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Alan D. Hornstein
University of Maryland

P. Michael Nagle
Hyatt & Rhoads

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STATE COURT POWER TO ENJOIN FEDERAL JUDICIAL PROCEEDINGS: *DONOVAN V. CITY OF DALLAS* REVISITED

ALAN D. HORNSTEIN* & P. MICHAEL NAGLE**

I. INTRODUCTION

Few notions in American jurisprudence are as inextricably bound up in concerns of federalism as that of the powers of federal and state courts to interfere directly with each others' proceedings. The difficulties presented by federal judicial interference with state proceedings have been explored exhaustively by courts[1] and commentators.[2] The converse problem of state court power to enjoin pending or impending proceedings in federal courts has received far less attention, however. What little analysis exists has emanated almost entirely from the

* Associate Professor of Law, University of Maryland. J.D. 1970, Rutgers University School of Law (Newark).

** Associate, Hyatt & Rhoads, P.C., Washington, D.C. J.D. 1979, University of Maryland School of Law.

1. *E.g.,* Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Wooley v. Maynard, 430 U.S. 705 (1977); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971).

2. *E.g.,* Aldisert, *On Being Civil to* Younger, 11 CONN. L. REV. 181 (1979); Calhoun, *Exhaustion Requirements in* Younger-*Type Actions: More Mud in Already Clouded Waters,* 13 IND. L. REV. 521 (1980); Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief,* 1977 SUP. CT. REV. 193; Mayton, *Ersatz Federalism Under the Anti-Injunction Statute,* 78 COLUM. L. REV. 330 (1978); Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale,* 63 CORNELL L. REV. 463 (1978); Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. CHI. L. REV. 717 (1977); Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion,* 53 N.C.L. REV. 591 (1975).

Supreme Court's decision in *Donovan v. City of Dallas*.[3]

In that case, the Supreme Court ostensibly "finally and authoritatively resolved the issue, and resolved it against state court power."[4] As to pending proceedings, the question has since been regarded as settled by state[5] and federal[6] courts alike. Any speculation about the applicability of the *Donovan* holding to cases in which federal proceedings had not yet been instituted at the time a state court's injunction was sought ended with *General Atomic Co. v. Felter*.[7] The Court summarily reaffirmed *Donovan* and extended the holding to include attempts to enjoin federal proceedings that are merely impending.[8]

After examining the cases and the traditional analysis and criticism of them, this Article will present an alternative theory of state power to enjoin federal judicial proceedings. It is our theory that the judicial proscription of state court injunction of in personam federal litigation is less than absolute, the traditional analysis—blanket prohibition—to the contrary notwithstanding. The Court in *Donovan* based its decision primarily upon the petitioners' federal right to sue in federal court— a right that "cannot be taken away by the State."[9] Given the supremacy of federal law,[10] that proposition is unassailable. Not every prospective

3. 377 U.S. 408 (1964). *See generally* Arnold, *State Power to Enjoin Federal Court Proceedings,* 51 VA. L. REV. 59 (1965); *Developments in the Law—Injunctions,* 78 HARV. L. REV. 994, 1053-55 (1965); Comment, *Anti-Suit Injunctions Between State and Federal Courts,* 32 U. CHI. L. REV. 471 (1965); Note, *State Injunction of Proceedings in Federal Courts,* 75 YALE L.J. 150 (1965); 49 MINN. L. REV. 344 (1964); 10 N.Y.L.F. 392 (1964); 59 NW. U.L. REV. 832 (1965); 26 U. PITT. L. REV. 147 (1964). *See also* Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345 (1930); Note, *State Injunctions Against Proceedings in the Federal Courts,* 90 U. PA. L. REV. 714 (1942).

4. Arnold, *supra* note 3, at 60.

5. *E.g.,* Moody v. State *ex rel.* Payne, 295 Ala. 299, 307, 329 So. 2d 73, 79 (1976); Crawley v. Bauchens, 57 Ill. 2d 360, 364-65, 312 N.E.2d 236, 238 (1974); Eddy *ex rel.* Pfeifer v. Christian Science Bd., 62 Ill. App. 3d 918, 920, 379 N.E.2d 653, 655 (1978); Jamaica Hosp. v. Blum, 68 A.D.2d 1, 6, 416 N.Y.S.2d 294, 297 (1979).

6. *See, e.g.,* St. Paul Fire & Marine Ins. Co. v. Lack, 443 F.2d 404, 407 (4th Cir. 1971); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1312 (5th Cir. 1971) (dictum); Tampa Phosphate R.R. v. Seaboard Coast Line R.R., 418 F.2d 387, 394 (5th Cir. 1969); Windbourne v. Eastern Air Lines, Inc., 479 F. Supp. 1130, 1163 (E.D.N.Y. 1979); Carter v. Bedford, 420 F. Supp. 927, 929 (W.D. Ark. 1976); Bekoff v. Clinton, 344 F. Supp. 642, 645 (S.D.N.Y. 1972).

7. 434 U.S. 12 (1977).

8. "It is therefore clear from *Donovan* that the rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state court injunctions, regardless of whether the federal litigation is pending or prospective." *Id.* at 17.

9. Donovan v. City of Dallas, 377 U.S. 408, 413 (1964).

10. U.S. CONST. art. VI, § 1.

federal litigant, however, has a right to a federal adjudication. A litigant must first establish that the case meets the constitutional and statutory prerequisites to the assertion of federal judicial power.[11] If the litigant fails to meet these prerequisites, there is no federal right to a federal forum[12] and the holding in *Donovan* is inapplicable.

In such a situation a state court might properly enjoin litigants subject to its control from filing or maintaining an in personam action in federal court. To do so, the court would first need to determine that the federal court was without power, which perforce raises questions regarding the competence of a state court to make this determination and the effect that such a ruling should have in the event that a party seeks to invoke federal jurisdiction despite a state court order forbidding it.

We do not intend to suggest that a state court may enjoin federal court proceedings merely upon a showing of a lack of federal jurisdiction over the parties or the subject matter.[13] The injunctive power is that of a court of equity. An applicant would be required not only to show that the federal court was devoid of power to hear the case, but also to demonstrate the existence of whatever state law might require to justify injunctive relief.[14] Thus, the rather limited focus here is the demonstration that there is no federal constitutional ban on state court injunctions against federal proceedings, pending or impending, once a state equity court determines that the federal court lacks jurisdiction.

II. THE CASES AND THE "RULE"

In *Donovan v. City of Dallas*,[15] citizens of Dallas, Texas had brought a class action in state court, seeking to enjoin construction of an additional runway at the municipal airport and to bar the issuance of municipal bonds to fund its construction.[16] The trial court entered

11. *See* text accompanying notes 108-13 *infra*.

12. Whether the constitutional and statutory grants of jurisdiction to the federal courts should be read as conferring a private right to a federal forum, as opposed to dividing power between state and federal courts, is itself an intriguing question. *See, e.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 606 (1975).

13. 1 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 125, at 148 (4th ed. 1905); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 898, at 84-85 (12th ed. 1877).

14. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10 (1973).

15. 377 U.S. 408 (1964).

16. The plaintiffs alleged that construction of the new runway and its subsequent use would result in "noises, vibrations and disturbances" over their property, exposing them to "permanent mental and physical injury" and doing "irreparable damage to their property due to increased insurance rates, reduced rental values, etc. . . . without compensation and without exercising the

summary judgment for the city, and the judgment was affirmed on appeal.[17] The Supreme Court of Texas denied review, and the United States Supreme Court denied certiorari.[18] Thereafter, 120 Dallas citizens, twenty-seven of whom had been parties to the state court action, sought similar relief in the United States District Court for the Northern District of Texas.[19] Under Texas law the bonds that were to have financed the construction could not be issued as long as litigation challenging them was pending.[20] After an initial denial,[21] the Texas Supreme Court[22] directed the Texas Court of Civil Appeals to grant the city's motion for an injunction barring prosecution of the federal court suit and initiation of any new proceedings by the plaintiffs.[23] The federal district court then dismissed the case, and several of the plaintiffs appealed.[24] For this action, the Texas Court of Civil Appeals cited the appellants for contempt.[25] The Supreme Court granted certiorari to review both the Texas Supreme Court's judgment directing the Texas Court of Civil Appeals to enjoin the federal proceedings and the latter court's judgment of conviction for contempt.[26]

Justice Black framed the question presented to the Court in *Donovan* as "whether a state court can validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States *which has jurisdiction both of the parties and of the subject matter*."[27] The answer was predictable, if not inevitable. The Court first

power of eminent domain" implying that their property would be taken without due process of law. Atkinson v. City of Dallas, 353 S.W.2d 275, 277 (Tex. Civ. App. 1961), *cert. denied,* 370 U.S. 939 (1962).

17. Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961), *cert. denied,* 370 U.S. 939 (1962).

18. Atkinson v. City of Dallas, 370 U.S. 939 (1962).

19. Brown v. City of Dallas, No. 9276 (N.D. Tex. May 9, 1963).

20. Donovan v. City of Dallas, 377 U.S. 408, 409 (1964) (citing TEX. REV. CIV. STAT. ANN. art. 1269j-5, § 3 (Vernon 1963)). *See* City of Dallas v. Dixon, 365 S.W.2d 919, 925 (Tex. 1963).

21. City of Dallas v. Brown, 362 S.W.2d 372 (Tex. Civ. App. 1962).

22. City of Dallas v. Dixon, 365 S.W.2d 919 (Tex. 1963).

23. *See* Donovan v. City of Dallas, 377 U.S. 408, 410 (1964).

24. *Id.*

25. City of Dallas v. Brown, 368 S.W.2d 240 (Tex. Civ. App. 1963), *vacated sub nom.* Donovan v. City of Dallas, 377 U.S. 408 (1964).

