federal courts.[6] On the other hand, Congress, in the Judiciary Act of 1789,[7] authorized the transfer to inferior federal courts of proceedings in state courts. This first removal statute represented a serious interference with state court adjudicative processes, an intrusion upon states' rights, and was certain to cause friction and clash between the respective judicial bodies.[8]

Adherents of a second view have sought to explain the passage of the anti-injunction statute as an answer to the Supreme Court's decision in *Chisholm v. Georgia*.[9] Yet, as Mr. Justice Frankfurter points out, *Chisholm* was decided a mere two weeks prior to the passage of the anti-injunction statute, and "[t]he significance of this proximity is doubtful."[10] A third explanation for the anti-injunction provision lies in the assumption that, during the early years of this country, there

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3 *Id.* at 131. *See* 3 ANNALS OF CONG. (1791-93).

4 *See* Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1145-46 (1932); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1171 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-48 (1930).

5 Durfee & Sloss, *supra* note 4, at 1146.

6 *See* Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 291-92 (1906); Durfee & Sloss, *supra* note 4, at 1146; Warren, *supra* note 4, at 348 n.14.

7 Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73.

8 Warren, *supra* note 4, at 369.

9 2 U.S. (2 Dall.) 419 (1793). See Taylor & Willis, *supra* note 4, at 1171; Warren, *supra* note 4, at 347-48.

10 Toucey v. New York Life Ins. Co., 314 U.S. 118, 131 (1941).

was an avowed prejudice against equity jurisdiction in general.[11] Proponents of this explanation allude to the many pronouncements of Senator Ellsworth, "the principle draftsman of both the 1789 and 1793 Judiciary Acts,"[12] which indicate a prejudice against equity jurisdiction. However, had this propensity against equity truly been dominant, not only would federal courts have been barred from enjoining state courts, but also federal courts would have been forbidden to enjoin each other.

The anti-injunction provision was but one sentence in one section of a two-page statute.[13] Little attention, if any, has been directed to the balance of the 1793 Act.[14] The several sections of the Act were, for the most part, unconnected and dealt with matters such as the manner of appraisal for goods taken on a writ of *fieri facias*,[15] bail for appearance in a criminal cause,[16] the duty of the clerk to afford newspaper publicity of special sessions of circuit courts,[17] subpoena for witnesses living in another district,[18] and the number of Supreme Court Justices required to sit on circuit courts.[19]

The anti-injunction provision made its appearance inconspicuously in the midst of section 5, which gave the power to issue writs of *ne exeat* and injunction to Supreme Court Justices:

> *And be it further enacted*, That writs of ne exeat and of injunction may be granted by any judge of the supreme court in cases where they might be granted by the supreme or a circuit court; but no writ of ne exeat shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly

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11 *See id.* Mr. Justice Frankfurter, writing for the majority in *Toucey*, states that Ellsworth "often indicated a dislike for equity jurisdiction. *Id.* However, he cited as support for that contention, page 194 of Brown's *Life of Oliver Ellsworth* which does not appear to lend credence to that view. Ellsworth opposed passage of an amendment which would have expanded equity jurisdiction to matters where there was an adequate remedy at law. He did not, however, argue against the viability of equity jurisdiction where there was no such legal remedy available.

12 Toucey v. New York Life Ins. Co., 314 U.S. 118, 131 (1941). *See* Taylor & Willis, *supra* note 4, at 1171.

13 *See* Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334-45.

14 *See generally* Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), and authorities cited at note 4 *supra*.

15 Act of March 2, 1793, ch. 22, § 8, 1 Stat. 335.

16 *Id.* § 4, at 334.

17 *Id.* § 3, at 334.

18 *Id.* § 6, at 335.

19 *Id.* § 1, at 333-34.

> to depart from the United States; nor shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.[20]

Section 5 has not been so read,[21] but its plain grammatical sense indicates that it is directed only to individual "judge[s] of the supreme court,"[22] and not to United States courts. The first clause of section 5 grants two new powers to individual Justices;[23] the remaining clauses, including the anti-injunction provision, qualify this grant to individual Justices to issue writs of ne exeat and of injunction. The proscription of injunctions against state courts is a limit only on the power of individual Justices to issue injunction provided by the first clause of section 5. Section 5 recognized that the Supreme Court and the circuit courts inherently possessed the power of injunction prior to the Act of 1793. The prohibition against interference with state powers by injunction is to be read as an appropriate distinction to make between an injunction issued by a single judge and an injunction issued by a court proceeding. This distinction is analogous to that drawn today in the three-judge court acts requiring three federal judges instead of one to enjoin a state officer from enforcing an unconstitutional state statute.[24] The anti-injunction provision was not interpreted by the Supreme Court until 1872, almost eighty years after its passage,[25] when the Court, without discussing the issue, held that it barred injunctions issued by lower federal courts.[26] Congress thereafter enacted a version of the provision in language clearly applying the ban to courts of the United States.[27]

