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Federal Injunctions and State Criminal Prosecutions: Vestiges of "Our Federalism"

Bruce E. Gaynor*

I care not who makes th' laws iv a nation if I can get out an injunction.

—Peter Finley Dunne, Mr. Dooley
on IRVYTHING and IRVYBODY 153.

INCREASINGLY OVER THE PAST DECADE, persons charged with violations of "unconstitutional"¹ federal or state statutes have sought to obtain equitable relief in the federal courts.² Most often, the relief sought has been in the form of an injunction restraining the government from prosecuting or threatening to prosecute³ under the allegedly invalid statute.⁴ Declaratory relief (that the statute is, in fact, unconstitutional) has often been sought as an additional or alternative remedy.⁵

While requests for federal injunctions to restrain *federal* prosecutions have posed few problems,⁶ attempts at obtaining federal injunctive relief against *state* court prosecutions have proved more troublesome.⁷ Basing their decisions on the two-hundred year old concept of "Our Federalism,"⁸ the federal district courts, and the United States

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¹ The contentions in this paper presume the existence of a good faith challenge to the constitutionality of a statute. The issue is not the constitutionality itself, but rather the propensity of the federal courts to intervene where a statute is invalid, or where it is valid but applied unconstitutionally.

² Injunctions against the enforcement of state and federal statutes may only be granted by three-judge courts. 28 U.S.C. § 2281, 2282. Between 1963 and 1970, the number of three-judge court hearings increased from 129 to 291, a change of 125.6%. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 136 (1970). [hereinafter cited as JUDICIAL CONFERENCE.]

³ The term "prosecution" or "prosecute," should be interpreted generally so as to include all stages of the criminal proceedings, from pre-arrest through the actual court proceedings. Though the different stages of the prosecution are critical in this paper, they will be otherwise distinguished as "threatened" prosecution, "pending" prosecution, etc.

⁴ See 28 U.S.C. § 2281, 2282 (1964).

⁵ See, e.g., *Harris v. Younger*, 281 F. Supp. 507 (1968), *rev'd* 91 S. Ct. 746 (1971) where declaratory relief was granted as "such other and further relief as to the Court may seem just and proper."

⁶ 42 AM. JUR. 2d *Injunctions* § 201 (1969). See 28 U.S.C. § 2282, 2284 (1964).

⁷ See generally Carey, *Federal Court Intervention in State Criminal Prosecutions*, 56 MASS. L. Q. 11 (1971); Kurland, *The Supreme Court, 1963 Term, Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964); Comment, *The Civil Rights Act as a Statutory Exception to the Anti-Injunction Statute*, 4 JOHN MARSH. L. J. 55 (1970); Commentary, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294 (1971); *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1971).

⁸ *Younger v. Harris*, 91 S. Ct. 746, 750 (1971). For historical definitions and commentaries on "federalism," see M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 34, 283, 301, 314, 331 (1966); Bell, *Federalism in Current Perspective*, 1 GA. L. REV. 586 (1967).

Supreme Court,⁹ have been loath to interfere with state court prosecutions,¹⁰ whether *threatened* or *pending*.¹¹

Much to the dismay of criminal defense and civil rights lawyers,¹² the federal "hands-off" or abstention policy has become firmly entrenched in our system of jurisprudence.¹³ For a short time, though, proponents of a liberal shift toward intervention had reason to be optimistic. Their optimism was predicated on the 1965 decision in *Dombrowski v. Pfister*,¹⁴ which held that an injunction should properly have been granted to restrain Louisiana state officials from prosecuting members of the Southern Conference Educational Fund, Inc., (SCEF) an organization active in fostering civil rights in the South. Perhaps as a result of *Dombrowski*-based speculation, the number of federal injunction applications in civil rights cases rose dramatically in the period following that decision.¹⁵ From 1965 to 1970, the number of such applications in three-judge courts increased by over 500%.¹⁶

On February 23, 1971, however, the Supreme Court laid all speculation to rest when it handed down a series of decisions "explaining" *Dombrowski*.¹⁷ *Younger v. Harris*,¹⁸ the leading case in that series, reaffirmed the existence of a "national policy"¹⁹ against federal intervention, and confirmed the notions of many who had always felt that the *Dombrowski* decision was a "bearded, one-eyed, red-haired, man with a limp."²⁰

⁹ 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court from decisions of three-judge courts.

