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Injunctions - Section One of the Civil Rights Act of 1871 Is an Expressly Authorized Exception to the Federal Anti-Injunction Statute

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the findings by the *Wade* Court of the hazards to fairness inherent in all identification procedures. This decision, therefore, is a departure from those principles that motivated the Court in *Wade*. *Kirby* has, in effect, removed the responsibility for the fairness of a particular pretrial confrontation from the judicial arena and placed it with the other branches of government. It is questionable whether such a move is constitutionally mandated in light of past decisions extending the right to counsel.

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INJUNCTIONS — SECTION ONE OF THE CIVIL RIGHTS ACT OF 1871 IS AN "EXPRESSLY AUTHORIZED" EXCEPTION TO THE FEDERAL ANTI-INJUNCTION STATUTE.

Mitchum v. Foster (U.S. 1972)

A prosecuting attorney for a Florida county brought suit in a state court, pursuant to Florida's general nuisance statutes, to close appellant's bookstore.[1] Finding that certain books offered for sale at the store were obscene,[2] the court issued an interlocutory order enjoining the store's continued operation.

While review of the interlocutory order and related contempt proceedings was pending in the state courts, appellant filed a complaint in a federal district court. Relying upon section 1 of the Civil Rights Act of 1871,[3] he sought injunctive and declaratory relief against the state court proceedings, asserting that Florida laws were being unconstitutionally applied so as to cause him great and irreparable harm.[4] He alleged that

1. FLA. STAT. ANN. §§ 60.05, 823.05 (1961).
2. The Florida statutes provide a test for determining obscenity:
> . . . Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

Id. § 847.011(10).
3. 42 U.S.C. § 1983 (1970), which provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. The jurisdiction of the federal district court was based on 28 U.S.C. § 1343(3) (1970) which provides:
> [The district courts have jurisdiction to] redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

This statute differs from the general federal question provision, *id.* § 1331, in that it does not require the allegation of a minimum amount in controversy (now

the injunction against the operation of his bookstore was depriving him of his first and fourteenth amendment rights.[5] A three-judge court heard the complaint[6] and refused to enjoin the proceedings in the Florida courts, holding that the injunctive relief sought was barred by the federal anti-injunction statute[7] which prohibits a federal court from enjoining proceedings[8] in a state court except in three situations. The court held that the relief did not fall within any of these exceptions, *i.e.,* it was neither "expressly authorized" by an act of Congress, nor "necessary in aid of" its jurisdiction, nor necessary to "protect or effectuate" its judgments.[9]

On direct appeal, the Supreme Court reversed the decision of the three-judge court, *holding* that the Civil Rights Act was an act of Congress which fell within the "expressly authorized" exception to the federal anti-injunction statute. The Court remanded the case to the district court, noting that it did not "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster,* 407 U.S. 225, 243 (1972).

The original anti-injunction statute was enacted by Congress in 1793.[10] It provided without qualification that "[no] writ of injunction [shall] be granted [by any federal court] to stay proceedings in any court of a state."

$10,000) to invoke the jurisdiction of the federal courts. Justice Stone, in a concurring opinion to Hague v. CIO, 307 U.S. 496, 529–32 (1939), indicated that section 1343(3) did not apply to "proprietary" rights, but only to personal rights. Otherwise, he asserted the minimum amount in controversy requirement of section 1331 would be rendered superfluous. However, the Court has recently abrogated this distinction between personal and proprietary rights. Lynch v. Household Fin. Corp., 405 U.S. 538, 542–52 (1972). The more crucial distinction between section 1343(3) and section 1331 is that the former is applicable only in cases involving state action and thereby is ineffective against any federal deprivation of civil rights. Nevertheless, the Civil Rights Act and section 1343(3) are now considered to be coextensive in application.