That the Supreme Court seemed unable to locate the anti-injunction provision when deciding early cases where federal courts had been asked to enjoin state proceedings[28] supports a contention that its role

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20 *Id.* § 5, at 334-35 (footnote omitted).

21 Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807).

22 Act of March 2, 1793, ch. 22, § 5, 1 Stat. 333.

23 *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 142-43 (1941) (Reed, J., dissenting).

24 28 U.S.C. § 2281 (1964).

25 *See* Warren, *supra* note 4, at 367.

26 Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872); *see* Warren, *supra* note 4, at 367.

27 Revised Statutes of 1874, ch. 12, § 720, 18 Stat. 134.

28 *See* Orton v. Smith, 59 U.S. (18 How.) 263 (1856); Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 178, 179 (1807).

was very limited. Prior to the first decision actually rendered under the act,[29] the Supreme Court had been asked twice to rule on the validity of federal court injunctions of state court proceedings—once in 1807,[30] and again in 1856.[31] The decisions in both cases are not inconsistent with the proposition that the 1793 provision did not apply to federal courts but to judges. These cases also suggest that the intention of the act was to bar an injunction against the state court itself and not an injunction against parties.[32] In the first case, without making reference to the 1793 Act, the Supreme Court held that the United States circuit court lacked "jurisdiction" to enjoin proceedings in a state court.[33] In the second case, the Court again denied the right of a federal court to enjoin state court proceedings with no mention of the anti-injunction provision. Rather, the Supreme Court based its decision on equitable principles, on the ground that the complainant was the volunteer purchaser of a litigious claim, and on the theory that the "bill of peace" sought would only prompt a clash of jurisdiction.[34] Simply stated, the Supreme Court rested its decision on every feasible ground execpt the 1793 provision.

In sum, the anti-injunction provision appeared in a statutory section which empowered individual Supreme Court Justices to grant writs of *ne exeat* and injunction. The provision was not expressly a limit on the power of United States courts to issue injunctions against state court proceedings. In fact, the wording was not altered by Congress to include such prohibition until the general codification of June 24, 1874.[35] Statements, mainly in the twentieth century, which celebrate the provision's importance are in sharp contrast to its inauspicious appearance in section 5 of the 1793 Act.[36] Mr. Justice Frankfurter, for example, characterized the act as "an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having po-

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

30 Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 178 (1807).

31 Orton v. Smith, 59 U.S. (18 How.) 263 (1856).

32 *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 143 (1941) (dissenting opinion); Marshall v. Holmes, 141 U.S. 589, 599, 600 (1891). *But see* Warren, *supra* note 4, at 372.

33 Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 178, 179 (1807).

34 Orton v. Smith, 59 U.S. (18 How.) 263 (1856).

35 Revised Statutes of 1874, ch. 12, § 720, 18 Stat. 134.

36 *See, e.g.*, Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. — (1970); Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939).

tential jurisdiction over the same subject matter."[37] But this statement of the anti-injunction provision's historical role must be tempered by the Court's failure to employ it as a device for avoiding "needless friction" and by the Court's failure to employ it at all during the first eighty years following its passage. The Court achieved harmony between the two court systems and delimited the boundaries of permissible interference by relying on principles of equity and rules relating to the judicially-created doctrine of comity.[38]

When Congress enacted the general codification of 1874, the provisions of section 5 of the 1793 Act were severed and, with modification, appeared in divers sections of the Revised Statutes.[39] The provision which granted the power to issue *ne exeat* writs appeared in section 717,[40] and the limitation on issuance of injunctions without notice to the adverse party appeared in section 719.[41] For the first time since its passage, the anti-injunction provision was framed in a separate section, section 720.[42] Also for the first time, it was worded as an express limitation on "any court of the United States."[43] In the same section, Congress authorized an exception to the statute in cases where an injunction was issued by a federal court sitting in a bankruptcy proceeding.[44] The anti-injunction statute began to flourish in the late nineteenth century[45] and by the end of the first quarter of the twentieth century at least ten cases had been decided in which the new statute was enforced and injunctions by federal courts were held void.[46]

