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THE RIGHT TO AVOID TRIAL: JUSTIFYING FEDERAL COURT INTERVENTION INTO ONGOING STATE COURT PROCEEDINGS

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State courts are presumed to be competent to decide questions of federal law; consequently, federal courts are ordinarily not allowed to intervene in state court proceedings either collaterally or on direct review while they are still pending. Exceptions to the general rules of noninterference do exist, however. In this Article, Professor Collins examines these exceptions to various statutory and judicially-created noninterference rules. He argues that these exceptions are not isolated in nature, but are unified by a concern for the adequacy of state forums to protect against irreparable harm to federal interests despite the usual presumption of parity. Professor Collins further argues that the exceptions to the noninterference rules are consistent with the basic policies underlying the rules themselves. Concluding that considerable overlap exists among the exceptions, the Article offers a theory of "extraordinary circumstances" that preserves a limited role for federal court intervention and that is consistent with the presumption of parity.

I. INTRODUCTION

Federal court intervention into ongoing state judicial proceedings is not an everyday event.[1] Congressional and judge-made jurisdictional rules ordinarily prevent federal court input into state court adjudication until after its conclusion. The Anti-Injunction Act,[2] judicially developed abstention doctrines,[3] and

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1. The subject, however, figures prominently in many of the United States Supreme Court's most recent decisions. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987) (reversing injunction imposed by federal district court that prevented plaintiff, who prevailed in state court, from executing judgment in its favor pending appeal to state appellate court); Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987) (allowing Supreme Court intervention into ongoing state criminal proceedings); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (denying federal injunction against ongoing state agency enforcement proceeding); Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986) (reversing injunction that halted ongoing state civil proceedings); *see also* Deakins v. Monaghan, 798 F.2d 632 (3d Cir. 1986) (federal trial court interference with ongoing state grand jury proceedings), *cert. granted*, 107 S. Ct. 946 (1987).

2. 28 U.S.C. § 2283 (1982) (banning federal court injunctions against state court proceedings); *cf.* Johnson Act, 28 U.S.C. § 1342 (1982) (denying federal district courts the power to enjoin operation of public utility rates); Tax Injunction Act, 28 U.S.C. § 1341 (1982) (denying federal district courts the power to enjoin assessment, levy, or collection of state taxes).

3. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (equitable restraint); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention).

the exhaustion requirement for federal habeas corpus[4] provide the most familiar examples of noninterference rules. The narrow scope of removal for federal question cases filed in state court[5] and the requirement of a final judgment prior to United States Supreme Court review of state court decisions[6] further restrict immediate federal interference. Taken together, the noninterference rules often make state courts the initial and, as a practical matter, the final arbiter of many questions of federal law and related facts.

Congress, of course, has enacted other statutes that would seem to provide an avenue for prompt vindication of federal rights and the resolution of federal issues in federal court.[7] Despite such statutes, the noninterference rules allow state judicial systems a free hand in resolving disputes over which they have asserted jurisdiction—even though federal law may provide a complete defense to the state law claim, and even though suits raising the same issues might be brought in federal court.[8] Some noninterference rules allow federal litigation to proceed simultaneously with state court proceedings and simply bar federal courts from enjoining them.[9] Other noninterference rules, however, bar litigants from pursuing parallel federal court litigation altogether, thus ensuring that state courts will exercise jurisdiction to the exclusion of federal courts.[10]

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4. *See Ex parte* Royall, 117 U.S. 241 (1886) (requiring federal habeas applicants in custody prior to judgment to exhaust state court remedies); 28 U.S.C. § 2254(b) (1982) (requiring federal habeas applicant in custody pursuant to state court judgment to exhaust state court remedies before case can be heard in federal court).

5. *See* 28 U.S.C. § 1441(a) (1982) (limiting federal question removal to cases that could have been filed in federal court originally); *infra* note 8; *cf.* 28 U.S.C. § 1443 (1982) (civil rights removal).

6. *See* 28 U.S.C. § 1257(1)-(3) (1982) (providing for Supreme Court review of final judgments from state court); *cf.* 28 U.S.C. § 1291 (1982) (providing for review of final decisions from federal district court to federal appeals court).