5. Mitchum v. Foster, 407 U.S. 225, 227 (1972).

6. 28 U.S.C. § 2281 (1970) provides that an injunction against the enforcement of a state statute on the ground of its unconstitutionality may not be granted except by a district court composed of three judges. *Id.* § 2284 provides the rules for the composition and procedure of such a court.

7. *Id.* § 2283. For the actual language of the statute, *see* text accompanying note 29 *infra.*

8. The state court order being challenged was clearly a "proceeding" within the scope of the anti-injunction statute:

> [The term "proceedings" includes] all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings. . . . [And it] applies alike to action by the court and by its ministerial officers . . . [and] to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other.

Hill v. Martin, 296 U.S. 393, 403 (1935).

The prohibitions against federal intervention, however, do not apply to a proceeding which is merely threatened. Dombrowski v. Pfister, 380 U.S. 479, 484–85 (1965). Nor do they apply to a pre-judgment garnishment levied without participation of a court. Lynch v. Household Fin. Corp., 405 U.S. 538, 552–56 (1972).

9. Mitchum v. Foster, 315 F. Supp. 1387, 1389 (N.D. Fla. 1970).

10. The prohibition first appeared in section 5 of the Judiciary Act of 1793. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335. The congressional intent motivating its enactment is obscure since there is no record of the debates preceding its adoption. Justice Frankfurter, writing for the Court in Toucey v. New York Life Ins. Co., 314

Congress amended the statute in 1875 to permit a federal court to stay proceedings which interfered with the administration of a federal bankruptcy proceeding.[11] The statute was adopted in its present form in 1948 when Title 28 of the United States Code was enacted.[12]

The Court initially construed the statute as an unqualified restraint on the equity powers of the federal courts.[13] In 1874, however, the Court modified its approach in *French v. Hay*,[14] in which a federal court, which had obtained jurisdiction of a controversy pursuant to the provisions of a federal removal statute, was sustained in enjoining proceedings in a state court which were related to the same controversy. Apparently, the Court's rationale was that the removal act qualified pro tanto the anti-injunction statute.[15]

The Court thereafter found several other acts of Congress to contain pro tanto qualifications to the anti-injunction statute. In addition to the bankruptcy exception explicitly recognized by Congress in 1875[16] and the legislation providing for the removal of litigation from state to federal courts,[17] the Court in *Mitchum v. Foster*[18] noted that there were at least five other federal statutes which embodied qualifications to the anti-injunction statute. These exceptions were found in legislation limiting the liability of shipowners,[19] providing for federal interpleader actions,[20] con-

U.S. 118, 130–32 (1941), stated that it was likely that the provision reflected Congress' "prevailing prejudice against equity jurisdiction." There seems to have been a desire to restrict the power of courts of equity to withdraw the decision of actions at law from the jury.

11. Rev. Stat. § 720 (1873).

12. 28 U.S.C. § 2283 (1970). *See* text accompanying note 29 *infra*.

13. In Diggs v. Wolcott, 8 U.S. (4 Cranch) 179 (1804), the Court held that a federal court was without power to enjoin a state court proceeding. However, the anti-injunction provision was not mentioned in the opinion. In Peck v. Jenness, 48 U.S. (7 How.) 612, 625 (1849), the Court again denied a stay of state court proceedings but relied upon the provision.

14. 89 U.S. (22 Wall.) 250, 253 (1874). French had obtained a judgment against Hay in a Virginia court. Hay removed the case to a federal court pursuant to a federal removal statute. French then tried to sue on the Virginia judgment in a Pennsylvania court. The Supreme Court upheld an injunction by the federal court against the proceedings in the Pennsylvania court. *Id.*

15. Toucey v. New York Life Ins. Co., 314 U.S. 118, 133 (1941).

16. Rev. Stat. § 720 (1873). Mitchum v. Foster, 407 U.S. 225, 234 (1972).

17. 28 U.S.C. § 1446(e) (1970) provides that once a copy of a removal petition is filed with the clerk of a state court, the state court "shall proceed no further unless and until the case is remanded." *See* note 14 *supra*. *See also* Toucey v. New York Life Ins. Co., 314 U.S. 118, 133 (1941) (dictum).