¹⁰ See *Younger v. Harris*, 91 S. Ct. 746 (1971); *Dyson v. Stein*, 91 S. Ct. 769 (1971); *Boyle v. Landry*, 91 S. Ct. 758 (1971); *Samuels v. Mackell*, 91 S. Ct. 764 (1971); *Perez v. Ledesma*, 91 S. Ct. 674 (1971); *Byrne v. Karalexis*, 91 S. Ct. 777 (1971); *Atlantic Coast Line R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970); *Douglas v. City of Jeanette*, 319 U.S. 157 (1943); *Williams v. Miller*, 317 U.S. 599 (1942); *Watson v. Buck*, 313 U.S. 387 (1941); *Beal v. Missouri Pac. R. Co.*, 312 U.S. 45 (1941); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Fenner v. Boykin*, 271 U.S. 240 (1926).

¹¹ The distinction between *threatened* and *pending* is critical in federal injunction cases. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Nevertheless, it is safe to say that, in either case, federal courts are reluctant to interfere.

¹² Most of the federal injunction applications have been in civil rights cases. JUDICIAL CONFERENCE, *supra* note 2, at 136.

¹³ See cases cited note 10, *supra*.

¹⁴ 380 U.S. 479 (1965).

¹⁵ JUDICIAL CONFERENCE, *supra* note 2, at 136.

¹⁶ *Id.*

¹⁷ See *Younger v. Harris*, 91 S. Ct. 746 (1971); *Dyson v. Stein*, 91 S. Ct. 769 (1971); *Boyle v. Landry*, 91 S. Ct. 758 (1971); *Samuels v. Mackell*, 91 S. Ct. 764 (1971); *Perez v. Ledesma*, 91 S. Ct. 674 (1971); *Byrne v. Karalexis*, 91 S. Ct. 777 (1971).

¹⁸ 91 S. Ct. 746 (1971).

¹⁹ *Id.* at 749.

²⁰ Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 536 (1970).

History of Federal Intervention in State Court Prosecutions

The general rule that federal courts will not interfere with a state's good-faith administration of its criminal laws²¹ is rooted in the very structure of federalist government:

Even the early colonialists, despite the sense of independence and consequent concern with keeping government close to the people, were compelled to recognize the inevitability of some federal union. This tension between the desire for local government and the necessity of federal power has never relinquished its hold over the American experiment in political organization.²²

The precarious balance between state and federal judicial systems has long been a source of major concern. Indeed, as early as 1787, Noah Webster wrote Benjamin Franklin that, "It is also intimated as a probable event, that the federal courts will absorb the judiciaries of the . . . states."²³ Though fears of "absorption" have, for the most part, been allayed, even Chief Justice Warren, addressing the American Law Institute in 1958, expressed concern over the "proper jurisdictional balance between the federal and state court systems."²⁴ This sentiment has been perpetuated by Chief Justice Burger who, on the matter of federal-state injunctions, commented in 1970:

The friction in relations between state and federal courts presents serious problems in both the review of state prisoner petitions and other cases.²⁵

Creation of the Hands-Off Policy: Pending v. Threatened Prosecutions

Anti-injunction law of 1971 is very much the result of two lines of cases: (1) Those concerned with federal injunctions to stay "proceedings," or *pending* state court actions; and (2) those concerned with restraining the institution of proceedings, or *threatened* state prosecutions.

1. *Pending State Prosecutions (Proceedings)*

The first court-oriented legislation in our country, the Judiciary Act of 1789,²⁶ contained no provision granting or restricting federal use of injunctions against state actions. It is contended, however, that the *power* to enjoin state proceedings was inherent in the federal government.²⁷

Codification of the "hands-off" policy did not occur until 1793 when, in response to the sentiment expressed by some Jeffersonians,

²¹ *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965).