7. *See, e.g.*, 28 U.S.C. § 1331 (1982) (granting general federal question jurisdiction to federal district courts); *id.* § 1343(a)(3) (1982) (granting federal district courts jurisdiction over constitutional and civil rights claims).

8. Removal from state court on federal question grounds is not an option when the federal issues arise only by way of defense to a claim based on state law; it is limited to civil suits that could have been filed originally in federal court, consistent with the "well-pleaded complaint rule." *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983) (discussing effect of pleading rules for original federal question jurisdiction on removal). *See generally* Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986) (discussing impact of well-pleaded complaint rule on removal).

9. Parallel litigation in the state and federal courts may occur when the state suit is not removable and federal jurisdiction exists over a suit raising the same issues, but neither system defers to or enjoins the other. Prohibitions such as that contained in the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), which bars federal injunctions against ongoing state judicial proceedings, contemplate that both the state and federal court systems may proceed independently, without interference from the other. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970); *cf.* Donovan v. City of Dallas, 377 U.S. 408, 412-413 (1964) (state courts ordinarily cannot enjoin party from prosecuting action in federal district court).

10. Some noninterference rules, such as the doctrine of equitable restraint, do more than prohibit federal courts from shutting down state judicial proceedings; they require the federal courts not to proceed at all when a potentially preclusive federal judgment might "interfere" with the state court's resolution of federal issues in suits over which it has obtained jurisdiction. *See* Samuels v. Mackell, 401 U.S. 66, 68-69 (1971) (applying equitable restraint doctrine of Younger v. Harris, 401 U.S. 37 (1971), to bar declaratory relief); *cf.* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299-301 (1943) (doctrine of comity prohibits declaratory relief that would interfere with state tax collection efforts). To this extent such noninterference rules cut *against* the presumption of parallel litigation of issues in both systems. *See supra* note 9.

The noninterference rules rest on the underlying presumption that state courts ordinarily are just as competent at deciding federal questions and related facts in the first instance as are federal courts.[11] Although this presumption of parity of the state courts is hotly debated by commentators,[12] it is firmly entrenched in the various noninterference doctrines. These doctrines rely on the ability of state court corrective process to police violations of federal law during trial and to catch trial court errors on appeal. They also rely on post-trial federal review to check for federal errors after the state court system has finished with the case.

The noninterference rules and the presumption of parity on which they rest are propelled by a strong sense of deference to ongoing state court decision making in our federal system.[13] In addition to such comity concerns, the interest in efficient judicial administration may favor letting state courts handle suits based on state law that have been filed in state court, and in which federal questions arise only by way of defense or reply. Weighing against the usual presumption of parity and the interest in resolving disputes efficiently in state court, however, is the judicial system's interest in accurate dispute resolution. In a system in which federal issues must be decided, this interest in correct decision making focuses on the proper construction and application of federal law and the accurate finding of facts bearing on federal rights. One manifestation of this interest is the usual availability of a federal forum at some stage of the litigation to give uniform answers to federal questions and to safeguard federally protected interests. Direct review in the Supreme Court is possible in state court cases raising federal questions, and collateral review often is available in criminal cases.[14] The availability of such federal corrective process itself may act as a guarantee of state court parity.[15] Thus, the competing concerns for accurate and efficient dispute resolution are roughly accommodated by current noninterference rules, given the presumption of state court parity and the usual possibility of a posttrial federal forum.

Despite the normal presumption of parity, however, the noninterference rules are not absolute, and there are notable "exceptions" to each of them. The Court has made clear that interference with state court proceedings is sometimes allowable while the state proceedings are still pending, either through injunc-

11. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976) (Court "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states"); Robb v. Connolly, 111 U.S. 624, 637 (1884) (state courts have same duty to uphold Constitution and federal law).

12. *Compare* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (rejecting presumption) *with* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (embracing presumption).

13. *See* O. FISS, THE CIVIL RIGHTS INJUNCTION 67-68 (1978); Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 464-65 (1978).

14. *See* 28 U.S.C. § 1257 (1982) (appeal and certiorari); *id.* § 2254(a) (1982) (postconviction habeas corpus).