18. 407 U.S. 225, 234 (1972).

19. 46 U.S.C. § 185 (1970) provides that once a shipowner has deposited with a federal court an amount equal to the value of his interest in a ship, "all claims and proceedings with respect to the matter in question shall cease." In Providence & N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883), the Court held that a state court proceeding could not continue once a shipowner had complied with the statute's provisions. *Id.* at 599–601. The Court also indicated that this provision would authorize an injunction against a state court proceeding. *Id.*

20. 28 U.S.C. § 2361 (1970) provides:

> In any civil action of interpleader . . . a district court may . . . enter its order restraining [all claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action.

In Treines v. Sunshine Mining Co., 308 U.S. 66, 74 (1939), the Court held that this provision authorized a federal court to enjoin a state court proceeding.

ferring federal jurisdiction over farm mortgages,[21] governing federal habeas corpus proceedings,[22] and providing for control of prices.[23]

In addition to these statutory qualifications, the Court also delineated certain "implied" exceptions to the prohibition of the anti-injunction statute. One such exception was the "in rem" exception which permitted a federal court to enjoin a subsequent state court proceeding that interfered with its control of a res over which it had first obtained jurisdiction.[24] A second was the "relitigation" exception which enabled a federal court to enjoin the relitigation in a state court of issues which it had itself already decided and which were res judicata between the parties to the state proceedings.[25] A third exception has been recognized more recently — subsequent to the revision of the anti-injunction statute in 1948 — permitting a federal court to enjoin proceedings in a state court when the petitioner in the federal court is the United States or a federal agency asserting "superior federal interests."[26]

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21. 11 U.S.C. § 203(s)(2) (1940) provides that in all situations to which it is applicable a federal court shall "stay all judicial or official proceedings in any court." In Kalb v. Feuerstein, 308 U.S. 433 (1940), the Court held that once a petition was filed with a bankruptcy court pursuant to the statute, a state court was without jurisdiction to conduct a foreclosure proceeding.

22. 28 U.S.C. § 2251 (1970) provides that a federal court before which a habeas corpus proceeding is pending may "stay any proceeding against the person detained in State court . . . for any matter involved in the habeas corpus proceeding." In *Ex parte* Royall, 117 U.S. 241, 248–49 (1886), the Court indicated that this provision would authorize an injunction against a state court proceeding.

23. The Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 33 (expired 1947), provided that the Price Administrator could request a district court to enjoin acts that threatened to violate the Act. In Porter v. Dicken, 328 U.S. 252, 255 (1946), the Court held that this provision authorized an injunction against state court proceedings at the request of the Administrator.

24. *See* Freeman v. Howe, 65 U.S. (24 How.) 450 (1860), in which a Massachusetts sheriff replevied certain railroad cars which a federal marshal had previously attached pursuant to a mesne process of a federal court. The Supreme Court held that the Massachusetts court erroneously proceeded to judgment in the replevin action since the marshal had held the cars under authority of a federal court. The Court held that the court — whether federal or state — which *first* takes possession of a res withdraws it from the reach of the others.

25. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921), the Court held that a federal district court could enjoin members of a class bound by a decree which it had rendered from relitigation in a state court of issues settled by that decree.