²² Introduction to SHUMAN, *THE FUTURE OF FEDERALISM* 9 (1968).

²³ P. L. FORD, *PAMPHLETS ON THE CONSTITUTION* 52-53 (1968).

²⁴ *Dyer, State Trial Courts from a Federal Viewpoint*, 54 *JUDICATURE* 372, 374 (1971).

²⁵ *Id.*

²⁶ 1 Stat. 73 (1789).

²⁷ Comment, *supra* note 7, at 57.

Congress enacted the first anti-injunction statute.²⁸ The ban of the law was absolute:

[Nor] shall a writ of injunction be granted to stay proceedings in any court of a state.²⁹

Despite the broad prohibition, over a period of years the Supreme Court promulgated several judicial exceptions to the rule.³⁰ The trend continued until the 1941 case of *Toucey v. New York Life Insurance Co.*,³¹ where Mr. Justice Frankfurter returned to a strict construction of the law and delivered a majority opinion which effectually negated all of the exceptions.

Advocates of federal abstention and the Supreme Court³² have heralded the Act of 1793 as a "monument to the principle of independent state judicial systems."³³ Because of its constitutionally based inception, state's rights espousers often point to the statute as evidence of an historic national policy against intervention.³⁴ With some exceptions, prompted by the decision in *Toucey*, the Act has been re-enacted and exists today as 28 U.S.C. §2283. Still known as the "anti-injunction statute," §2283 has been interpreted as precluding federal injunctive relief against *pending* state actions.³⁵ Though interpretations of the statute, and the statute itself, have been variously attacked,³⁶ §2283 continues to serve, directly and indirectly,³⁷ as a primary obstacle to federal intervention.

§2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.* [Emphasis added.]³⁸

2. Threatened State Prosecutions

Whereas §2283 exists as a preclusion against federal-state injunctions in *pending* state proceedings, there is no statutory prohibition against federal injunctions against *threatened* state proceedings.

²⁸ Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.

²⁹ *Id.*

³⁰ *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922); *Julian v. Central Trust Co.*, 193 U.S. 93 (1904); *Marshall v. Holmes*, 141 U.S. 589 (1891); *Providence & New York S. S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Orton v. Smith*, 59 U.S. (18 How.) 263 (1856); *Diggs & Keith v. Wolcott*, 8 U.S. (4 Cranch) 178 (1807).

³¹ 314 U.S. 118 (1941).

³² *Atlantic Coast Line R. R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

³³ *Federal Court Stays*, *supra* note 7, at 613.

³⁴ See *Younger v. Harris*, 91 S. Ct. 746, 750 (1971).

³⁵ *Id.*

³⁶ See Comment, *supra* note 7; Commentary, *supra* note 7; *Federal Court Stays*, *supra* note 7.

³⁷ It will be noted that although this section directly precludes intervention in pending cases, it indirectly serves as supportive evidence of the national policy against intervention in other non-pending cases. That is, its constitutional origin is used as an indication of "federalist feeling" at the time of our nation's founding.

³⁸ 28 U.S.C. 2283 (1964).

In the 1908 case of *Ex parte Young*,³⁹ the Supreme Court opened the door to federal injunctions to restrain *threatened* state prosecutions. Justice Peckham, for the Court, promulgated that federal injunctions may be granted where state officials:

[*Threaten*] and are about to commence proceedings, either of a civil or criminal nature to enforce against parties affected an unconstitutional act, violating the Federal Constitution . . . [Emphasis added.]⁴⁰

Young was a "fountainhead,"⁴¹ it opened the door to federal intervention, but made no effort to delimit its scope. In *Fenner v. Boykin*,⁴² and a line of associated cases,⁴³ the Court began to whittle the doctrine down to a functional size. These cases, *in toto*, required the showing of irreparable injury which is both great and immediate;⁴⁴ inadequate remedy at law;⁴⁵ the possibility of multiple suits;⁴⁶ bad faith prosecutions;⁴⁷ and a "chilling effect" on constitutional rights.⁴⁸ The culmination of the various limitations was the red herring, *Dombrowski v. Pfister*.⁴⁹