26. Donovan v. City of Dallas, 375 U.S. 878 (1963). The Court did not grant certiorari, however, to review the district court's dismissal of the case before it, *id.*; the dismissal of the appeal coerced by the state's contempt power, *see* 377 U.S. at 411 & n.8; or the district court's later dismissal of petitioners' action to enjoin the Supreme Court of Texas from interfering with the federal suit, *see id.*

27. Donovan v. City of Dallas, 377 U.S. at 408 (emphasis added).

maintained that it was merely following "the old and well-established judicially declared rule that state courts are completely without power to restrain federal court proceedings in *in personam* actions like the one here."[28] Second, the Court determined that the litigants had a federal

28. *Id.* at 412-13. Justice Black relied upon four cases for this proposition: United States v. Council of Keokuk, 73 U.S. (6 Wall.) 514 (1868); Weber v. Lee County, 73 U.S. (6 Wall.) 210 (1868); Riggs v. Johnson County, 73 U.S. (6 Wall.)166 (1868); and M'Kim v. Voohries, 11 U.S. (7 Cranch) 279 (1812). Although Justice Black did not cite these cases as direct support, his reading of the precedents has been criticized primarily on the ground that those cases all concerned attempted interference with final federal court orders. Arnold, *supra* note 3, at 64; Comment, *supra* note 3, at 499; *see id.* at 495-96. *M'Kim* held that "the State Court had no jurisdiction to enjoin a judgment of the Circuit Court of the United States . . . ." 11 U.S. (7 Cranch) at 281. *Riggs* also involved a state injunction against the implementation of a federal court order. The *Riggs* Court, however, stated:

> State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and State courts act separably and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them "was traced by landmarks and monuments visible to the eye."
>
> Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit courts are wholly independent of the State tribunals.

73 U.S. (6 Wall.) at 195-96 (footnotes omitted) (quoting Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1859)). *Weber* was a companion case to *Riggs*. *Keokuk* expressly reaffirmed *Riggs*. 73 U.S. (6 Wall.) at 517.

Although each of these cases did involve state court interference with final court orders, it is improper to conclude that, for that reason, they have no application to a situation in which judgment has not been entered in the federal proceeding. As noted, the *Riggs* opinion expressly denied to state courts the power to restrain the "process or proceedings" of federal courts. 73 U.S. (6 Wall.) at 196. The same is true of *Weber*, 73 U.S. (6 Wall.) at 213, and *Keokuk*, 73 U.S. (6 Wall.) at 517. Although perhaps written more broadly than necessary, these Supreme Court pronouncements are sufficient to establish the "general rule" to which Justice Black referred in *Donovan*.

Justice Black also cited *M'Kim* and Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807), for the proposition that "[e]arly in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings." 377 U.S. at 412. *Diggs* did hold that "a circuit court of the United States had not jurisdiction to enjoin proceedings in a state court," 8 U.S. (4 Cranch) at 179, but made no mention of reciprocity. Neither did *M'Kim*. As is pointed out in Arnold, *supra* note 3, at 64-65, the better source of such a rule based upon mutuality of effect is to be found in the writing of Justice Story, upon which the later cases relied. In his *Commentaries on Equity Jurisprudence,* Justice Story outlined the common-law power of courts to enjoin inequitable foreign litigation, but continued:

> There is one exception to this doctrine which has long been recognized in America; and that is, that the State Courts cannot enjoin proceedings in the Courts of the United States; nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.

2 J. STORY, *supra* note 13, § 900, at 88 (footnote omitted). An excellent analysis of the basis for

right, in this case pursuant to congressional enactment,[29] to have a federal court adjudicate the issues they presented. Justice Black made no direct reference in his opinion to the supremacy clause of the Constitution,[30] but the clause surely was the basis for his statement that "[t]hat right was granted by Congress and cannot be taken away by the State."[31] No credence was given to the argument that because Congress had relaxed the statutory ban on federal injunctions directed at state court proceedings[32] the judicial prohibition against state injunctions directed at federal proceedings should be correspondingly relaxed.[33]

General Atomic Co. v. Felter[34] arose as the result of the filing of mul-

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this doctrine and its influence on the decisions of the following 70 years may be found in Note, *State Injunctions Against Proceedings in the Federal Courts, supra* note 3.

29. Justice Black never so stated, but jurisdiction must have been predicated upon 28 U.S.C. § 1331 (1976), conferring jurisdiction over cases arising under federal law, through the petitioners' due process claims. *See* note 16 *supra*.

30. U.S. CONST. art. VI, § 2.

31. Donovan v. City of Dallas, 377 U.S. at 413. *See* General Atomic Co. v. Felter, 434 U.S. 12, 15 (1977) (per curiam).

32. *See* Comment, *supra* note 3.

The statute, 28 U.S.C. § 2283 (1976), unchanged since the 1948 revision, 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."

Early versions of the statute were uncompromising in language. *See* Judiciary Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335 ("nor shall a writ of injunction be granted [by a federal court] to stay proceedings in any court of a state"). Congress later provided an exception in bankruptcy cases. Act of Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162. The courts had, however, recognized certain exceptions prior to the relaxation of the general proscription in 1948, so that other acts of Congress could be afforded their intended scope. These exceptions included "legislation providing for removal of litigation from state to federal courts, . . . limiting the liability of shipowners, . . . providing for federal interpleader actions, . . . conferring federal jurisdiction over farm mortgages, . . . governing federal habeas corpus proceedings and providing for control of prices." Mitchum v. Foster, 407 U.S. 225, 234-35 (1972) (footnotes omitted). *Accord,* O'Shea v. Littleton, 414 U.S. 488, 512 (1974); Toucey v. New York Life Ins. Co., 314 U.S. 118, 132-34 (1941).

The *Mitchum* opinion also noted that three other "implied exceptions" had been recognized: one for cases in rem, another to prevent relitigation in a state court of issues previously decided in a federal court, and a third when the United States is a plaintiff in a federal court action and asserts a superior federal interest. 407 U.S. at 235-36 & nn.18-20. *Toucey* had "expressly disavowed the 'relitigation' exception to the [anti-injunction] statute," and the congressional response was the enactment of 28 U.S.C. § 2283 (1976), which "served not only to overrule the specific holding of *Toucey*, but to restore 'the basic law as generally understood and interpreted prior to the *Toucey* decision.'" 407 U.S. at 236 (footnotes omitted) (citing H.R. REP. No. 308, 80th Cong., 1st Sess., at A181-82 (1947)). *See also* notes 69-70 *infra* and accompanying text.

33. 377 U.S. at 412-13. *See* text accompanying note 43 *infra*.

34. 434 U.S. 12 (1977).

tiple lawsuits in state and federal courts among the parties to contracts providing for the sale of uranium. United Nuclear Corporation (UNC) had entered into contracts to supply uranium fuel for nuclear reactors to several utility companies. UNC's assignee subsequently assigned the contracts to General Atomic Company (GAC). Under a separate agreement UNC was obligated to supply GAC with the uranium required to meet the contracts with the utility companies. When the price of uranium increased from seven dollars per pound to approximately forty dollars per pound, UNC stopped delivery to GAC and sought a declaratory judgment in New Mexico state court to avoid its obligations under the supply contract.[35] Shortly thereafter, GAC filed an interpleader action in the United States District Court for the District of New Mexico, naming UNC and four utility companies as defendants. GAC sought a determination of its rights and obligations under its agreement with UNC for uranium supplies and under its agreement to supply the uranium to the utilities. The court dismissed the action for lack of subject matter jurisdiction, and the dismissal was affirmed on appeal.[36] Meanwhile, however, three other actions involving GAC and the utility companies had been instituted in different federal district courts.[37]

UNC obtained an injunction from the New Mexico state court barring GAC from filing any original, third party, or arbitration actions against it[38] except the two New Mexico federal court actions then in progress.[39] The New Mexico Supreme Court, without opinion, de-

35. *Id.* at 12-13. UNC filed this action against GAC and its constituent partners. Upon removal to the United States District Court for the District of New Mexico by one of the partners, UNC took a voluntary nonsuit pursuant to Fed. R. Civ. P. 41(a)(1)(i). On the same day UNC instituted a new action against only GAC in the New Mexico district court. It did so apparently to preserve its choice of forum, *see* General Atomic Co. v. Felter, 434 U.S. 12, 13 n.1 (1977), because GAC was not entitled to remove, *see* 28 U.S.C. § 1441 (1976).

36. General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977). *See* General Atomic Co. v. Felter, 434 U.S. 12, 13 & n.2 (1977).

37. Indiana & Mich. Elec. Co. v. General Atomic Co., No. 76-881 (S.D.N.Y. Jan. 5, 1977); General Atomic Co. v. Duke Power Co., 420 F. Supp. 215 (W.D.N.C. 1976); Commonwealth Edison Co. v. Gulf Oil Corp., 400 F. Supp. 888 (N.D. Ill. 1975), *aff'd,* 541 F.2d 1263 (7th Cir. 1976). *See* General Atomic Co. v. Felter, 434 U.S. 12, 13 (1977).

38. *See* General Atomic Co. v. Felter, 434 U.S. 12, 14 (1977).

39. The actions excepted were the appeals subsequently reported as General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977), and Gulf Oil Corp. v. United Nuclear Corp., No. 76-032-B (D.N.M. 1976), which was to be dismissed within six months. *See* General Atomic Co. v. Felter, 434 U.S. 12, 14 n.4 (1977); note 49 *infra*.

clined to dissolve the injunction.[40] The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the New Mexico Supreme Court to determine whether the state court's decision was based on state or federal grounds.[41]

On remand, the New Mexico Supreme Court held that the injunction was properly issued despite the holding in *Donovan*.[42] It stated that *Donovan* was inapplicable to cases in which a party was already litigating the same issues in federal court, reasoning that the injunction would not "directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached."[43] Thus the court distinguished *Donovan* on the ground that the injunction in *General Atomic* was directed toward institution of *future* litigation, so that no court had yet acquired jurisdiction.[44] Regarding GAC's right to a federal forum, the court held:

> Here no such right is being infringed. GAC has its case before two United States Courts—one district court and one appellate. GAC can raise any issue that is being litigated in the state court, and the federal court may hear all the questions on the merits; it is not limited to first considering whether the state decision is valid and the application of res judicata because no judgment has yet been rendered in the New Mexico district court. This right the Donovan Court tried to protect and the injunction here is not contrary to the Donovan holding.[45]

The Supreme Court reversed.[46] Without hearing argument, the Court issued a per curiam opinion in which it noted that the injunction issued by the Texas Court of Civil Appeals had similarly prohibited the plaintiffs in *Donovan* from filing further actions in any court.[47] The Court concluded that the New Mexico Supreme Court's attempt to lim-

40. *See* General Atomic Co. v. Felter, 434 U.S. 12, 14 (1977).

41. General Atomic Co. v. Felter, 429 U.S. 973 (1976). If the New Mexico Supreme Court's determination was to rest on an adequate and independent state ground, the Court would have been without jurisdiction to review. *E.g.,* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632-33 (1875). *See* C. WRIGHT, FEDERAL COURTS § 107 (3d ed. 1976).