At the same time that the Court gave vitality to the statute, however, it also adopted two methods for hedging its operative scope: the Court was disposed in certain circumstances to find that the statute was susceptible to "*exceptions*," on the one hand, and, on the other, the Court held on some occasions that the prohibition of the statute simply "*did not apply*." By 1941, "exceptions" were sanctioned in a variety of situations. It was held that federal legislation enacted subsequent to the anti-injunction act constitutes implied exceptions in five

37 Hale v. Bimco Trading, Inc., 306 U.S. 375, 378 (1939).
38 Warren, *supra* note 4, at 359-66.
39 Revised Statutes of 1874, ch. 12, §§ 171, 719, 720, 18 Stat. 134.
40 *Id.* § 717.
41 *Id.* § 719.
42 *Id.* § 720.
43 *Id.*
44 *Id.*
45 *See, e.g.*, Durfee & Sloss, *supra* note 4, at 1149-55.
46 Warren, *supra* note 4, at 367.

areas.[47] And the Supreme Court early recognized a sixth exception to the anti-injunction statute where a state court attempted to exercise its jurisdiction in matters involving a *res* over which a federal court had first obtained jurisdiction.[48] Similarly, prior to 1941, another exception obtained where, absent an injunction against state proceedings, the parties would be compelled to relitigate matters already settled by a federal court.[49] An eighth exception was reached in cases in which the party seeking the federal injunction could show that the state court had been defrauded in arriving at its judgment.[50]

The other method of hedging the statute was to declare it inapplicable in some situations. In 1965 the prohibition against enjoining state court proceedings was construed not to apply to state proceedings then in existence but not in existence at the time the federal injunction was initially sought.[51] The Court has also found the anti-injunction provision "inapplicable" where the parties seeking federal injunctive relief were not identical to those involved in the state litigation at issue.[52] Another example of inapplicability was announced by the Court in 1919.[53] There, it was held that the injunction ban is not applicable in cases where state legislatures have conferred upon their courts powers which are not strictly judicial, such as the power to establish drainage districts.[54] Finally, even before the 1957 Supreme Court decision in *Leiter Minerals, Inc. v. United States*,[55] there was some support in lower federal court decisions for the proposition that the anti-injunction statute did not apply in cases in which the federal injunction was sought by the United States.[56] The *Leiter Minerals*

47 *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 132-34 (1941).

48 *See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 235 (1922); Freedman v. Howe, 65 U.S. (24 How.) 450 (1861).

49 *See, e.g.*, Looney v. Eastern Texas R.R., 247 U.S. 214 (1918); Root v. Woolworth, 150 U.S. 401, 411 (1893).

50 *See, e.g.*, Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1970); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744, 763 (1967).

It is also of note that commentators have characterized an additional exception where a state court attempts enforcement of an unconstitutional state statute. Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 551 (1947); Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 728 (1961).

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

52 Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939).

53 Public Serv. Co. v. Corboy, 250 U.S. 153 (1919).

54 *Id.* at 161-62.

55 352 U.S. 220 (1957).

56 See cases cited in Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 553 n.39 (1947).

decision affirmed the correctness of those lower court decisions. In sum, then, the Supreme Court has recognized that the injunction ban does not apply to at least four situations.

Thus, the Court had clearly manifested a view, by the use of the "exception" and "inapplicable" devices, that the statute was not to be taken literally. In 1941, in *Toucey v. New York Life Insurance Co.*,[57] Mr. Justice Frankfurter, writing for the majority, attempted the first comprehensive treatment of the statute. The question before the Court was the viability of the relitigation exception, but also at issue was the validity of judicially created exceptions to the statute. Mr. Justice Frankfurter endeavored to demonstrate that most "exceptions" to the anti-injunction statute were inferred from other federal legislation. First, he recognized the existence of the bankruptcy exception, which was the only qualification contained in the 1874 revision,[58] and the interpleader exception, which resulted from an express modification of the prohibition by the Interpleader Act of 1926.[59] Less convincing was Frankfurter's explanation of the "removal" exception[60] and the exception resulting from the 1851 statute limiting shipowners' liability.[61] Neither of those statutes contained modifications of the anti-injunction act, and the Court could find these "statutory exceptions" only by "judicial legislation" inferring an exception. Mr. Justice Frankfurter, turning to the non-statutory implied "exceptions," admitted that there was no authority for inferring an exception for actions in rem, but he maintained that such an exception was valid owing to its long recognized status.[62] The only other existing judicially created exception was that which permitted a federal injunction against state court judgments obtained by fraud.[63] The validity of that exception, said the Justice, was "doubtful"; however, he concluded that, since this exception was not before the Court, it was not necessary to rule on it.[64] Then, addressing the question actually presented the Court, he reasoned that the relitigation exception could not be justified, and he struck it down.[65]