15. *Cf.* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 40-41 (1981) (suggesting that state courts might neglect their "constitutional obligation" under the supremacy clause if Congress should ever withdraw Supreme Court review of state court judgments).

tion, removal, pretrial habeas corpus, or early direct review in the Supreme Court. These exceptions to the noninterference rules allow the federal courts to interfere in ongoing state court litigation by effectively bringing it to a halt. Although much attention has been given to the various noninterference rules and their justifications, very little has been paid to their exceptions.[16] The Court usually treats the exceptions to the different noninterference rules separately. Such treatment belies the fact that these exceptions are closely related to each other and feed on similar concerns.

This Article illustrates the remarkable degree of overlap among the rationales for each of the diverse exceptions to the statutory and judge-made noninterference rules. The common thread connecting the exceptions is a concern that the state forum adequately protect against the immediate and irreparable loss of important federal interests. The noninterference rules and their exceptions reflect a judicial consensus that undergoing a state court proceeding, even an erroneously instituted one, and having federal legal and factual questions decided there initially, ordinarily does not entail any irreversible loss of federal rights. The "interlocutory harm" of incorrect decisions on federal issues is usually remediable, given the presumption of parity and the availability of subsequent state and federal corrective process. However, the mere commencement or maintenance of state court proceedings can sometimes work an immediate and independent injury to federally protectable interests that cannot be effectively remedied by posttrial review. Concerns about these potentially unreviewable interlocutory harms are the focus of all the exceptions.

This Article also seeks to demonstrate that the exceptions to the noninterference rules are consistent with the basic policies behind the noninterference rules themselves. The Court allows immediate federal interference in those few cases in which the supremacy of federal law and accuracy of decision making substantially outweigh the powerful concerns for efficient dispute resolution and comity that usually call for nonintervention. The strong presumption of state court parity may be dispelled when the state system is procedurally unable to provide adequate process for resolving federal issues. For example, ongoing state judicial proceedings simply may not allow federal issues to be raised in a sufficiently prompt manner, thus permitting immediate federal intervention.[17] Alternatively, the presumption of parity may be dispelled when continued litigation in the state courts would amount to a substantive injury under federal law.

16. The academic criticism and scholarship that surrounds each of these noninterference rules is extensive, particularly the doctrine of equitable restraint outlined in Younger v. Harris, 401 U.S. 37 (1971), but few efforts have been made to address them together. *See, e.g.*, Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965); Bator, *supra* note 12; Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 311-19, 320-35 (1969); Maraist, *Federal Intervention in State Criminal Proceedings*: Dombrowski, Younger *and Beyond*, 50 TEX. L. REV. 1324, 1332-38 (1972); Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). The only attempt to treat any of the exceptions to these rules is Wingate, *The Bad-Faith Harassment Exception to the* Younger *Doctrine: Exploring the Empty Universe*, 5 REV. OF LITIG. 123 (1986).

17. *See infra* text accompanying notes 98-101.

For example, appellate process or postconviction collateral attack would do little to vindicate a state court litigant's colorable defense to a prosecution based on double jeopardy grounds—a defense that the Court has characterized as a right not to undergo additional trial proceedings at all.[18] Such a claim has, therefore, justified pretrial habeas corpus,[19] an injunction against state court proceedings,[20] and immediate direct review in the Supreme Court under a liberalized reading of the final judgment rule.[21] In cases based on this paradigm, state court corrective process is not only inadequate as a solution for protecting federal interests, it is part of the problem.