42. General Atomic Co. v. Felter, 90 N.M. 120, 560 P.2d 541 (1977).

43. *Id.* at 124, 560 P.2d at 545.

44. *Id.* Presumably, this was the basis for excepting the cases already pending in the New Mexico federal court. *See* note 39 *supra* and accompanying text.

45. 90 N.M. at 124, 560 P.2d at 545. The court thought that any further federal litigation would be "vexatious, harassing and multiplicitous." *Id.* at 123, 560 P.2d at 544. Consequently, the court found the traditional prerequisites to injunctive relief. *See* note 14 *supra*.

46. General Atomic Co. v. Felter, 434 U.S. 12 (1977).

47. *Id.* at 16-17. *See* Donovan v. City of Dallas, 377 U.S. 408, 410 (1964).

it *Donovan* to anti-suit injunctions against pending, but not impending, cases was untenable and that the injunction was in "direct conflict with that decision and the Supremacy Clause of the Constitution."[48] The Court also rejected the state court's attempt to distinguish *Donovan* on the ground that GAC already was proceeding in two federal court actions[49] and that any additional suits would be vexatious and harassing, because

> [D]onovan presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. . . . We nevertheless overturned the state court injunction.
>
> There is even less basis for the injunction in this case. Here there is no final state court judgment . . . . [Additionally, w]hat the New Mexico Supreme Court has described as "harassment" is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities. This, of course, is something which GAC has every right to attempt to do . . . . The right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in Donovan. Federal courts are fully capable of preventing their misuse for purposes of harassment.[50]

The dissenters in both *Donovan* and *General Atomic*, while disagreeing with the decisions, accepted the analyses employed by the majorities. They were most concerned that the majorities denied " 'the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits.' "[51] Justice Harlan, dissenting in *Donovan*, was of the opinion that such power did exist.[52] He thought the cases cited by Justice Black were not control-

48. 434 U.S. at 15.

49. Indeed, as the Court noted, 434 U.S. at 17 n.10, the federal actions exempted from the state court's injunction had been dismissed prior to the announcement of the New Mexico Supreme Court's opinion. *See* note 39 *supra*.

50. 434 U.S. at 17-19 (footnotes omitted).

51. Donovan v. City of Dallas, 377 U.S. 408, 417 (1964) (Harlan, J., dissenting) (quoting Baltimore & O.R.R. v. Kepner, 314 U.S. 44, 55 (1911) (Frankfurter, J., dissenting)). *See* General Atomic Co. v. Felter, 434 U.S. 12, 19, 21 (1977) (Rehnquist, J., dissenting).

52. Donovan v. City of Dallas, 377 U.S. at 416-17 (Harlan, J., dissenting). Justice Harlan cited the dictum to that effect in Baltimore & O.R.R. v. Kepner, 314 U.S. 44, 51-52 (1941), and quoted Justice Story's statement that

> [i]t is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country.

ling as to the power of a state court to enjoin the prosecution of inequitable litigation because they were not concerned with vexatious litigation.[53] He glossed over, however, the main thesis of the majority opinion—that the petitioners had a federal right to bring suit in federal court—stating only that "the statutory boundaries of federal jurisdiction are hardly to be regarded as a license to conduct litigation in the federal courts for the purpose of harassment."[54]

Justice Rehnquist, dissenting in *General Atomic*,[55] premised his position against the prohibition on the "general rule" against state and federal court interference with each other. Ironically, this was the same rule that Justice Black had in part relied upon in *Donovan* as the basis for *establishing* the prohibition.[56] Justice Rehnquist maintained that this rule of parity implies that because the federal courts are not barred from enjoining vexatious state court proceedings pursuant to the Anti-Injunction Act,[57] state tribunals should be accorded a like power with respect to vexatious litigation in a federal forum.[58] He then went a step further:

> Congress, in enacting the Anti-Injunction Act limiting the authority of United States courts to stay proceedings in any court of a State, 28 U.S.C. § 2283, excepted from the limitation an injunction "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." . . . If Congress saw fit to create such an exception to the "[l]egislative policy [which] is here expressed in a clear-cut prohibition" . . . *it could not have intended to deny the same limited injunctive authority to state courts of general jurisdiction*.[59]

The dissenters in both cases simply misconceived the nature of the difficulty. It is true that at common law courts of equity possessed the power to restrain parties subject to their control from prosecuting inequitable foreign litigation.[60] It is also true that the original judicially created ban on injunctions against suit in this country applied to both

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377 U.S. at 416 (Harlan, J., dissenting) (quoting 2 J. STORY, *supra* note 13, § 900, at 87).

53. 377 U.S. at 418-21 (Harlan, J., dissenting). *See* note 28 *supra*.

54. 377 U.S. at 420 (Harlan, J., dissenting). *See* note 12 *supra*.

55. 434 U.S. 12, 20 (1977) (Rehnquist, J., dissenting).

56. Donovan v. City of Dallas, 377 U.S. at 412.

57. 28 U.S.C. § 2283 (1976). The text of § 2283 is quoted in note 32 *supra*.

58. 434 U.S. at 20 (Rehnquist, J., dissenting). Justice Black's statement of this general rule is found in Donovan v. City of Dallas, 377 U.S. at 412. *See also* note 18 *supra*.

59. 434 U.S. at 20 (Rehnquist, J., dissenting) (citations omitted) (brackets in original) (emphasis added).

60. 2 J. STORY, *supra* note 13, §§ 899-900; Annot., 74 A.L.R.2d 828, 829 (1960).

state and federal courts and was couched in terms of reciprocity.[61] Nevertheless, absent congressional sanction, state court interference with the proceedings of federal courts that are properly seized of both personal and subject matter jurisdiction is unconstitutional.[62] The Constitution grants Congress the power to "ordain and establish" lower federal courts[63] and invest them with the "judicial power of the United States."[64] The states are not free, under the supremacy clause, to interfere with the valid exercise of congressional power.[65] Consequently, a state court may not enjoin federal court proceedings that Congress has empowered the federal judiciary to hear.

It does not follow, absent specific congressional language to such effect, that Congress "could not have intended to deny the same limited injunctive authority to state courts of general jurisdiction"[66] when it enacted the Anti-Injunction Act.[67] The purpose of the relevant provisions of that statute was specifically to overrule *Toucey v. New York Life Insurance Co.*[68] and to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision."[69] *Toucey* had held it impermissible for a federal court to enjoin a state court proceeding in

61. *See* note 28 *supra. See also, e.g.,* Covell v. Heyman, 111 U.S. 176, 182 (1884); Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 137-38 (1870); Comment, *supra* note 3, at 495 & n.126; Note, *State Injunctions Against Proceedings in the Federal Courts, supra* note 3, at 714 n.5.

62. Justice Black has been criticized for his reliance on the absence of congressional sanction as a basis for finding a lack of state power. Professor Currie, for example, conceded that "Mr. Justice Black was quite correct in saying that Congress has never relaxed the rule forbidding state courts to enjoin federal proceedings," but he asked: "[S]ince the courts created the rule to begin with, what was to stop them from amending it?" D. CURRIE, FEDERAL COURTS 755 (2d ed. 1975). The argument, however, fails to recognize that enactment of statutes conferring jurisdiction on the federal courts, when viewed in light of the supremacy clause, *see* note 30 *supra*, operates as just such a congressional ban on state injunctions. *See* text accompanying notes 29-31 *supra*.

63. U.S. CONST. art. III, § 1. *See id.* art. I, § 8, cl. 9.

64. *Id.* art. III, § 1. The power of Congress to circumscribe the jurisdiction of the lower federal courts is implied from its power to create those courts under article I and its power to limit the jurisdiction of the Supreme Court under article III. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). *See also* Cary v. Curtis, 44 U.S. (3 How.) 236 (1845).

65. U.S. CONST. art. VI, § 1. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

66. General Atomic Co. v. Felter, 434 U.S. 12, 20 (1977) (Rehnquist, J., dissenting).

67. *See* note 32 *supra*.

68. 314 U.S. 118, 137-41 (1941). *See* note 32 *supra*.

69. H.R. REP. No. 308, 80th Cong., 1st Sess., at A181-82 (1947). *See* note 32 *supra*.

order to prevent relitigation of a matter originally litigated by the federal court. The generally understood doctrine prior to *Toucey* may fairly be said to have been that state and federal courts would not interfere with each other's proceedings—except those judicially created exceptions that Congress preserved by incorporating them into the Anti-Injunction Act.[70]

Nor does it follow, as Justice Harlan suggested, that state injunctions against federal in personam actions should be allowed simply because state courts have been permitted to enjoin federal in rem proceedings over which "statutory [subject matter] jurisdiction"[71] existed. Although federal jurisdiction over the subject matter of an in rem action may exist, once a state court has exercised prior control over the res involved, the federal courts are deprived of jurisdiction to hear the case—jurisdiction over the "person," as it were.[72]

Over a century ago, in *Covell v. Heyman*,[73] the Supreme Court recognized the proposition that a court must, of necessity, exercise exclusive jurisdiction over the res in an in rem proceeding in order to avoid disastrous conflicts in the administration of our dual judicial system. Subsequent decisions have faithfully adhered to this proposition.[74] The *Covell* opinion succinctly set forth the underlying rationale:

> The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdic-

70. *See* notes 28 & 32 *supra*.

71. Donovan v. City of Dallas, 377 U.S. at 421 (Harlan, J., dissenting).

72. *See* D. CURRIE, *supra* note 62, at 853-54:

> It is common understanding that at least three requisites must be satisfied before an action can be entertained by a federal court. First, there must be jurisdiction over the subject matter; the case must be a type (e.g., federal-question or diversity) cognizable by some federal court. Second, there must be jurisdiction over the person of the defendant, *or, if the action is in rem*, over the property in suit; third, venue must be proper.

Id. (emphasis added).

73. 111 U.S. 176 (1884).

74. *See, e.g.,* Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Princess Lida v. Thompson, 305 U.S. 456, 466 (1939); Kline v. Burke Constr. Co., 260 U.S. 226, 229-30 (1922).

> tion, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.[75]

The factual situation in *Princess Lida v. Thompson*,[76] in which the Supreme Court first held valid an anti-suit injunction issued by a state court and directed against a federal adjudication, aptly illustrates the potential seriousness of such a conflict between state and federal courts.