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57 314 U.S. 118 (1941).
58 *Id.* at 132-33; *see* note 44 and accompanying text *supra.*
59 314 U.S. at 133-34.
60 *Id.* at 133.
61 *Id.* at 133.
62 *Id.* at 134-36, 139; *see* D. CURRIE, FEDERAL COURTS, CASES AND MATERIALS 560 (1968).
63 314 U.S. at 136-37. *See* Comment, *supra* note 56, at 550.
64 314 U.S. at 136-37.
65 *Id.* at 137-41.

Several commentators have assessed *Toucey* as having swept away the judicially created exceptions to the statute.[66] But of the seven exceptions which he specifically ruled on, Frankfurter overruled only one and gave credence to six. Importantly, Frankfurter's decision seemed to check the creation of further judicial exceptions.[67] But while he may have chilled further development of the "exception" device, he did not speak to the contention that the statute might be "inapplicable" in certain circumstances, a view which he seemingly adopted some fifteen years later.[68]

Mr. Justice Reed dissented in *Toucey* in an opinion in which Mr. Chief Justice Stone and Mr. Justice Roberts concurred.[69] He pointed out that the legislative intent of the statute was unclear and imprecise and that it was quite rational to perceive the 1793 Act in terms which would engender a narrow reading of its scope.[70] After all, as Reed noted, the anti-injunction provision "was a single line in a two page act . . . ."[71] Reed posited his underlying philosophy: "We should not, in reaching for theoretical symmetry, hamper the efficiency and needlessly break the continuity of our judicial methodology."[72]

Reed took issue with the majority on the question of the existence and validity of the "relitigation" exception noting that the exception was the only one actually before the Court. He argued that Congress had recodified the anti-injunction provision in 1911 with knowledge of intervening Supreme Court decisions which had recognized the existence of a "relitigation" exception.[73] He purported to show that such cases were in abundance and dispositive of the doctrine's viability.[74] This fact was evidence of Congress' implied acceptance of the doctrine. To hold otherwise would do as much damage to the intent of the statute as the recognition of those exceptions might be said to have done had the original statute been intended not to yield to exception. The gravamen of Mr. Justice Reed's opinion is that the "flexibility

66 *See, e.g.*, J. MOORE & H. FINK, JUDICIAL CODE PAMPHLET 924 (1967); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744, 763-74 (1967).

67 Mr. Justice Frankfurter stated: "The fact that one exception has found its way into § 265 [the anti-injunction act] is no justification for making another." 314 U.S. at 139. *See, e.g.*, J. MOORE & H. FINK, *supra* note 66, at 924.

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

69 Toucey v. New York Life Ins. Co., 314 U.S. 118, 141 (1941) (dissenting opinion).

70 *Id.* at 142-43 (dissenting opinion).

71 *Id.* at 142 (dissenting opinion).

72 *Id.* at 144 (dissenting opinion).

73 *Id.* at 143-46 (dissenting opinion).

74 *Id.* at 146-54 (dissenting opinion).

supplied by judicial interpretation" was needed to meet the demands of an expanding jurisprudence.[75]

Several years later, in 1948, Congress revised the anti-injunction statute.[76] Having noted Mr. Justice Reed's dissent, the Reviser stated that the new statute "restores the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision. Changes were made in phraseology."[77] The act, now contained in 28 U.S.C. section 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court, except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[78]

Some commentators who have interpreted Frankfurter's opinion in *Toucey* as a "sweeping decision" which denigrated a whole raft of implied exceptions to the anti-injunction act have questioned whether the Reviser's Note implies reinstatement of all the exceptions overruled in *Toucey* or only the "relitigation" exception.[79] However, *Toucey* only overruled the one exception. Clearly the revised statute in restoring "the basic law as generally understood" prior to *Toucey* resurrected the relitigation doctrine without intending to impugn the exceptions which Frankfurter did not overrule.