Appellant *Dombrowski* and two others were officers of SCEF,⁵⁰ a civil rights organization in the South. In October, 1963, the appellants were arrested by Louisiana local and state police for alleged violations of "Communist control laws."⁵¹ Police raided appellants' homes and offices and seized, *inter alia*, Thoreau's Journal, membership lists and newspapers of SCEF, files and various correspondence. The office was destroyed of its "capacity to function."⁵² The chairman of the State Un-American Activities Committee, Pfister, declared that the arrests were made because of "racial agitation."⁵³

Within a few weeks, a state judge quashed the indictments and granted a motion to suppress the illegally seized evidence. Despite the state court's disposition of the case, Pfister and his cohorts continued to threaten and harass the appellants with prosecution under the statutes. These actions "paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause."⁵⁴

³⁹ 209 U.S. 123 (1908).

⁴⁰ *Id.* at 156.

⁴¹ *Dombrowski v. Pfister*, 380 U.S. 479, 483 (1965).

⁴² 271 U.S. 240 (1926).

⁴³ See cases cited note 10, *supra*.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 380 U.S. 479 (1965).

⁵⁰ Southern Conference Educational Fund, Inc. See text at note 14, *supra*.

⁵¹ Appellants were charged with violations of two Louisiana state laws: Louisiana Subversive Activities and Communist Control Law, LA. REV. STAT. §§ 14.353 through 14.374 (Cum. Supp. 1962); and the Louisiana Communist Propaganda Control Law, LA. REV. STAT. §§ 14.390 through 14.390.8 (Cum. Supp. 1962).

⁵² 380 U.S. 479 (1965).

⁵³ 227 F. Supp. 556, 573 (1964), *rev'd*, 380 U.S. 479 (1965).

⁵⁴ 380 U.S. 479, 488-489 (1965).

Appellants brought an action under the Civil Rights Act⁵⁵ but the three-judge court denied an injunction to restrain appellees from prosecuting or threatening to prosecute the SCEF officers. Relief was denied because appellants:

[Did] not present a case of threatened irreparable injury to federal rights which warranted cutting short the normal adjudication of constitutional defenses in the course of state criminal prosecutions⁵⁶

On direct appeal from the three-judge decision,⁵⁷ the Supreme Court, Mr. Justice Brennan for the majority, reversed. Recognizing that federal interference is "peculiarly inconsistent with our federal framework,"⁵⁸ the court commented:

[But] the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.⁵⁹

In addition to finding irreparable injury, however, the Court recognized that the overbroad and sweeping vagaries of the statute would impair freedom of expression,⁶⁰ and that a "chilling effect" might well result from such a prosecution.⁶¹ Furthermore, Mr. Justice Brennan noted that the prosecutions were made in bad faith, without any real intent to secure convictions⁶² and that the statutes were, in fact, void on their face.⁶³

After *Dombrowski*, the circuits were in conflict as to the real meaning of that case. Were all of the *Dombrowski*, elements necessary for federal injunctive relief, or only some of them? If so, which of them? Even Justice Brennan, speaking in the later case of *Younger v. Harris*,⁶⁴ noted that there were "some statements in the *Dombrowski* opinion" which could lead one astray.⁶⁵ Indeed, the three-judge court in *Younger* granted an injunction against a *pending* case on the basis of unconstitutionality on the face of the statute, without regard to bad faith or harassment.⁶⁶

⁵⁵ 42 U.S.C. § 1983 (1964).

⁵⁶ 380 U.S. 479, 483 (1965).

⁵⁷ *Supra* note 9.

⁵⁸ 380 U.S. 479, 484 (1965).

⁵⁹ *Id.* at 485-486.

⁶⁰ *Id.* at 585-489.

⁶¹ *Id.* at 487-489.

⁶² *Id.* at 490.

⁶³ *Id.* at 497-498.