Princess Lida involved a controversy between two surviving trustees of a voluntary trust and two of the five beneficiaries. On July 7, 1930, the two trustees filed a partial accounting with the Court of Common Pleas of Pennsylvania. The following day the beneficiaries brought suit against the trustees in federal district court, alleging mismanagement and praying for an accounting and restitution. The trustees moved for a dismissal of the federal action, claiming a lack of jurisdiction therein, and obtained an injunction from the state court barring the cestuis que trustent from proceeding further in federal court. The federal court subsequently denied the motion to dismiss and temporarily enjoined the trustees from further prosecuting the state action for the injunction[77] that the cestuis had appealed to the Supreme Court of Pennsylvania.

On March 21, 1938, nearly eight years after the partial accounting had been filed, the Pennsylvania Supreme Court affirmed the propriety of the state injunction.[78] On that same day, the federal district court held that it had jurisdiction over the suit, notwithstanding the prior control over the res exercised by the state trial court.[79]

Reviewing the affirmance of the state court injunction, the United States Supreme Court held that the state court had properly enjoined the cestuis from further proceeding in the federal action:

> [I]t is settled that where the judgment sought is strictly in personam, both the state court and the federal court, *having concurrent jurisdiction*, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of

75. 111 U.S. at 182 (emphasis added).
76. 305 U.S. 456 (1939).
77. *See id.* at 460.
78. Thompson v. Fitzgerald, 329 Pa. 497, 198 A. 58 (1938).
79. *See* 305 U.S. at 460-61.

> the litigation in order to proceed with the cause and grant the relief sought[,] the jurisdiction of the one court must yield to that of the other. . . . The doctrine is necessary to the harmonious cooperation of federal and state tribunals.[80]

Finding that control of the res was essential to the effective exercise of the state court's ordinary jurisdiction over the case and that the state court had first established control over the res, the Court concluded that the federal district court was "without jurisdiction of the suit subsequently brought for the same relief" and that the petitioners had been "properly enjoined from further proceedings in that court."[81]

It is noteworthy that the permissibility of the state injunction against federal proceedings in in rem cases depends solely upon the exclusivity of the state court's jurisdiction. In in personam actions in which there is concurrent jurisdiction in state and federal courts, the injunction may not issue—persuasive equitable arguments to the contrary notwithstanding. Where a state court has taken prior control over the res, however, it becomes endowed with exclusive jurisdiction, and the federal court is deprived of all jurisdiction. When the federal court lacks jurisdiction over subject matter, res, or persons, there is no right to be in

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80. *Id.* at 466 (footnotes omitted) (emphasis added). *See* United States v. Bank of N.Y. & Trust Co., 296 U.S. 463, 477-79 (1936); Penn Gen. Cas. Co. v. Pennsylvania, 294 U.S. 189, 195 (1935).

81. 305 U.S. at 468. A federal court first exercising control over a res has the same power to enjoin conflicting state court proceedings. *See, e.g.,* DeKorwin v. First Nat'l Bank, 267 F.2d 337, 340 (7th Cir. 1959), *cert. denied,* 361 U.S. 931 (1960); Green v. Green, 259 F.2d 229, 230 (7th Cir. 1958); Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534, 546 (W.D.S.C. 1955); 1A MOORE'S FEDERAL PRACTICE ¶ 0.218[3], at 2522 (2d ed. 1980); C. WRIGHT, *supra* note 41, § 47, at 201. That power now derives from the "where necessary in aid of its jurisdiction" language in the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), *quoted at* note 32 *supra*. *See* Alabama Vermiculite Corp. v. Patterson, 149 F. Supp. 534 (W.D.S.C. 1955); C. WRIGHT, *supra* note 41, § 47, at 204. The Supreme Court, however, had allowed such an injunction prior to the 1948 relaxation of the anti-injunction statute, basing its power on the same theory:

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.

Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922). Federal courts also have the power to protect their prior in rem jurisdiction from interference by other federal courts. *See, e.g.,* Albuqerque Nat'l Bank v. Citizens Nat'l Bank, 212 F.2d 943, 949 (5th Cir. 1954); 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶¶ 0.214, at 2507; 0.218[3], at 2522.

federal court.[82] A state injunction may then issue, not because the in rem situation is special but because the rule in *Donovan* will not have been violated.

The same is true in in personam actions in which the federal court is barred from taking cognizance of the suit by mandate of Congress or the Constitution. In those situations, too, a state court, as long as it possesses jurisdiction over the parties and subject matter, should have the power to protect its jurisdiction by enjoining the unauthorized federal proceedings—assuming that the traditional equitable prerequisites for the issuance of an injunction also exist.[83] The holdings in *Donovan* and *General Atomic* were premised upon the litigants' congressionally granted right to a federal forum—a right, the Court held, that "cannot be taken away by a State."[84] In *Donovan* the petitioners were adjudged to have been "properly in the federal court."[85] In *General Atomic* the state court injunction prohibited the petitioners from either impleading UNC in federal court lawsuits already in progress or instituting new federal litigation.[86] In regard to the former prohibition the Court held that petitioners had a "right to pursue federal remedies and take advantage of federal procedures and defenses,"[87] a right obviously ancillary to that of proceeding in a federal forum.[88]

In regard to the prohibition against instituting new federal proceedings, the Court in *General Atomic* merely held that *Donovan* controlled because the state court injunction there had included a like prohibition.[89] In *Donovan*, however, the litigants' right regarding prospective litigation was easily determinable, because the state court injunction prohibited the institution of new federal proceedings between the same parties and over the same subject matter as in the federal court suit then pending.[90] In other words, the injunction prohibited instituting

82. *See* note 72 *supra*.

83. *See* note 14 *supra* and accompanying text.

84. General Atomic Co. v. Felter, 434 U.S. 12, 16 (1977); Donovan v. City of Dallas, 377 U.S. 408, 413 (1964).

85. 377 U.S. at 413.

86. 434 U.S. at 14 n.4. *See* notes 39-49 *supra*.

87. 434 U.S. at 18-19.

88. *See* Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis,* 56 IND. L.J. 563 (1981).

89. 434 U.S. at 16-17. *See* 377 U.S. at 410-11; City of Dallas v. Brown, 368 S.W.2d 240, 241 (Tex. Civ. App. 1963), *vacated sub. nom.* Donovan v. City of Dallas, 377 U.S. 408 (1964).

90. 377 U.S. at 410. The injunction was directed to Donovan, et al., respondents, and, in pertinent part, prohibited them from

> filing or instituting any litigation . . . seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field

suits of which it had been determined that federal courts could take cognizance and that, therefore, the parties had a federal right to pursue.

In *General Atomic*, the injunction was not against the institution of new federal litigation identical to any pending federal action.[91] No determination, therefore, had yet been made with respect to whether the parties possessed a federal right to a federal forum for prospective suits. The Court's reliance on its earlier decision in *Donovan* thus was inappropriate, because *Donovan* only prohibited the deprivation of a right previously determined to exist. As a result, the Court in *General Atomic*, without so acknowledging, extended *Donovan* to its logical (and still officially unstated) conclusion: a litigant may not be deprived of his right to a federal forum unless and until that right is determined *not* to exist. After *General Atomic*, therefore, the burden is on the party claiming lack of federal judicial power. Because that party will be the plaintiff in the state proceeding for the injunction, it should be expected that he is to bear that burden.

Consequently one may read both *Donovan* and *General Atomic* as prohibiting only state court injunctions against in personam federal court actions over which the federal court has jurisdiction. The converse is implicit: state courts are not so prohibited if federal jurisdiction is absent. Thus, determining the appropriate forum for deciding the existence *vel non* of federal jurisdiction is critical to the question of the propriety of state injunctions against federal proceedings.

III. State Court Power to Determine Federal Jurisdiction

The notion that a state court might properly determine the existence or, more precisely, the nonexistence of federal jurisdiction may appear

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> . . . or from instituting and prosecuting any further litigation . . . the purpose of which is to contest the validity of the airport revenue bonds . . . that might be issued . . . for the construction of the Love Field runway . . . .

City of Dallas v. Brown, 368 S.W.2d 240, 242 (Tex. Ct. App. 1963), *vacated sub nom.* Donovan v. City of Dallas, 377 U.S. 408 (1964). The City of Dallas, of course, would have to be a necessary party defendant to any such litigation.

91. *See* 434 U.S. at 14 n.4. The interpleader action filed by GAC against UNC and four utility companies had been dismissed on March 2, 1976, a month before the state court injunction issued. *See id.* at 13. That action was dismissed for lack of subject matter jurisdiction. *See* General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977). The only other action pending between GAC and UNC at the time was the second declaratory judgment action filed by UNC in the Santa Fe district court. UNC had taken a voluntary nonsuit when the first such action was removed to federal court. *See* 434 U.S. at 13 n.1.

novel and unsupported by precedent. Yet in the in rem situation that is precisely what occurs.[92] The state court must determine that its jurisdiction is exclusive—that is, that the federal court is without jurisdiction over the res—before it may enjoin duplicative federal proceedings.[93]

It is but a short analytical step from the in rem situation in which a state court may determine that the federal court has no jurisdiction over the "thing," or res, to its in personam analog: the determination by a state court that the federal court lacks jurisdiction over the subject matter of the cause or the person of the defendant.[94]

Congress undoubtedly has the power to provide that the jurisdiction of the federal courts shall be exclusive of the courts of the several states,[95] but Congress must do so "expressly or by fair implication."[96] The Supreme Court has, for over a century, regarded exclusive federal jurisdiction as the exception, not the rule: concurrent state-federal jurisdiction exists unless "excluded by express [statutory] provision, or by incompatibility in its exercise arising from the nature of the particular case."[97] Congress apparently has never spoken with respect to the exclusive right of federal courts to determine federal jurisdiction.[98] The

92. *See* notes 72-82 *supra* and accompanying text.

93. *See* Princess Lida v. Thompson, 305 U.S. 456, 466 (1939).

94. For the sake of concision the following discussion is in terms of subject matter jurisdiction. It is, however, equally applicable to the question of jurisdiction over the person. If the analysis is valid for the former, it is valid for the latter. Indeed, in many cases the competence of a state court to decide whether a federal court lacks jurisdiction over the person is easier to assert than when the problem involves federal subject matter jurisdiction, for in the former case the governing law is often the law of the state. FED. R. CIV. P. 4(d)(2), (3), (6), (7). *Cf.* Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (state law rather than Rule 3 determined when action commenced for state statute of limitations purposes).

95. *See* The Moses Taylor, 71 U.S. (4 Wall.) 411, 429 (1867); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816); THE FEDERALIST No. 82, at 516 (A. Hamilton) (B. Wright ed. 1961).