Frankfurter, however, had seriously questioned the validity of any further "judicial exceptions" to the act[80] although at the same time he gave sanction to the removal and limitation on shipowners' liability exceptions (both created on the authority of vague congressional words) and the *res* exception (wholly inferred without aid of any authority of Congress). The question left unanswered by the Reviser's Note, then, is whether Congress intended to reinstate the relitigation exception without giving credence to a "flexibility supplied by judicial interpretation . . . to meet the needs of our expanding jurisprudence,"[81] the view of Mr. Justice Reed with whom Chief Justice Stone and Mr. Justice Roberts concurred. If Congress, in promulgating the 1948 revi-

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75 *Id.* at 143 (dissenting opinion).

76 28 U.S.C. § 2283 (1964).

77 H.R. REP. No. 308, 80th Cong., 1st Sess. A182 (1947).

78 28 U.S.C. § 2283 (1964).

79 *See, e.g.*, Comment, supra note 66, at 764.

80 Toucey v. New York Life Ins. Co., 314 U.S. 118, 139 (1941). *See* J. MOORE & H. FINK, *supra* note 66, at 924.

81 314 U.S. at 143 (dissenting opinion) (quoting phrases in reverse order).

sion, had revivified the relitigation exception (which was wholly the product of judicial genesis) and had incorporated the *res* exception (which was similarly the result of judge-made law) as well as legitimatized two statutory exceptions[82] (which had been inferred in essence by the judiciary), did it then intend to bring to a halt the judicial process of finding exception to the statute?

The first significant Supreme Court interpretation of section 2283 came in *Amalgamated Clothing Workers v. Richman Brothers*,[83] a 1955 case. Once again, Mr. Justice Frankfurter spoke for the majority of the Court. In *Amalgamated* an employer sought an injunction in state court to prevent its employees from engaging in peaceful picketing. The workers sought to remove the action to federal district court alleging that the employer's prayer for injunctive relief brought the dispute within the original jurisdiction of federal courts under the Taft-Hartley Act.[84] The district court remanded the case to the state court with instructions that if Taft-Hartley was found to control the case was within the exclusive jurisdiction of the National Labor Relations Board. The union moved for dismissal in the state court, but the motion was denied.[85] From the same district court it then sought an injunction which would require the action to be withdrawn from the state court. The district court relied on section 2283 to deny the relief sought, and both the court of appeals and the Supreme Court affirmed.[86]

Discussing the anti-injunction provision Mr. Justice Frankfurter stated: "By its enactment Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."[87] It would seem, to borrow a phrase from Mark Twain, that the 1793 Act "was born modest, but it wore off." Mr. Justice Frankfurter then asserted that the recodification of the anti-injunction provision was not intended to allow judicial flexibility in interpreting the strictures of that interdiction.[88] It remained, as he had asserted in *Toucey*, a firm prohibition against federal court injunction of state court proceedings.[89] Frankfurter dismissed the relevance of the Reviser's repudiation

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82 The two statutory exceptions are the "removal" and "limitation-on-shipowners' liability" exceptions.

83 348 U.S. 511 (1955).

84 Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-87 (1964).

85 *See* 348 U.S. at 513.

86 Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955).

87 *Id.* at 514.

88 *Id.* at 515-16.

89 *Id.* at 514-16.

of *Toucey* in a footnote proclaiming that the revised statute had only purported to reinstate the relitigation exception;[90] all permissible exceptions to the anti-injunction statute, in the view of the majority, were embedded in the statute. No others were to obtain.

Three Justices, including Mr. Justice Black, who later would write the opinion of the Court in *Atlantic Coast Line,* dissented vehemently from the majority view:[91] "§ 2283 is not broader in scope than its predecessor . . . . Indeed, the express purpose of § 2283 was to contract —not expand—the prohibition . . . . By enacting § 2283, Congress thus rejected the *Toucey* decision and its philosophy of judicial inflexibility."[92] In a separate dissenting opinion,[93] the same three Justices stated that "[t]he Court has been ready to imply other exceptions to § 2283, where the common sense of the situation required it."[94] Mr. Justice Black concurred in both dissents, but some fifteen years later, in *Atlantic Coast Line,* he retreated from that view because in the years since *Amalgamated* Congress had not seen fit to amend the anti-injunction act.[95]

In *Atlantic Coast Line,* a union sought from a district court an injunction staying a state court injunction which prohibited labor picketing. The Supreme Court refused to authorize the relief sought, holding that a federal injunction was neither necessary to protect the district court's jurisdiction nor necessary to effectuate a prior judgment. In the Court's opinion, there was no district court judgment in existence at the time the union sought its federal injunction, and the state court had concurrent jurisdiction over the subject matter. Thus, the Court found that the facts did not warrant an injunction under any of the exceptions expressly stated in section 2283. It was then that Mr. Justice Black addressed the issue of the statute's susceptibility to judicially fashioned exceptions. Retreating from the view he espoused in *Amalgamated,* Black averred:

> [It is] intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal court. The argument implies that in certain circumstances a federal court may

90 *Id.* at 515 n.1.