26. In Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), the Court held the prohibitions of the anti-injunction statute inapplicable when the United States was the party seeking a stay of state court proceedings. The Court admitted the absence of express statutory language or legislative history supporting such a construction of the statute but stated:

> There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. 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 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 except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we

In 1941, the Court, in *Toucey v. New York Life Insurance Co.*,[27] re-evaluated its approach to the anti-injunction statute and expressly disavowed the relitigation exception. The opinion indicated that the Court would be slow to carve out new exceptions to the statute:

> [T]he purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunctions to stay litigation in a state court.[28]

In 1948, however, Congress restored the relitigation exception when it adopted the anti-injunction statute in its present form. As revised, the statute provided:

> 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.[29]

Apparently the words "to protect or effectuate its judgments" were expressly included in order to restore the "relitigation" exception.[30]

In a recent case,[31] the Court held that the anti-injunction statute was an absolute prohibition against interference with state court proceedings unless an injunction was sought under one of the three exceptions. The Court emphasized that the statute imposed a "binding rule on the power of the federal courts" and rejected a contention that it established a mere "principle of comity."[32]

Prior to the instant case, the Supreme Court had not directly confronted the question of whether the Civil Rights Act of 1871 fell within the expressly authorized exception to the anti-injunction statute. As a

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cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone.

Id. at 225–26.

In NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), the *Leiter* rationale was extended to permit a federal administrative agency to obtain an injunction of a state court proceeding. The Court considered irrelevant the fact that the moving party was a federal agency, rather than the United States itself. *Id.* at 145–46. The Court reasoned that it could not reasonably impute to Congress, by means of section 2283, a purpose of frustrating the "superior federal interest" in regulating labor relations. *Id.* at 246.

27. 314 U.S. 118 (1941).

28. *Id.* at 132.

29. 28 U.S.C. § 2283 (1970).

30. The Reviser's Note to section 2283 states in pertinent part:

> The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. . . .
>
> Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision.

H.R. REP. No. 308, 80th Cong., 1st Sess. A181–82 (1947).

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

32. *Id.* at 286.

result, the lower courts were split with respect to this issue.[33] In *Dombrowski v. Pfister*,[34] the Court held that the Civil Rights Act would authorize a federal court injunction against threatened state criminal proceedings. However, in *Younger v. Harris*,[35] the Court set aside an injunction granted under the Civil Rights Act against criminal proceedings pending in a state court, but the holding was based upon a judicially imposed rule of abstention and not upon the statutory prohibition.

It is important to note at this juncture that the Civil Rights Act of 1871 was the product of a reconstruction Congress and was adopted for the express purpose of enforcing the provisions of the fourteenth amendment[36] as part of a basic alteration in the federal system developed by the Congresses of that era.[37] By this enactment, Congress sought to counteract an effort within the states to deprive former slaves of the rights secured to them by the twelfth, thirteenth, and fourteenth amendments.[38] The legislators believed that the state courts had failed to protect these rights.[39] They hoped that the federal courts, better insulated from local influences, would prove to be more effective in guarding those rights[40] and, therefore, they created a civil remedy, enforceable in the federal courts, for the redress of unconstitutional actions effected under color of state law. In the words of one representative, the Act threw "open the doors of the United States courts to those whose rights under the Constitutional [were] denied or impaired."[41]

As mentioned above, it was the intent of Congress in 1948 "to restore the basic law as generally understood and interpreted prior to the Toucy [*sic*] decision."[42] However, the exceptions codified in 1948 did not accurately reflect the case law prior to *Toucey*.[43] In particular, some com-

33. *Compare* Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970), and Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), *with* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) and Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963).

34. 380 U.S. 479, 491 (1965).

35. 401 U.S. 37, 54 (1971).

36. Ch. 22, 17 Stat. 13 (1871).

37. Prior to 1875 the enforcement of most federal rights was left to the state courts with the exception of occasional ad hoc grants of jurisdiction and the particular specialties of federal jurisdiction. *See* Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 518 (1955). The Removal Act of 1867, ch. 196, 14 Stat. 558 (28 U.S.C. §§ 1441-50 (1970)), and the general federal question provision Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (28 U.S.C. § 1331 (1970)), were, as was the Civil Rights Act, post-Civil War enactments.

38. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871) (remarks of Representative Hoar).