96. *E.g.,* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3527, at 120-21 (1975) [hereinafter cited as FEDERAL PRACTICE]; C. WRIGHT, *supra* note 41, § 10, at 26.

97. Claflin v. Houseman, 93 U.S. 130, 136 (1876). *Accord,* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); D. CURRIE, *supra* note 62, at 374; FEDERAL PRACTICE, *supra* note 96, § 3527, at 124. *See* C. WRIGHT, *supra* note 41, § 10, at 26.

98. The legislative purview is, of course, much broader than that of the judiciary. *See generally* 70 HARV. L. REV. 509 (1957). The task of the courts is to decide whether the congressional grant of federal jurisdiction is to be interpreted as a grant of the exclusive power to determine that jurisdiction. The touchstone of that determination is the existence *vel non* of no legal "incompatibility" between state and federal courts acting concurrently in this area. Should the need arise for congressional examination of this question, there are extra-legal factors that will also require con-

question to be examined here, therefore, is whether the exercise of concurrent jurisdiction over that issue is incompatible with the efficient operation of our dual judicial system.

It is hornbook law that federal courts are courts of limited jurisdiction and that most state courts are courts of general jurisdiction.[99] As such, state courts have the power,[100] and indeed the duty,[101] to construe, apply (or limit the application) and even declare unconstitutional laws of the United States.[102] The Judiciary Act of 1789 contained a provision establishing Supreme Court review of state court decisions "where is drawn in question the validity of a treaty or statute of . . . the United States, and the decision is against their validity."[103] That provision survives.[104] In 1816, the Supreme Court recognized this

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sideration. These factors fall generally into three categories: (1) administration of the law; (2) judicial economy; and (3) comity. This last category includes but a single factor for consideration: the likelihood that the exercise of concurrent jurisdiction will generate state-federal friction. Each of the first two categories includes several factors that should be weighed.

Within the category labeled administration of the law fall the national policy factors. One justification for exclusive federal jurisdiction in certain areas of the law is a need for uniformity of decision. This factor should certainly be considered here, but it may be noted that there is often uniformity within the federal system only when the Supreme Court has spoken unequivocally and that state courts are also bound by Supreme Court rulings on federal law. Another factor is the likelihood that errors will be frequent or serious. A third is whether there is an overriding national concern militating either for or against the normal state-federal concurrent jurisdiction over federal law.

Within the category labeled judicial economy are more pragmatic questions. Is there, for example, a greater familiarity with the law on one side, and should that outweigh a greater familiarity with the particular case on the other? Is there a significant saving of time and judicial resources if a state court judge who has the case already before him makes the jurisdictional determination?

99. *See* C. WRIGHT, *supra* note 41, § 7, at 17.

100. [T]he State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth.

THE FEDERALIST No. 82, *supra* note 95, at 516. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

101. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief [under federal law]; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws.

Claflin v. Houseman, 93 U.S. 130, 137 (1879). *Accord,* Testa v. Katt, 330 U.S. 386 (1947); McKnott v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912).

102. 28 U.S.C. § 1257 (1976). *See* notes 105-07 *infra* and accompanying text.

103. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73.

104. 28 U.S.C. § 1257 (1976) states in part that

[f]inal judgments or decrees rendered by the highest court of a State in which a decision

power in the famous case of *Martin v. Hunter's Lessee*.[105] Justice Story, writing for the Court, reversed a decision of the Virginia Court of Appeals[106] that had found section 25 of the Judiciary Act of 1789 unconstitutional. Justice Story did not, however, reverse upon the ground that the Virginia court was inherently incapable of invalidating a congressional enactment. Rather, he held section 25 to be necessary if the judicial power of the United States was to extend to all cases arising under federal law, because state courts were certain to be called upon to adjudicate federal questions.[107]

Given that the interpretation and application of federal law by state courts is generally compatible with (and, indeed, necessary to) the efficient operation of our dual judicial system, it remains only to determine whether state courts should for any reason be relieved of that responsibility with respect to the statutes establishing the jurisdictional limitations of the federal courts. The most compelling argument in favor of regarding jurisdiction to determine federal jurisdiction as reserved exclusively for the federal judiciary is that state courts otherwise would exercise a large measure of control over federal courts—control that might violate the supremacy clause.

Article III of the Constitution generally defines the boundaries of federal jurisdiction. Congress, acting in accordance with the article,[108] specifically delineates and vests this jurisdiction in the federal courts. The inferior federal courts are incapable of taking cognizance of any suit that falls beyond the limits so prescribed and must in each case

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could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

105. 14 U.S. (1 Wheat.) 304 (1816).

106. Hunter v. Martin, 18 Va. (4 Munf.) 1 (1813).

107. 14 U.S. (1 Wheat.) at 339.

108. The Supreme Court has stated that

> the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possesses the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction . . . .

Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). *Accord,* Palmore v. United States, 411 U.S. 389, 400-02 (1973); Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850). *But see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-31 (1816); Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950).

determine, upon their own motion if necessary,[109] whether Congress and the Constitution authorize the proceedings.[110] That determination is a process controlled by constitutional and congressional mandate. The lower federal courts have no discretion to expand[111] and little discretion to contract the jurisdiction so authorized.[112] All jurisdictional determinations, of course, ultimately are subject to review by the Supreme Court.[113]

State courts possess the competence to apply and interpret the laws of the United States and have a duty so to do when resolution of a case before them so requires. That in a given case a law happens to confer jurisdiction upon the federal courts should not disturb the general state court competence unless its interpretation or application gives the state court an unwarranted control over the operations of the federal courts. The Constitution, however, allows, as the inevitable price of a concurrent jurisdiction, whatever "control" results from interpretation and application of a statute passed by Congress. Misinterpretation or misapplication, whether intentional or unintentional, may be corrected upon review by the Supreme Court—as are errors made with respect to any other federal law by state or lower federal courts.

Thus the exercise of concurrent state-federal jurisdiction in this area is not incompatible with the operation of our dual judicial system. Nor is the supremacy clause in any way violated. A state tribunal, making a federal jurisdictional determination incident to its decision regarding issuance of an injunction against a federal court suit, would be following both the letter and the spirit of that clause. It would be according the proper respect to superior federal law in the course of determining its proper action under state law.

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109. *E.g.,* Mansfield, C. & L.M.R.R. v. Swan, 111 U.S. 379, 382 (1884); Warner v. Territory of Hawaii, 206 F.2d 851, 852 (9th Cir. 1953).

110. *See* C. WRIGHT, *supra* note 41, § 7, at 17.

111. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

112. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), in which Chief Justice Marshall stated:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

But see Markham v. Allen, 326 U.S. 490, 494 (1946) (dictum); Burford v. Sun Oil Co., 319 U.S. 315, 317 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859) (dictum); C. WRIGHT, *supra* note 41, § 52.

113. *See* 28 U.S.C. §§ 1254, 1258 (1976). Clearly, the jurisdiction of the courts of the United States is a federal question.

Upon establishing that federal court jurisdiction is lacking and that traditional equitable prerequisites have been met,[114] a state court may properly enjoin the parties to a suit before it from proceeding in federal court. This raises the issue of what effect such an injunction should have in the event an action is filed in a federal court in violation of the state court order.

IV. THE PRECLUSIVE EFFECT OF STATE DETERMINATIONS OF FEDERAL JURISDICTION

Although the propriety of an injunction against suit does not turn upon whether it is directed to the parties or to the court that would have conducted the proceedings enjoined, the anti-suit injunction normally speaks to the parties rather than to the court.[115] Consequently, when a state court issues an injunction against engaging in pending or impending federal litigation, the parties so restrained must either comply or risk contempt proceedings. Should the parties choose to obey the state court order—forsaking filing a contemplated action or abandoning a previously instituted one—the federal court will be affected only indirectly. Should the parties choose to defy the state court's injunction, however, the federal court in which suit is initiated will be required to determine the effect of the prior state adjudication on its own jurisdiction.[116]

Federal courts are required, as a matter of federal law, to give some preclusive effect to prior state court adjudication.[117] Although the details of the requirement remain unclear,[118] it can be said that before an issue decided in a former case is given preclusive effect, certain general

114. *See* note 14 *supra*.

115. *Cf.* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970) (federal injunction).

116. Defiance may also result in a state contempt citation that may in turn lead to eventual federal jurisdiction pursuant to 28 U.S.C. § 2254 (1976). Although res judicata is not applicable to federal post-conviction review, it is unlikely that the federal district court on a writ of habeas corpus would determine the correctness of the state court's determination of federal jurisdiction. *See generally* United States v. United Mine Workers, 330 U.S. 258 (1947).

117. The law of preclusion has two aspects: res judicata or claim preclusion, *e.g.,* RESTATEMENT (SECOND) OF JUDGMENTS § 45(a)-(b) (Tent. Draft No. 1, 1973), and collateral estoppel or issue preclusion, *id.* § 45(c). Res judicata precludes a party from asserting the same claim or defense that was or could have been asserted in the prior litigation. *Id.* §§ 47, 48, 56, & 56.1. Under collateral estoppel any issue actually determined by the prior judgment is foreclosed. RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

118. *See* notes 134-94 *infra* and accompanying text.

prerequisites must be established: there must be a final judgment;[119] the parties in the subsequent federal action must be the same, or there must be reason to treat them as the same, as those in the former state action;[120] the issue must be the same;[121] and, most important, the issue must actually have been litigated in the former proceedings[122] and must have been necessary to the earlier judicial determination.[123]

The Supreme Court has indicated that preclusive effect must be given to the judgment of a court having personal and subject matter jurisdiction.[124] Although such effect need not be given when jurisdiction is lacking,[125] if the first court has examined the question of its own jurisdiction, its determination is binding in a subsequent proceeding[126] on the theory that regardless of its jurisdiction to determine the case, the state court has jurisdiction to determine its own jurisdiction.

The question presented here is whether a state court's determination of its own jurisdiction, which necessarily entails a corresponding determination that a federal court lacks jurisdiction, must be given preclusive effect in a subsequent federal proceeding. Another way of putting the question is whether, given the important federal values involved, a federal court should be bound to follow a state court's determination that denies the power of the federal court. Although this inquiry is related to the question of state court power to determine initially the

119. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 41, 68 (Tent. Draft No. 1, 1973).