91 Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 521 (1955) (dissenting opinion).

92 *Id.* at 523 (dissenting opinion).

93 *Id.* at 524 (dissenting opinion).

94 *Id.* at 525 (dissenting opinion).

95 Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. —, — (1970).

> enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention.[96]

Interestingly, Mr. Justice Black, in support of his contention that the prohibition of section 2283 is not subject to judicial improvisation, relied upon the majority decision in *Amalgamated*,[97] a decision from which he had dissented. He then reasoned that since Congress had not seen fit to repudiate the view espoused in *Amalgamated*, the doctrine of inflexibility was impliedly accepted. This is a tenuous argument owing primarily to the abundance of decisions in the interim that recognized exceptions to the anti-injunction statute which would not fall into any of the act's three express categories of exemption.[98] It is pure speculation to say that the Congress failed to react to *Amalgamated* because it approved of the rationale espoused therein. Nevertheless, the *Atlantic Coast Line* opinion represents the unanimous view of the Court on the issue of implied exceptions.[99]

No mention is made in either *Amalgamated* or *Atlantic Coast Line* of the doctrine of "inapplicability," and nothing in either opinion can be construed as impugning the validity of that concept. The Supreme Court has, on several occasions after *Amalgamated*, recognized the concept,[100] and Mr. Justice Black reflects no discredit of and makes no reference to those decisions in *Atlantic Coast Line*.

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96 *Id.* at —.

97 *Id.* at —.

98 Several cases have avoided the strictures of section 2283 since the *Amalgamated* decision in 1955. Since the courts have not always been clear as to whether they are inferring judicial "'exceptions" or finding the injunction ban "inapplicable," it cannot be said that Congress has accepted the *Amalgamated* view. *See, e.g.*, Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Studebaker Corp. v. Gitlin, 360 F.2d 692 (2d Cir. 1966); United States v. Wood, 295 F.2d 772 (5th Cir. 1961); Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957). In all the above cited cases, an injunction issued against pending state court proceedings despite the provision of section 2283 and without finding applicable one of the three enumerated exceptions to the anti-injunction statute. For an excellent discussion of cases permitting injunctions to issue where section 2283 does not expressly provide, see Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 591-603 (1970).

99 Although Mr. Justice Harlan wrote a concurring opinion and Mr. Justice Brennan, joined by Mr. Justice White, dissented, the eight participating Justices (Mr. Justice Marshall took no part in the decision) agreed in principle with Mr. Justice Black's majority opinion.

100 *See* Dombrowski v. Pfister, 380 U.S. 749 (1965); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

Some two years after *Amalgamated,* Mr. Justice Frankfurter, speaking for a unanimous Court in *Leiter Minerals, Inc. v. United States,*[101] ruled that, when the United States was seeking an injunction against state court proceedings, the ban of section 2283 simply has no application. He reasoned:

> The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.[102]

Thus, Frankfurter, who had so adamantly refused to recognize judicially fashioned "exceptions" to the statute, would permit the judiciary to limit its scope. While it is clear beyond cavil that section 2283 is not susceptible to judicial improvisation, as Mr. Justice Frankfurter had stated in *Amalgamated,* it is also clear beyond cavil that there are judicially cognizable situations where the statute does not apply. The concept of inapplicability would also seem unhampered by Mr. Black's enunciation in *Atlantic Coast Line,* which is more restrictive than its broad, categorical "holding" suggests.

An initial reading of the opinion in *Atlantic Coast Line* does give the impression that its stoic refusal to bend to judicially created exceptions means that section 2283 is absolute in its application. But, paralleling that view is the accepted doctrine that federal courts are not precluded from granting an injunction whenever non-application of the broad terms of the act is justifiable.

Before the Supreme Court this Term[103] is the question of whether the Civil Rights Act, 42 U.S.C. section 1983,[104] allows a federal court to enjoin suits in state court. Section 2283 permits an injunction to

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101 352 U.S. 220 (1957).

102 *Id.* at 225-26.

103 *E.g.,* Fernandez v. Mackell, 288 F. Supp. 348 (S.D.N.Y.), *prob. juris. noted,* 393 U.S. 975 (1968) (No. 844, 1968 Term; renumbered No. 20, 1969 Term; renumbered No. 9, 1970 Term).