39. *Id.* at 374 (remarks of Representative Lowe). Congress intended to remedy not only the misconduct of the state courts, but also their impotence:

> Proponents of the legislation noted that the state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

407 U.S. at 240.

40. CONG. GLOBE, 42d Cong., 1st Sess. 460 (remarks of Representative Coburn).

41. *Id.* at 376 (remarks of Representative Lowe).

42. H.R. REP. No. 308, 80th Cong., 1st Sess. A181-82 (1947). *See* note 30 *supra*.

43. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1372, at 300 (1969); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 482 (1965).

mentators had deemed the term "expressly authorized" to be an inaccurate description of the statutory qualifications developed prior to *Toucey*.[44]

Not surprisingly, therefore, the *Mitchum* Court did not focus on the term "expressly" in developing the criteria for the exception.[45] It noted that a statute need not expressly refer to the anti-injunction statute to qualify as an exception;[46] none of the previously created exceptions had contained such an express reference.[47] Moreover, the Court also stated that it was not even necessary that a statute contain an express authorization of the use of injunctive relief against a state court proceeding.[48] The inquiry was instead directed toward legislative intent. The Court held that:

> The test . . . [was] whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.[49]

Applying this test to the Civil Rights Act, the Court concluded that it was such an act as fell within the "expressly authorized" exception to the anti-injunction statute.[50] The Act was intended to protect against judicial as well as legislative and executive misconduct.[51] Moreover, the provision of the Act for suits in equity authorized injunctive relief where necessary.[52] Finally, past decisions had indicated that in exceptional circumstances, only the use of injunctive relief against state court proceedings could avoid great, immediate, and irreparable harm to a person's constitutional rights.[53] Hence, the Court decided that the Congress which had enacted the Civil Rights Act had not contemplated that the remedy provided would be emasculated by the prohibition of the anti-injunction statute.[54]

However, a recurrent theme in the earlier cases of the Court dealing with the anti-injunction statute was that the Court should expand its exceptions only in clear cases:

> [S]ince the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts,

44. *See, e.g.*, Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 737 (1961). The objection was that the earlier decisions had not focused upon the express language of the statutes.

45. 407 U.S. at 237.

46. *Id.*

47. *See* notes 17–23 and accompanying text *supra*.

48. 407 U.S. at 237. *See* notes 17, 19 & 23 *supra*.

49. 407 U.S. at 238.

50. *Id.* at 243.

51. *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

52. 407 U.S. at 242.

53. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); *Ex parte* Young, 209 U.S. 123 (1908).

54. 407 U.S. at 242.

> with relief from error, if any, through the state appellate courts and ultimately this Court.[55]

In view of this policy, the instant decision is vulnerable to the criticism that the "expressly authorized" exception could reasonably have been construed more narrowly. Prior to *Mitchum,* one commentator had noted that, unlike the Civil Rights Act, all of the previously created statutory qualifications had evinced on their faces a congressional concern with jurisdictional or procedural matters.[56] Indeed, all of the past exceptions either reserved exclusive jurisdiction of certain types of controversies to the federal courts or authorized the federal courts to enjoin proceedings in the state courts.[57] Another commentator had asserted that the Reviser's position that the removal acts should have been classified under the "necessary in aid of" jurisdiction exception indicated an intent that the "expressly authorized" exceptions be limited to statutes which by their express language authorized injunctions against state court proceedings; on the other hand, statutes which granted exclusive jurisdiction over certain types of controversies should fall within the "necessary in aid of" jurisdiction exception.[58] So construed, the Civil Rights Act, containing only a general provision for suits in equity, would not have been considered within the "expressly authorized" exception or the "necessary in aid of" jurisdiction exception.