120. The parties need not be identical. The trend is to hold prior judgments preclusive whenever the party to be precluded had an opportunity to litigate the issue in the prior proceeding. *See, e.g.,* Montana v. United States, 440 U.S. 147, 153-55 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 111, Comment a (Tent. Draft No. 4, April 15, 1977). *Cf.* County of Imperial v. Munoz, 449 U.S. 54, 59-60 (1980) (federal injunction barred by Anti-Injunction Act unless sought by strangers who were not bound " 'as though [they were parties] to the litigation in the state court' ").

121. *E.g.,* RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment c (Tent. Draft No. 4, 1977).

122. *E.g., id.* § 68. *See id.,* comments c, d, & e. It is noteworthy that the question of federal jurisdiction was not litigated in the prior state proceedings in either *Donovan* or *GAC.*

123. *Id.* Comments h, i, & j.

124. Riley v. New York Trust Co., 315 U.S. 343, 349 (1942).

125. *See, e.g.,* Montana v. United States, 440 U.S. 147, 153 (1979) (court must be one of "competent jurisdiction"); RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 (Tent. Draft No. 4, 1977) (same).

126. Davis v. Davis, 305 U.S. 32, 43 (1938) (subject matter jurisdiction); American Sur. Co. v. Baldwin, 287 U.S. 156, 165-66 (1932) (personal jurisdiction). *Accord,* Jack's Fruit Co. v. Growers Marketing Serv., Inc., 488 F.2d 493 (5th Cir. 1973) (per curiam). *See* Stoll v. Gottlieb, 305 U.S. 165, 173 (1938).

jurisdiction of the federal court,[127] the issue may be of yet greater significance because it may deny ultimate federal power, other than that of the Supreme Court,[128] to make or review that determination.[129] A danger may be perceived that if states are permitted to prevent the exercise of federal protection through the preclusive effect of their own courts' judgments, then the principle of federal protection will be thwarted. Yet the general requirements of preclusion will have been met: there will have been a final adjudication in an action between the same parties of an issue actually and necessarily litigated. Only if the nature of that issue warrants a departure from the general criteria of preclusion should the state determination not be binding. This inquiry may in turn depend upon the source of law that controls the specific requirements of preclusion. If the law of the judgment state supplies the rule of decision with respect to the effect of its judgments, a federal court will not be free in the same way as if the rule of decision is supplied by a federal common law of preclusion.

Although federal courts are required to give preclusive effect to prior state court judgments, the source of the requirement and the content of the law to be applied are less than entirely clear.[130] The prevailing view is that Congress has commanded that the law to be applied is that of the state whose court has rendered the judgment.[131] Cases have suggested, however, that the rule of decision to be applied in determining the effect of a prior state court judgment stems from the same source as the rule to be applied when the prior judgment is federal.[132] Under this theory the effect of a prior state court judgment would be determined by resort to federal common law, the content of which need not be

127. *See* text accompanying notes 92-114 *supra*.

128. *See* note 113 *supra* and accompanying text.

129. *See* note 116 *supra*.

130. *See* Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts,* 66 MICH. L. REV. 1723, 1726-28 (1968).

131. *E.g.,* Winters v. Lavine, 574 F.2d 46, 54 (2d Cir. 1978); 1B MOORE'S FEDERAL PRACTICE, *supra* note 81, ¶ 0.46[1]; Currie, *Res Judicata: The Neglected Defense,* 45 U. CHI. L. REV. 317, 326 (1978).

The relevant statute provides: "[J]udicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State." 28 U.S.C. § 1738 (1976). "[C]ourt within the United States" includes federal courts. *E.g.,* Davis v. Davis, 305 U.S. 32, 40 (1938).

The full faith and credit clause of the Constitution, U.S. CONST. art. IV, § 1, applies only to the states.

132. *E.g.,* Jones v. United States, 228 F.2d 52 (D.C. Cir. 1955); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951).

bounded by the law of the judgment state.[133]

Additionally, it may be that the doctrine of *Erie Railroad v. Tompkins*[134] dictates the application of neither federal common law nor the law of the judgment state but, rather, the law of the state in which the federal court sits. This approach now appears to represent the prevailing view.[135] Because the statute[136] and the Constitution[137] require the state courts to apply the law of the judgment state to the question of the judgment's preclusive effect, one might expect that it would be immaterial whether the federal court in a diversity case sought to apply the law of the judgment state or the law of the state in which the federal court sits—which itself is required to look to the law of the judgment state. Yet in the latter instance, the federal court would look to the forum state's view of the judgment state's preclusion law, while in the former case it would look directly to the judgment state's view of its own law.

If either the law of the forum state or the law of the rendering state is to determine the preclusive effect of a prior determination that the federal court lacks jurisdiction, the analysis is concluded. The federal interest involved in that inquiry, however, likely would justify resort to federal common law in order to determine the preclusive effect to be given the prior state adjudication. Consequently, it is necessary to determine the content of the federal preclusion doctrine.

In three recent opinions the Supreme Court has addressed the question of the proper effect that a federal court should give to determination by a state court of matters of federal concern. Although the analyses of both the source of law question and the content of the applicable law of preclusion are less than satisfactory, the opinions nonetheless suggest a theory of preclusion to accommodate the state and federal interests involved.

In *Brown v. Felsen*[138] the Court permitted litigation in federal court of a question concerning the dischargeability of a debt that a state court had previously determined to be due. In *Montana v. United States*[139]

133. Vestal, *supra* note 130, at 1726-28, 1749-50.

134. 304 U.S. 64 (1938).

135. *See* Degnan, *Federalized Res Judicata,* 85 YALE L.J. 741, 750, 753 (1976); Vestal, *supra* note 130, at 1728-33.

136. 28 U.S.C. § 1738 (1976).

137. U.S. CONST. art. IV, § 1.

138. 442 U.S. 127 (1979).

139. 440 U.S. 147 (1979).

the Court held that the federal government could not relitigate in federal court issues previously determined in a state action in which the federal government had financed and controlled the litigation. Finally, in *Allen v. McCurry*[140] the Court applied collateral estoppel to a suit brought under 42 U.S.C. § 1983 despite the unavailability of a federal forum for consideration of plaintiff's claim.

In *Brown v. Felsen* a debt had been reduced to judgment in state court prior to the debtor's bankruptcy petition. A debtor's discharge in bankruptcy leaves unaffected debts that are the product of the debtor's fraud or deceit.[141] The state judgment was the result of a stipulation that did not indicate the basis of the creditor's claim or of the debtor's liability.[142] In the bankruptcy court, the creditor contended that the debt was not dischargeable because it was the product of the debtor's fraud and deceit. The debtor's position was that the state judgment in favor of the creditor and the record on which that judgment was based (including the stipulation) did not reflect any such finding and that the creditor was barred by res judicata from relitigating the question of fraud.[143]

The Court held that res judicata did not bar consideration of the creditor's claim that the debt was based on fraud. First, the defense of bankruptcy was itself new matter that upset the repose of the prior judgment in the creditor's favor. Hence, the creditor was entitled to the opportunity to meet this "new initiative."[144] More important, the 1970 amendments to the Bankruptcy Act were found to reflect a congressional purpose to have the bankruptcy court determine dischargeability questions under section 17a rather than to have those questions determined in state court collection suits, as had been the pattern before the amendments.[145] The Court reasoned that it would make little sense to compel a creditor in the state collection proceeding to litigate issues irrelevant to those proceedings but material to discharge in order to avoid the "mere possibility that a debtor might take bankruptcy in the

140. 449 U.S. 90 (1980).

141. 11 U.S.C. § 35 (1976). *Brown* involved the Bankruptcy Act of 1898, which was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2682 (codified at 11 U.S.C. § 101 prec. note (Supp. IV 1980)). The new statute however, contains similar discharge provisions. 11 U.S.C. § 523 (Supp. IV 1980). *See* Brown v. Felsen, 442 U.S. 127, 129 n.1 (1979).

142. 442 U.S. at 128.

143. *Id.* at 129.

144. *Id.* at 134.

145. *Id.* at 135-36.

future."[146]

The Court went still further, stating that even an express state court ruling on such issues would not be entitled to preclusive effect. Congress intended the jurisdiction of the bankruptcy court to be exclusive with respect to such issues, the Court stated, and this intention would be frustrated by the application of res judicata.[147]

Several aspects of the case are noteworthy. First, although the Court failed to indicate how it derived the res judicata principles it applied, the source most likely was the federal common law of preclusion.[148] The law of the state rendering the initial consent judgment apparently would have applied res judicata to bar additional evidence on the dischargeability question.[149] The Court, however, gave this no greater weight than it did the positions of a number of other state and federal courts and several commentators.[150]

Second, the Court made much of the expertise of the bankruptcy court, the strength of the federal interest in determinations of dischargability, and Congress' desire to vest the bankruptcy court with the exclusive power to determine such issues.[151] Consequently, there appears to be an as yet undefined relationship between the exclusivity of federal jurisdiction and the application *vel non* of res judicata. Courts and commentators elsewhere have suggested such a relationship,[152] although it still represents a minority view.[153] Even if the Court ultimately adumbrates this relationship, it is important to recall that federal jurisdiction to determine jurisdiction is not exclusive. The state courts, too, are competent to decide questions of federal law having to do with jurisdiction.[154]

Finally, the Court was careful to note that the issue was res judicata and thus avoided applying "the narrower principle of collateral estop-

146. *Id.* at 135.

147. *Id.* at 135-36.

148. *See* notes 132-33 *supra* and accompanying text.

149. Miller v. Rush, 155 Colo. 178, 187-88, 393 P.2d 565, 571 (1964).

150. 442 U.S. at 133-34 n.6.

151. *Id.* at 134-36.

152. *E.g.,* Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir.), *cert. denied,* 350 U.S. 825 (1955); Currie, *supra* note 131, at 347-48; Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Judgments,* 53 VA. L. REV. 1360 (1967). *Contra,* 1B MOORE'S FEDERAL PRACTICE, *supra* note 81, ¶ 0.445.

153. Currie, *supra* note 131, at 347 n.203.

154. *See* text accompanying notes 92-114 *supra*.

pel."[155] The question of fraud sought to be litigated in the bankruptcy court had not been actually and necessarily decided in the prior state suit. Thus, the Court reserved the question of the appropriate preclusive effect to be given a state judgment that had actually and necessarily decided the question sought to be relitigated in the federal forum.[156] Again, it is worth recalling that a state court, in order to enjoin proceedings in a federal court, must first actually and necessarily determine that federal jurisdiction is absent.