104 42 U.S.C. § 1983 (1964).

issue when "expressly authorized by Act of Congress,"[105] and some courts have accepted the view,[106] while others have not,[107] that section 1983 constitutes such an "Act of Congress" exception. In the Civil Rights Act, Congress created a separate and distinct federal cause of action for the protection of the civil rights therein asserted and provided that a person who violates those rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[108] One scholar has thoughtfully questioned: "[B]y what stretch of the English language could it be argued that the Civil Rights Act 'expressly' authorizes injunctions against suits in state courts"[109] since the Act mentions neither an injunction nor a state court? However, neither the Bankruptcy Act[110] nor the limitation on shipowners' liability legislation[111] expressly authorize injunctions or mention state courts although both acts were clearly intended by the 1948 revision to constitute express "Act of Congress" exceptions to the anti-injunction statute.

But the important question of whether, despite section 2283, a federal court may, in a Civil Rights Act case, enjoin state court proceedings should not be approached solely on the issue of whether the Act is an "expressly authorized" exception. Although the Court has predetermined in *Amalgamated* and *Atlantic Coast Line* that it will not tolerate judicially created exceptions, an alternative approach is clearly viable. The availability of the strong remedy of injunction against state court proceedings where important civil rights protected in section 1983 are at stake should also be approached in terms of whether section 2283 is "applicable" in such cases. For example, does the anti-injunction statute "apply" to bar injunctions against state court proceedings that are plainly discriminatory so as to deny equal protection of the laws or that are aimed at conduct clearly privileged under federal law?[112] Ad-

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105 28 U.S.C. § 2283 (1964). For the text of that section, see text accompanying note 78 *supra*.

106 *E.g.*, Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); Landry v. Daley, 288 F. Supp. 200, 221-25 (N.D. Ill. 1968); *see* Maraist, *supra* note 98, at 591-603.

107 *E.g.*, Baines v. City of Danville, 337 F.2d 579, 587-93 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Cameron v. Johnson 262 F. Supp. 873 (S.D. Miss. 1966) (Rives, J., dissenting), *aff'd on other grounds*, 390 U.S. 611 (1968). *See* Maraist, *supra* note 98, at 591-603.

108 Morrison v. Davis, 252 F.2d 102, 103 (5th Cir.), *cert. denied*, 356 U.S. 903 (1958).

109 D. CURRIE, *supra* note 62, at 563.

110 See notes 44 and 58 and accompanying text *supra*.

111 See note 61 and accompanying text *supra*.

112 *Cf.* ALI DIVISION OF JURISDICTION 32 (Tent. Draft No. 5, 1967).

mittedly this approach—as to section 2283's applicability—shifts the test from whether or not a statutory exception exists to a consideration of the degree of importance to be afforded the right sought to be vindicated. But, the shift in test is authorized by both *Leiter Minerals,* which spoke in terms of "superior federal interests," and the Supreme Court's decision in *Dombrowski v. Pfister,*[113] a 1965 case.

In *Dombrowski* a federal court was asked to enjoin criminal prosecutions which were then pending in state court but which were not technically "pending" at the time the suit for federal injunction had been filed. The lower court denied the injunction; but the Supreme Court reversed,[114] holding that the prohibition of section 2283 was not applicable where the state proceedings were not technically commenced before the institution of federal suit. However, the Court's ruling which appears in a mere footnote is barren of justification for this conclusion.[115] First, the literal terms of section 2283 make no exception for, and plainly proscribe, an injunction against state court proceedings pending in fact although the federal court complaint was filed first.[116] Furthermore, the actual interference with the state court process caused by an injunction is the same regardless of whether the federal court issues its injunction on basis of a complaint technically filed before or after the institution of the state court action.[117]

The *Dombrowski* result apparently rests more on the proposition that the invidious infringement upon first amendment rights there involved did not warrant application of section 2283. In other words, as in *Leiter Minerals,* the superior federal rights exemplified in the case justified not applying the statute.

One might focus on *Machesky v. Bizzell*[118] as an example of a case where the Civil Rights Act was not held to constitute an express exception but where an injunction was allowed against state court proceedings nonetheless. In that case, a state court had enjoined the civil rights activities of a Mississippi organization, the Greenwood Move-

113 380 U.S. 479 (1965). For an exhaustive analysis of *Dombrowski* and its ramifications, see Maraist, *supra* note 98.

114 Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964), *rev'd,* 380 U.S. 479 (1965).