⁶⁴ 91 S. Ct. 746 (1971).

⁶⁵ *Id.* at 753.

⁶⁶ *Harris v. Younger*, 281 F. Supp. 507 (1968), *rev'd*, 91 S. Ct. 746 (1971).

The State of the Law After *Younger v. Harris*

It is safe to say that, after *Younger* at least, no federal-state injunction will be granted unless special circumstances can be shown.⁶⁷ In any case, whether the target of the injunction is a threatened or pending action, constitutional rights must be involved.⁶⁸ In addition, it is helpful if the constitutional rights in danger are some of the "more important" ones; that is, first amendment rights.⁶⁹

The normal prerequisites to equitable relief must also be present, including an inadequate remedy at law and irreparable injury.⁷⁰ The irreparable harm must be both great and immediate,⁷¹ or relief will not be granted; and it must be other than that "incidental to every criminal proceeding brought lawfully and in good faith."⁷² In other words, there must be bad faith or harassment.⁷³

Additionally, there must be a threat of multiplicity of suits:

The threat to federally protected rights must be one that cannot be eliminated by defense against a single criminal prosecution.⁷⁴ Finally, unconstitutionality of the statute "on its face" is required,⁷⁵ though such unconstitutionality alone is not of itself sufficient to justify relief.⁷⁶

Though neither "chilling effect" nor unconstitutionality on the face of the statute will alone justify federal relief, it was stated in *Younger* that:

There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in absence of the usual prerequisites of bad faith and harassment.⁷⁷

Though the Court was definite as to the possible existence of such circumstances, it was reticent as to what they might be.⁷⁸ It does seem clear, however, that where the "chilling effect" operates on first amendment rights, the odds of success will be greater.⁷⁹

Where the prosecution sought to be enjoined is *not* a pending one, persons seeking a federal-state injunction may invoke 42 U.S.C. §1983 (the Civil Rights Act) and 28 U.S.C. §2281, 2284. The Civil Rights Act provides that:

⁶⁷ See cases cited note 10 *supra*.

⁶⁸ *Id.*

⁶⁹ See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

⁷⁰ *Id.*

⁷¹ *Fenner v. Boykin*, 271 U.S. 240 (1926).

⁷² *Younger v. Harris*, 91 S. Ct. 746 (1971).

⁷³ *Id.*

⁷⁴ *Id.* at 751.

⁷⁵ *Dombrowski v. Pfister*, 380 U.S. 470 (1965).

⁷⁶ *Younger v. Harris*, 91 S. Ct. 746, 755 (1971).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress. [Emphasis added.]⁸⁰

Thus, one who has met the requirements for injunctive relief as set forth above will have standing to file a §1983 action.

Section 2281⁸¹ provides for the convening of a three-judge court to grant injunctions to restrain the institution of state actions, and §2284 contains the procedures for three-judge courts.⁸²

Where the prosecution sought to be enjoined is *pending*, the procedural impediments are much greater. As mentioned *supra*, the anti-injunction statute⁸³ prohibits federal-state injunctions in such cases. The only real consideration is whether the case falls within one of the legislative exceptions to §2283.

The exceptions are three: (1) where expressly authorized by Act of Congress, (2) where necessary in aid of the court's jurisdiction and (3) where necessary to protect or effectuate the court's judgments.⁸⁴

In recent years, the most controversial of these exceptions has been the first. The question posed by jurists,⁸⁵ and as yet unresolved by the Supreme Court, is whether the Civil Rights Act⁸⁶ falls within the first category of exceptions. On this issue, the Supreme Court has consistently been reticent. As late as 1971, the Court avoided coming to grips with the issue:

Because our holding rests on the absence of factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. §2283, which prohibits an injunction against state court proceedings "except as expressly authorized by Act of Congress" would in and of itself be controlling under the circumstances of this case.⁸⁷

⁸⁰ 42 U.S.C. § 1983 (1964).

⁸¹ 28 U.S.C. § 2281 provides: An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

⁸² 28 U.S.C. § 2284 (1964).