In *Montana v. United States*[157] the Supreme Court was called upon to determine the preclusive effect of a state court determination of a question that had been actually and necessarily decided in the prior suit. Montana imposed a gross receipts tax on contractors of public, but not private, construction contracts. A federal contractor challenged the tax in state court at the instance of the United States, which directed and financed the litigation.[158] The theory of the suit was that the tax violated the supremacy clause by singling out the federal government and those with whom it dealt for disparate treatment. Private contractors were not subject to the tax, and state contractors, through higher prices, passed the extra cost back to the state, which had imposed the tax. Federal contractors, however, would pass the cost on to the federal government, which could not recoup it through offsetting revenues as did the state through collection of the tax.[159] The Montana Supreme Court sustained the tax.[160]

Shortly after initiation of the state action, the government filed suit in federal court which was then continued by agreement pending decision by the state courts. The federal court subsequently held the tax invalid under the supremacy clause. The federal court found that res judicata was not a bar to the government's suit.[161] The Supreme Court

155. 442 U.S. at 139 n.10. *See* Winters v. Lavine, 574 F.2d 46, 55 (2d Cir. 1978).

156. 442 U.S. at 139 n.10.

157. 440 U.S. 147 (1979).

158. *Id.* at 151.

159. *Id.* at 152.

160. Peter Kiewit Sons' Co. v. State Bd. of Equalization, 161 Mont. 140, 505 P.2d 102 (1973). *See* Montana v. United States, 440 U.S. 147, 151 (1979). A second suit was filed by the contractor, again at the behest of the Government, for tax payments alleged to be different from those in the first suit. The Montana Supreme Court found them to be essentially the same and dismissed the action on the ground of res judicata. Peter Kiewit Sons' Co. v. Department of Revenue, 166 Mont. 260, 531 P.2d 1327 (1975). *See* Montana v. United States, 440 U.S. at 151.

161. United States v. Montana, 437 F. Supp. 354 (D. Mont. 1977), *rev'd,* 440 U.S. 147 (1979). *See* United States v. Montana, 440 U.S. at 151-52.

reversed, holding that the government, because it had controlled the state litigation, was bound by the prior adverse determination.[162] The Court relied on general principles of res judicata and collateral estoppel, citing general works, federal cases, and even a state case. The opinion neither contained a reference to constitutional or statutory full faith and credit nor discussed the source of its law of preclusion. Apparently, the Court adopted a general common law of preclusion as federal common law.

The Court concluded that the government was so involved in the prior state litigation that it should be precluded under the rule that nonparties who control litigation in which they have a direct financial interest are precluded from relitigating the issue.[163] The Court also found that the issue litigated was the same[164] and that there had been no change in the facts or legal principles since the state judgment.[165] Finally, it determined that nothing in the particular circumstances justified an exception to preclusion.[166]

The Court considered three circumstances that might have warranted finding such an exception but found none of them present. These circumstances are also absent in the case in which a state court has enjoined federal litigation in part on the basis of a finding that the federal court is without jurisdiction. First, the Court noted an exception to the general principles of preclusion for " 'unmixed questions of law' in successive actions involving substantially unrelated claims."[167] Because of the congruence in the subject matter of the state and federal suits, this exception was inapplicable in *Montana v. United States*. There is similar congruence when a federal court is asked to second-guess a state court's determination that Congress has not vested the federal courts with jurisdiction over a particular case.

Second, the case did not involve "a litigant who ha[d] 'properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims' and who [was] then 'compelled, without his consent . . . , to accept a state court's determination of those claims.' "[168]

162. 440 U.S. at 153-55.
163. *Id. See also* County of Imperial v. Munoz, 449 U.S. 54 (1980).
164. 440 U.S. at 156-58.
165. *Id.* at 158-62.
166. *Id.* at 162-64.
167. *Id.* at 162 (quoting United States v. Moser, 266 U.S. 236, 242 (1924)).
168. 440 U.S. at 163 (quoting England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 415 (1964)).

Although the government had filed suit in federal court shortly after commencement of the state action, the federal suit had been continued by agreement pending the state court decision.[169] Consequently, if a litigant voluntarily foregoes federal adjudication, or if the litigant does not have a right to a federal forum, this basis for an exception to the principles of preclusion becomes inapplicable. Moreover, when a state court enjoins parties before it from commencing federal litigation on the ground that federal jurisdiction is lacking there will not even have been a prior invocation of federal jurisdiction. If federal judicial power had been successfully invoked before filing of the state court suit to enjoin, the federal court's determination of its own jurisdiction would preclude the state court from finding such jurisdiction lacking.[170] It is only when the party resisting the state injunction has not "properly invoked the jurisdiction of a Federal District Court" that the state injunction would be permissible.

Finally, there was no allegation that the state procedure was unfair or inadequate. Given a full and fair opportunity to present the federal issues before a state court competent to decide them, redetermination of those issues would be unwarranted.[171] Similarly, when the party resisting the anti-suit injunction has had a full and fair opportunity to establish his alleged right to litigate in federal court and has failed, there is no basis on which to provide a second opportunity to do so, and any exception to the policies of repose and finality reflected in the preclusion doctrine is unwarranted. The state court is fully competent to determine the federal question and, if there is no reason to doubt the quality, extensiveness, or fairness of the state procedures, the prior determination is entitled to full faith and credit.[172]

It is this notion that provided the basis for the Court's most recent pronouncement on the preclusive effect that a federal court is required to give a prior state court's determination of federal law. *Allen v. McCurry*[173] was a suit brought pursuant to 42 U.S.C. § 1983 for damages for an alleged unconstitutional entry into a home and subsequent seizure of evidence. Prior to the section 1983 action, McCurry had been convicted in state court after his motion to suppress the evidence

169. 440 U.S. at 151.
170. *See* notes 90-91 *supra* and accompanying text.
171. 440 U.S. at 163-64.
172. *Id.* at 164.
173. 449 U.S. 90 (1980).

in question had been denied.[174] The federal district court held McCurry's section 1983 claim precluded by the prior decision of the state court denying his motion to suppress and upholding the constitutionality of the entry.[175] The Court of Appeals reversed.[176] Without going so far as to hold all section 1983 cases an exception to the doctrine of preclusion, the Eighth Circuit held that the unavailability of federal habeas corpus to challenge convictions based on unconstitutionally obtained evidence[177] warranted such an exception for cases such as McCurry's. The court reasoned that the federal courts' "special role"[178] in the protection of civil rights could not be vindicated if such claims were precluded.[179] The Supreme Court reversed.[180]

The Court noted that the congressional command of 28 U.S.C. § 1738[181] required federal courts to give the same effect to a state court judgment as would the rendering state. Rather than regarding it as a device for terminating the inquiry, however, the Court viewed the statute as part of the "background" against which the relationship of section 1983 and collateral estoppel were to be examined.[182] The full faith and credit statute did not foreclose the question whether the rules of preclusion were applicable in section 1983 actions. That question was to be determined in light of the purposes of section 1983 and the principles of comity and federalism.[183] Moreover, the Court expressly reserved the question of the scope or content of the preclusion doctrine under the common law or section 1738.[184] Consequently, the opinion failed to resolve many questions that bear upon the issue of the preclusive effect a federal court is to give a prior determination by a state court.

174. *See id.* at 92. The state court had granted the motion to suppress with respect to some of the evidence seized but upheld the entry and the seizure of evidence in plain view subsequent to the entry. State v. McCurry, 587 S.W.2d 337 (Mo. Ct. App. 1979). *See* 449 U.S. at 93 n.2.

175. McCurry v. Allen, 466 F. Supp. 514 (E.D. Mo. 1978), *rev'd,* 606 F.2d 795 (8th Cir. 1979), *rev'd,* 449 U.S. 90 (1980). *See* 449 U.S. at 92-93.

176. McCurry v. Allen, 606 F.2d 795 (8th Cir. 1979), *rev'd,* 449 U.S. 90 (1980). *See* 449 U.S. at 93.

177. Stone v. Powell, 428 U.S. 465 (1976).

178. 606 F.2d at 799.

179. *Id. See* 449 U.S. at 93-94.

180. Allen v. McCurry, 449 U.S. 90 (1980).

181. *See* note 131 *supra.*

182. 449 U.S. at 96.

183. *Id.*

184. *Id.* at 93 n.2, 105 n.25.

Nonetheless, the opinion does illuminate that issue. Because of the special nature of section 1983, one would expect the preclusion doctrine to apply with no greater strictness in these cases than in others. Moreover, a party situated similarly to the defendant in *McCurry*, whose only opportunity to obtain a federal determination of his claims (apart from Supreme Court review of his state criminal conviction) would be foreclosed by giving preclusive effect to the state court's determination of the federal claim, might expect a still less strict approach to the application of the law of preclusion. Thus, by holding the preclusion doctrine applicable in section 1983 cases for alleged violations of federal rights for which no other federal remedy is available, the Court must be seen as taking a very hard line.

Finally, it is noteworthy that McCurry did not freely and voluntarily submit his claims to the state tribunal.[185] Unlike *Montana v. United States*, in which the government submitted to a state court[186] claims that were identical to those involved in the federal litigation, McCurry was compelled by the state criminal proceeding against him to litigate his claim of unconstitutional search in the state court.[187] Nonetheless, because he had already fully and fairly litigated his claim in state court, the preclusion doctrine barred relitigation in federal court.[188]

These three cases help to clarify the application of the doctrine of preclusion to be applied by a federal court when the issue before it previously has been before a state court. In general, though, it remains unclear what effect is to be given to issues that might have been, but were not actually, litigated in the state proceedings.[189] In cases in which the emergence of the federal issue might have been premature, so that the motivation to litigate might have been half-hearted, it may be that a federal court need not give preclusive effect to the state proceeding.[190] It seems plain, however, that when the parties have had a full and fair hearing on an issue of federal law before a state tribunal,

185. *See* 449 U.S. at 101 n.17. *See also* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

186. 440 U.S. 147 (1979). *See* notes 162-63 *supra* and accompanying text.

187. *See* 449 U.S. at 104 n.23.

188. Whether the doctrine would apply to bar relitigation of a federal issue that could have been, but was not, raised in a prior state proceeding, *see* Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974); Mack v. Florida Bd. of Dentistry, 430 F.2d 862 (5th Cir. 1970), was a question expressly reserved by the Court. 449 U.S. at 97 n.10.

189. *See, e.g.,* 449 U.S. at 94 n.5, 97 n.10.