Finally, this Article concludes that many of the state court cases giving rise to an exception to one of the noninterference rules can also trigger the applicability of exceptions to the others. Thus, there may be significant overlap among the available forms of immediate federal district court intervention— injunctive relief, removal, or pretrial habeas corpus—given the existence of unusual circumstances warranting prompt federal court action.[22] In addition, there often may be an overlap between the availability of immediate direct review in the Supreme Court before trial under a liberalized doctrine of finality and immediate collateral interference by a federal trial court.[23] In the direct review context, however, problems arise. Once a state court lawsuit is ripe for appellate intervention following a final judgment, the Supreme Court alone may have jurisdiction, to the exclusion of the lower federal courts.[24] This Article, therefore, suggests the directions in which litigants should be able to turn when faced with state court litigation warranting prompt federal court intervention.[25]

Most writing in this area has been based on the premise that the noninterference rules, as construed by the Court, are undesirable obstacles to the vindication of federal rights.[26] Although such arguments are compelling, this Article does not attempt to enter into that well-worn debate. Rather, it operates within

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18. *See, e.g.*, Abney v. United States, 431 U.S. 651, 659-62 (1977) (upholding intervention of federal appeals court after district court failed to dismiss case on double jeopardy grounds); Harris v. Washington, 404 U.S. 55, 56-57 (1971) (per curiam) (upholding Supreme Court intervention after state courts failed to dismiss on double jeopardy grounds); *cf.* Price v. Georgia, 398 U.S. 323, 331 (1970) (upholding defendant's right not to be subjected to double jeopardy.)

19. *See, e.g.*, Gully v. Kunzman, 592 F.2d 283, 287 & n.8 (6th Cir.) (approving federal adjudication of pretrial habeas when state trial court has heard and rejected double jeopardy claim), *cert. denied*, 442 U.S. 924 (1979); Fain v. Duff, 488 F.2d 218, 221-24 (5th Cir. 1973) (approving federal adjudication of pretrial habeas when juvenile has been kept in custody to avoid facing adult charges for same crime), *cert. denied*, 421 U.S. 999 (1975).

20. *See* Willhauck v. Flanagan, 448 U.S. 1323, 1325 (Brennan, Circuit Justice 1980) (dictum); Doe v. Donovan, 747 F.2d 42, 44 (1st Cir. 1984).

21. *See* Smalis v. Pennsylvania, 106 S. Ct. 1745, 1748 n.4 (1986); *cf.* Abney v. United States, 431 U.S. 651, 657-61 (1977) (pretrial denial of motion to quash indictment on double jeopardy grounds held immediately appealable under 28 U.S.C. § 1291 (1982), and under collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

22. *See infra* text accompanying notes 135-46, 178-80 & 224-27.

23. *See infra* text accompanying note 262.

24. *See infra* text accompanying note 263.

25. *See infra* text accompanying notes 264-89.

26. *See, e.g.*, Amsterdam, *supra* note 16; Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979); Redish, *supra* note 16; Soifer & MacGill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

the Court's own framework. It accepts, for purposes of discussion, the usual presumption of state court parity and the Supreme Court's role in the development of noninterference rules. The object of this Article is to develop the contours and limits of the Court's common-law approach to judicial noninterference, and to ascertain whether there is any coherent principle within that framework that nevertheless justifies federal court intervention into ongoing state court proceedings. Moreover, by treating the exceptions to the various noninterference rules as a group of related remedies with a similar purpose, the availability of intervention can be made less uncertain and the mode of possible intervention more predictable.

II. THE *YOUNGER* DOCTRINE OF "OUR FEDERALISM" AND THE IMPORTANCE OF BEING ADEQUATE

Perhaps the most notorious limitation on federal court interference into ongoing state proceedings is the equitable restraint doctrine of *Younger v. Harris*.[27] Relying on principles of equity, comity, and federalism, the United States Supreme Court in *Younger* held that federal courts ordinarily should not enjoin ongoing state criminal proceedings, even when the state court action is based on an unconstitutional statute. Federal intervention into a state criminal proceeding is permitted only if there is a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief."[28] *Younger* requires state court criminal defendants to raise their constitutional claims as a defense to the state proceedings, subject to ultimate review by the Supreme Court. Also, state court defendants in certain ongoing civil proceedings are now subject to this nonintervention rule.[29]