However, the offsetting advantage of the test of the "expressly authorized" exception developed by the *Mitchum* Court is that it focuses upon the *intention* of Congress, rather than upon express language. This approach avoids the criticism that the Court is engaging in mere judicial improvisation and ignoring the express congressional commands of the anti-injunction statute. By requiring an examination of the legislative history of the statute being analyzed under the test, it requires a deference to the will of Congress. Moreover, it provides a more accurate gauge of the scope of the remedy intended to be embodied in the statute than would a more restrictive test. This advantage is clearly manifested in the case at hand. A more restrictive test would have barred injunctive relief, thus producing, as Justice Douglas noted in his dissent in *Younger v. Harris,*[59] an illogical result:

> There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.[60]

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

56. *Developments in the Law — Injunctions,* 78 HARV. L. REV. 994, 1051 (1965).

57. *See* notes 17–23 and accompanying text *supra.*

58. *See* Comment, *supra* note 43, at 489.

59. 401 U.S. 37, 58 (1971).

60. *Id.* at 62.

In addition, it seems unlikely that any needless friction between the state and federal courts will be created by the *Mitchum* decision. Other recent decisions of the Court have evinced a marked contraction of the circumstances in which injunctive relief against state criminal proceedings is permissible.[61] In addition to the normal equity requirement of proof of severe, immediate, and irreparable harm, and the lack of an adequate remedy at law,[62] the Court in *Younger,* emphasizing a policy of federalism which requires a "sensitivity to the legitimate interests" of state governments,[63] enunciated a more restrictive standard for the use of an injunction against a criminal proceeding in a state court: an injunction is impermissible unless (1) the state law involved is "flagrantly and patently violative of express constitutional prohibitions,"[64] or (2) the state prosecution is being conducted in bad faith and with little hope of ultimate success to harass the defendants in the exercise of constitutionally secured rights.[65] Since it is difficult to imagine what legitimate interest could justify a state in continuing a criminal prosecution in such circumstances, the *Mitchum* holding will not result in any objectionable intrusion upon the sovereignty of the state courts in the area of criminal prosecutions. In this connection the *Mitchum* Court, in remanding the case, was careful to note that it did not question or qualify in any way the principles that should restrain a federal court when asked to enjoin state court proceedings.[66]

The *Mitchum* Court has imposed some order in a previously confusing area of the law by enunciating the criteria of the "expressly authorized" exception to the anti-injunction statute. Although the exception thus defined may be criticized as unnecessarily broad, the test does seem to be reasonable as well as workable. By making the intended scope of a statutory remedy the critical factor in determining whether it falls within the exception, the *Mitchum* test makes the effectuation of the congressional purpose more likely than would a test which focused solely upon the express language of a statute.

However, it should be noted that the *Mitchum* decision does represent a significant intrusion of the judiciary into the legislative area. The *Mitchum* test in certain cases will be more than a mere guide to statutory interpretation or construction, and will permit the judicial improvisation decried by Justice Frankfurter in the *Toucey* case. As in the instant case, where the legislative history of a statute reveals no consideration by Congress of its relation to the anti-injunction statute, the determination of whether it falls within the "expressly authorized" exception is left to the courts. Whether the courts should have the power to define the scope of a congressional limitation upon their powers is questionable. However,

61. *See, e.g.,* Cameron v. Johnson, 390 U.S. 611 (1968).
62. *See Ex parte* Young, 209 U.S. 123 (1908).
63. 401 U.S. at 43.
64. *Id.* at 53.
65. *Id.* at 54.
66. 407 U.S. at 243.

it should be remembered that this judicial legislation was required by the inadequacy of the congressional attempt in 1948 to define the scope of the exceptions.

While previously developed principles of abstention seem to assure that there will be no flood of *unwarranted* intrusions into the state courts,[67] *Mitchum* should assure that the anti-injunction statute will not thwart federal injunctive relief in those exceptional cases where such relief is truly required.

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67. Justices Stewart and Harlan, in a concurring opinion in *Younger,* indicated that federal courts might be more likely to intervene in state civil proceedings than in criminal proceedings:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. . . . The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.

401 U.S. at 55 n.2.