190. Brown v. Felsen, 442 U.S. 127, 135 (1979). *See* note 146 *supra* and accompanying text.

whether both parties had sought the adjudication or one was compelled to appear, a federal court must give preclusive effect to the prior state court determination.[191] This is true even when the federal government itself is the party seeking to vindicate an alleged federal interest in its own courts[192] or when the issue to be litigated is one over which the federal courts traditionally have demonstrated great sympathy and hospitality.[193]

The preceding seems to be true in all cases in which a state court has actually determined, after a full and fair hearing, an issue of federal law that a party seeks to relitigate in federal court. There is, however, one exception: relitigation is permissible in those cases in which Congress has manifested the intention that the federal forum be empowered to determine a particular issue, notwithstanding any prior determination by a state court. As the Court noted in *Allen v. McCurry*, the basis for finding a right to litigate a federal claim in a federal district court is "distrust of the capacity of the state courts to render correct decisions . . . ."[194] The Court has made clear, however, that such distrust is an unwarranted breach of the principles of federalism which define the relationship of the state and federal courts.[195] It is

191. The Third Circuit, in a related context, has read Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), to permit federal relitigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. IV 1980). Smouse v. General Elec. Co., 626 F.2d 333 (3d Cir. 1980). More recently, the Third Circuit has allowed federal relitigation under 42 U.S.C. § 1981. Davis v. United States Steel Co., 32 Fed. R. Serv. 2d 727 (3d Cir. 1981). *Alexander*, however, found merely that a Title VII plaintiff was not barred by an adverse arbitration decision, rendered pursuant to a collective bargaining agreement, from adjudicating his claim in a federal judicial forum. 415 U.S. at 49. In both *Smouse* and *Davis*, on the other hand, the plaintiff's claim had been submitted to a state administrative agency, whose determination was reviewed by the state courts.

The Second Circuit has recognized just such a distinction in Title VII cases, Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979), and in § 1981 cases, Mitchell v. NBC, 553 F.2d 265 (2d Cir. 1977).

Moreover, even to the extent that one accepts the Third Circuit's view, the preclusive effect to be given state judicial review of administrative findings might well differ from that to be accorded proceedings in which initial factfinding has taken place in a judicial forum. The reason, for example, that exhaustion of state judicial remedies is not required as a prerequisite to federal adjudication in cases in which exhaustion of state administrative remedies would be required is precisely because the administrative determination would not preclude later federal adjudication. *See* Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). *See also* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 101 (1973).

192. Montana v. United States, 440 U.S. 147 (1979).

193. Allen v. McCurry, 449 U.S. 90 (1980).

194. *Id.* at 105.

195. *E.g.*, Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976).

only when Congress has demonstrated the intention to exclude authoritative state adjudication of an issue—either by excepting them from the full faith and credit statute and the doctrine of preclusion or, perhaps, by providing exclusive jurisdiction in the federal courts[196]—that a federal court would not be bound by a prior state determination.

Absent demonstrable legislative intent, it is not sufficient to argue that the expertise of a federal court or the important federal nature of the issue involved—the jurisdiction of the federal courts—requires an exception to the normal rules of preclusion. So, for example, one federal court has held that a state court's determination that a claim was barred is entitled to preclusive effect in a later federal proceeding, even though the basis of the state court's ruling was that under the Federal Rules of Civil Procedure the claim constituted a compulsory counterclaim that had not been filed in a previous federal suit.[197] That the state court, whose judgment was held preclusive, was determining the application of a federal rule of procedure[198] was of no moment with respect to the preclusion issue. As long as the question has been fully and fairly litigated in the state court, the federal court was bound to give that determination of federal procedural law full faith and credit and hence was not free to relitigate it.[199]

The Ninth Circuit reached a similar result in a case touching yet more closely on issues of federal jurisdiction. *SEC v. United Financial Group, Inc.*[200] was a claim for attorney's fees brought against the federal receiver of United Financial Group by counsel for the corporation and its former officers. The attorney had earlier defended a class action brought in state court by a group of investors.

The federal receiver had objected to the plaintiff's acting as attorney for the state court defendants and, joined by the SEC, had unsuccessfully attempted to enjoin prosecution of the state proceeding. The state court rendered judgment for the investors but awarded attorney's fees to the instant plaintiff.[201] The court in a previously instituted state suit entered summary judgment against the receiver based on that award. The receiver had appeared in and defended that state court action after

196. *See* Brown v. Felsen, 442 U.S. 127, 135-36 (1979); notes 151-53 *supra* and accompanying text.

197. Cyclops Corp. v. Fischbach & Moore, Inc., 71 F.R.D. 616 (W.D. Pa. 1976).

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

199. 71 F.R.D. at 622-23.

200. 576 F.2d 217 (9th Cir. 1978).

201. *Id.* at 219.

unsuccessfully seeking to remove it to federal district court on the grounds that "jurisdiction over an action against a federal receiver resided in the federal court" and that the action could not be maintained in the absence of leave of the receivership court.[202] On appeal, the state court affirmed the award of attorney's fees, holding the receiver bound by the award in the original class action and also holding that leave of the receivership court was not required.[203]

The federal district court to which plaintiff submitted his claim for attorney's fees on the basis of the state court judgment granted the receiver's motion for summary judgment. It held, *inter alia*, that the receiver was not bound by the state adjudication because the failure to obtain the consent of the receivership court resulted in a lack of state court jurisdiction.[204] The court of appeals reversed, holding the receiver bound by the state judgment.[205] Significantly, the court agreed with the district court's determination on the merits of the case that consent to suit was required.[206] Nonetheless, because that issue had been fully and fairly litigated in the state court, the earlier judgment bound the receivership court.[207] Although the failure to obtain consent was not considered a jurisdictional defect, the court noted that "[e]ven if it were, however, once the issue had been fully and fairly litigated in the [state] court, the receivership court was bound by that court's determination, whether correct or not, and was obliged to accord full faith and credit to its resulting judgment."[208] Thus the Ninth Circuit recognized that a state court's determination, even of a matter involving potential interference with federal jurisdiction, must be given preclusive effect in the subsequent federal forum that would normally be protected from that interference.

The Second Circuit has taken a similar view of the effect to be given a state court's determination of issues of federal jurisdiction.[209] Appellant argued that a state court judgment approving a settlement of a

202. *Id.*

203. *Id.* at 219-20. The state court held the action maintainable without leave of the receivership court under 28 U.S.C. § 959(a) (1976), which provides for suits against receivers for acts or transactions in carrying on business connected with the receivership property.

204. 576 F.2d at 220.

205. *Id.* at 223.

206. *Id.* at 220.

207. *Id.* at 220-21.

208. *Id.* at 221 (citation omitted).

209. Allegheny Corp. v. Kirby, 340 F.2d 311 (2d Cir. 1965) (en banc).

director's liability in a shareholder's derivative suit should be set aside because "federal jurisdiction existed . . . and [the federal securities laws] made such jurisdiction exclusive."[210] Sitting en banc, the court was unanimous in finding it "unnecessary to rule on the argument, for . . . the issue of jurisdiction was raised in and decided by the [state] courts."[211] Surely, if a state court's determination concerning the exclusivity *vel non* of federal jurisdiction is entitled to preclusive effect, matters of substantial federal concern are less likely to be affected when the state's jurisdiction is clear.

In sum, although the Supreme Court has not yet ruled definitively on the precise issue of the preclusive effect to be given prior state court determinations concerning federal jurisdiction, its latest pronouncements plainly support the proposition that a federal court would be bound to acquiesce in a state court's determination that the federal court lacked jurisdiction. As has been demonstrated,[212] there is nothing to suggest a state court's lack of capacity to make that determination. Congress has not provided for exclusive federal jurisdiction to resolve the issue, nor has it provided an exception to the principles of preclusion with respect to that issue. Finally, the lower federal courts, in closely analogous situations, have recognized the competence of the state courts to determine issues of federal jurisdiction and procedure and have found those determinations binding on federal courts. Thus, after a full and fair hearing, a state court's order enjoining litigation in federal court based upon the federal court's lack of jurisdiction over the parties or the subject matter would be entitled to preclusive effect in a subsequent federal proceeding brought in defiance of the injunction.

V. CONCLUSION

The issue of state court power to enjoin parties before the court from prosecuting claims in the federal courts, given the intimacy of its relationship to principles of comity and federalism, has received surprisingly little attention. The conventional learning is that state courts are absolutely without power to interfere with federal proceedings, pending or impending. The basis for the rule is the supremacy of the congressional grant of jurisdiction to the federal courts over attempts by state

210. *Id.* at 312 n.1.
211. *Id.*
212. *See* text accompanying notes 92-114 *supra*.

courts to interfere with its exercise. The only exception to this blanket prohibition is for in rem cases in which the state court has first obtained jurisdiction over the res. The basis for the exception is that the state court, having first obtained control of the res, has jurisdiction exclusive of the federal courts to litigate claims affecting that res.

The "rule" and the exception are both manifestations of a single principle: a state court may not interfere with a litigant's federal right to a federal forum. Obversely, when the litigant has no such right the rule is inapplicable. There is no federal bar to a state court's injunction of federal proceedings if the federal court is without jurisdiction over the person or the subject matter.

Except in those rare cases in which federal jurisdiction is exclusive, state courts have the power and the obligation to determine issues of federal law necessary to the adjudication of cases before them. In the absence of congressional action providing for exclusive federal jurisdiction to determine the existence of federal judicial power, there is nothing to suggest an exception to the ordinary exercise of concurrent jurisdiction by state and federal courts (subject, of course, to Supreme Court review). Thus, state courts have the power to determine the existence or nonexistence of jurisdiction of a federal court over a particular case. Furthermore, if the state court determines that federal judicial power is lacking and that state law requirements for injunctive relief have been met, it may enjoin the parties before it from proceeding in federal court.

Should the parties defy the injunction, the federal court hosting parallel proceedings must give preclusive effect to the state court's determination and dismiss for lack of jurisdiction. Recent Supreme Court and lower federal court decisions support the proposition that a federal court may not relitigate issues of federal law—even those intimately bound up in traditionally federal concerns—after a state court, following a full and fair hearing, has determined those issues.

A proper appreciation of those principles of comity and federalism defining the relationship between the state and federal courts recognizes the power of the state to enjoin parties from proceeding with litigation in a federal court that, as a matter of federal law, is without power to adjudicate. This appreciation further recognizes the power of the state court to make, as well as bind the parties to, that determination.