⁸³ 28 U.S.C. § 2283 (1964).

⁸⁴ *Id.*

⁸⁵ *Supra* note 37.

⁸⁶ 42 U.S.C. § 1983 (1964).

⁸⁷ *Younger v. Harris*, 91 S. Ct. 746, 755 (1971).

As to this issue, the district courts have arrived at varying answers. Unfortunately, the series of cases handed down with *Younger* early in 1971 have provided no resolution.

At least Mr. Justice Douglas has supported the incorporation of §1983 as an exception to §2283.⁸⁸ In balancing the interests of states versus the constitutional rights of individuals, Mr. Justice Douglas has concluded:

In times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.⁸⁹

In response to the diatribes that federal-state injunctions are violative of our notions of federalism, Justice Douglas commented:

There is no more good reason for allowing a general statute dealing with federalism [the anti-injunction statute] passed at the end of the 18th century to control another statute [the Civil Rights Act] also dealing with federalism, passed almost 80 years later, than to conclude that the early concepts federalism were not changed by the Civil War.⁹⁰

Whether or not §1983 will act as an independent bar to relief against pending actions, however, remains an open question. While superficially it would appear that the only resolution can be a judicial interpretation of the statute, there is yet another possibility—a judicially-created exception to §2283, independent of §1983.

Some support for this contention is garnered from the example in *Leitner Minerals, Inc. v. United States*,⁹¹ where the Court judicially created such an exception. In addition, language in the concurring opinion of Mr. Justice Brennan, in *Perez v. Ledesma*,⁹² is compelling:

Taken together, the principles of *Ex parte Young* and *Dombrowski*, establish that whether a particular case is appropriate for federal intervention depends both on whether a state proceeding is pending and on the ground asserted for intervention. Where the ground is bad faith harassment, intervention is justified *whether or not a state prosecution is pending*. [Emphasis added.]⁹³

Immediately prior thereto, Mr. Justice Brennan recognized the existence of the §2283 bar to relief but commented that *Dombrowski* stood for the principles that bad faith and harassment constitute "exceptional circumstances."⁹⁴ It is contended that this concept is not inconsistent with the opinion of the Court.⁹⁵

⁸⁸ *Id.* at 762-763.

⁸⁹ *Id.* at 760-761.

⁹⁰ *Id.* at 762-763.

⁹¹ 352 U.S. 720 (1957).

⁹² 91 S. Ct. 674 (1971).

⁹³ *Id.* at 694.

⁹⁴ *Id.* at 693.

⁹⁵ See *Carey*, *supra* note 7, at 31.

Thus it appears that there may be two avenues to obtaining federal injunctive relief, despite the §2283 ban: (1) the incorporation of §1983 into the legislative exceptions; and (2) the judicial creation of "exceptional circumstance" exceptions. Either course, however, is highly volatile at this time. Hopefully, the Court or Congress will attend to a clarification in the near future.

Conclusion

The question, whether federal courts should intervene in state criminal prosecutions, is a matter of balance. On the one hand are considerations of federalism and a national policy against federal interference. On the other hand is an ever-increasing vocalization of individual rights and a charge to the federal courts to protect those rights, as guaranteed by the Constitution.

In the past few years, a new element has been added which merits consideration. In the *Proceedings of the Judicial Conference of the United States*,⁹⁶ it was noted that three-judge court applications for injunctive relief against state prosecutions are tying up the federal courts. Though this consideration should in no way be determinative on the question of intervention, it may well be an influential factor.

In any case, the current state of the law is seemingly well imbedded in notions of federalism, comity and "national policy." Despite the grim outlook for interventionists, however, §1983 and the "exceptional circumstance" viewpoint remain as a source of optimism. Though the Court has avoided coming to grips with these problems, its deference does not necessarily mean that it will not someday find "exceptions" to §2283. For the present, it will suffice to say that the vestiges of federalism are alive and well in the §2283 anti-injunction act.

⁹⁶ JUDICIAL CONFERENCE, *supra* note 2, at 73.