115 380 U.S. at 484 n.2.

116 *See, e.g.,* Warren, *supra* note 4, at 375; Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation,* 83 HARV. L. REV. 1870 n.1 (1970); Note, *supra* note 50, at 728-29; Note, *Federal Injunctions Against State Criminal Proceedings,* 4 STAN. L. REV. 381, 386 (1952).

117 *Cf.* Maraist, *supra* note 98, at 606; Warren, *supra* note 4, at 372-76; Comment, *supra* note 56, at 552.

118 414 F.2d 283 (5th Cir. 1969); *see* 4 GA. L. REV. 610 (1970).

ment. Specifically, the state court had enjoined picketing and other first amendment rights. Immediately, members of the Movement sought an injunction from the federal court. The district court denied relief; the court of appeals reversed.[119] Judge Bell, speaking for the court, reasoned that the state court injunction infringed upon first amendment rights which under the circumstances present could properly be labeled as "public" rights. Where "public," as opposed to "private," rights are at stake, said Judge Bell, the anti-injunction statute will not bar injunctive relief of the federal court. Judge Bell rested his decision on the rationale of *Leiter Minerals, Inc. v. United States.*[120] As noted earlier, that case had not turned on the existence of an "exception" to the statute but on a finding that the statute was "inapplicable."[121] So too, the decision in *Machesky* can be read as finding section 2283 without application, although Judge Bell spoke in terms of a judicially inferred exception where "public" rights are at issue.[122]

In cases under the Civil Rights Act, individuals have sought a federal injunction against state proceedings on a theory that section 1983 constitutes an express "Act of Congress" exception to the anti-injunction statute. However, the courts have been hesitant to accept such a view,[123] and the Supreme Court, having once refused,[124] has yet to decide the issue. The underlying concept of *Machesky* is not that section 1983 is an express exception to section 2283—an issue Judge Bell refused to decide—but that where protection of important "public," as opposed to "private," civil rights is sought, the anti-injunction act simply does not apply.

It is important to remember that, even if nonapplication of the anti-injunction statute can be justified, historic principles of equity come to bear upon a federal court's determination of whether an injunction should be granted and may prevent its issuance. For example, in those Civil Rights Act cases where section 2283 has not been found a bar to a stay of state court proceedings, an injunction has not necessarily issued.[125] To warrant injunctive relief, there must be a threat of irreparable harm for which the law does not provide an adequate rem-

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119 Machesky v. Bizzell 288 F. Supp. 295 (N.D. Miss. 1968), *rev'd*, 414 F.2d 283 (5th Cir. 1969).

120 352 U.S. 220 (1957). See notes 105-06 and accompanying text *supra*.

121 *Id.*

122 414 F.2d at 291.

123 *See* notes 106-07 and accompanying text *supra*.

124 Cameron v. Johnson, 390 U.S. 611, 613-14 n.3 (1968).

125 *E.g.*, Browder v. City of Montgomery, 146 F. Supp. 127 (M.D. Ala. 1956).

edy.[126] Thus, in many situations, even were the ban of section 2283 lifted, the sensibilities of the states' judicial systems would be protected from the possible incursion of injunction. The point is that in the area of important civil rights guarded by section 1983 the determination is best left to federal judicial flexibility.

Historically, it seems that the ban on injunctions may be read as a narrow one—one which was not, at its inauspicious inception, applicable to courts of the United States. Furthermore, it appeared at a time when inferior federal courts exercised no general federal question jurisdiction.[127] As Judge Rives has said about the present anti-injunction statute's relationship with the Civil Rights Act:

> Section 2283 is aimed primarily at allowing state courts to proceed to the determination of issue involving state law which might be drawn to the federal courts. The allegations in the instant case [violations of section 1983] show that this Court is asked to vindicate primarily federal rights . . . .[128]

Dombrowski laid the foundation for the inapplicability of section 2283 where a federal injunction against state court proceedings is sought to protect important civil rights under the auspices of section 1983. *Atlantic Coast Line*, in its broad, categorical pronouncement does not impugn this approach.

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126 *E.g.*, 1 C. BEACH, COMMENTARIES ON THE LAW OF INJUNCTIONS 41 (1895); *see* Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943). Additionally, a federal court, before granting an injunction of state court proceedings, would consider principles of comity and the doctrine of abstention.

127 W. HART & W. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 39 (1953).

128 Cameron v. Johnson, 262 F. Supp. 873, 884 (S.D. Miss. 1966) (Rives, J., dissenting).

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