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27. 401 U.S. 37 (1971). Another familiar brand of abstention is associated with Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). There the Court concluded that when litigants attack state statutes on federal constitutional grounds, the state courts should be given the first chance to resolve unclear questions of state law that would dispose of those constitutional issues. The desirability of having state courts construe state law in order for federal courts to avoid reaching constitutional questions, however, does not usually implicate federal noninterference with an *ongoing* state proceeding. *See* Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 226-27. Under *Pullman*, federal litigants ordinarily must commence state proceedings after the federal suit has been filed. *See* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4242, at 453 (1978). Of course, *Pullman* abstention conceivably could arise when there is an already pending state court proceeding in which the unclear questions of state law could be presented. In that situation *Pullman* would resemble a principle of noninterference with an ongoing proceeding such as those discussed here. Nevertheless, if irreparable harms arise in such contexts or in other abstention contexts, they can be policed in much the same way as under the exceptions to *Younger*, discussed in this Article. *See generally* Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65 (1977) (discussing availability of interim federal district court relief in context of *Pullman* abstention).

28. *Younger*, 401 U.S. at 54.

29. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1526-27 (1987) (private enforcement of postjudgment lien and bond provisions in state court); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432-37 (1982) (state bar disciplinary proceedings); Trainor v. Hernandez, 431 U.S. 434, 445-46 & n.8 (1977) (garnishment proceeding brought by state officers in aid of administering welfare programs); Juidice v. Vail, 430 U.S. 327, 335-36 (1977) (contempt action to enforce previously entered default judgment in private debt collection case); Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975) (nuisance proceeding "in aid of and closely related to" crimi-

Younger operates as a judge-made limitation on the congressionally conferred option that otherwise permits litigants challenging unconstitutional state action to go directly to federal court to seek injunctive relief. That general rule, illustrated by *Ex parte Young*,[30] still permits anticipatory injunctions in advance of any state court proceedings to prevent the judicial enforcement of unconstitutional state statutes by state officials. *Younger*'s applicability, therefore, often will turn on the timing of federal relief.[31]

A primary justification for *Younger*'s nonintervention rule is that the "cost, anxiety, and inconvenience"[32] of undergoing good faith judicial proceedings usually does not amount to irreparable harm sufficient to warrant enjoining them. Dispute resolution strongly favors letting good faith litigants—particularly the state or its proxy—have their day in court. That is why the inconvenience of involuntarily being haled into court and undergoing an unwanted lawsuit ordinarily is not a harm society is prepared to correct by the drastic remedy of interference in the middle of litigation.[33] The possibility of raising federal issues by defense supposedly obviates the need for federal equitable intervention.[34] To be sure, the costs of going through a proceeding are "irreparable" in the traditional sense of being noncompensable.[35] But *Younger* demands that there be greater harm than the cost inevitably associated with undergoing good faith litigation before declaratory or injunctive relief is allowed. *Younger* sug-

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nal obscenity statutes). The extent to which *Younger* should apply to state court civil proceedings is a much debated question. *See generally infra* note 144 (listing sources).

30. 209 U.S. 123 (1908).

31. If there is no pending state proceeding when federal relief is sought, a federal suit does not interfere with an ongoing proceeding, and *Younger* is inapplicable. *See* Steffel v. Thompson, 415 U.S. 452, 460-62 (1974). If a state enforcement proceeding is filed *after* the federal suit, however, "but before any proceedings of substance on the merits," the federal court can no longer proceed. Hicks v. Miranda, 422 U.S. 332, 349 (1975). Nevertheless, *Hicks* is only a problem for those who have already violated the law inasmuch as a state proceeding cannot be brought against federal plaintiffs seeking injunctive relief against enforcement of a law they have never violated. The federal plaintiff in such a case may face "case and controversy" problems, however. *See Steffel*, 415 U.S. at 476 (Stewart, J., concurring); *cf.* Bator, *supra* note 12, at 616-18 & nn. 35-37 (noting problems of abstractness when parties raise anticipatory challenges to constitutionality of state statute as applied to future action).

32. *Younger*, 401 U.S. at 46.

33. *Id.*; *accord* Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 244 (1980); Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938); *see also* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.").

34. *Younger*'s "equity" prong is principally based on the tradition of equitable noninterference into criminal proceedings and the rule that equity will not act whenever there is an adequate remedy at law. *See Younger*, 401 U.S. at 43; 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, 597-616 (1975).

35. *See, e.g.*, Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (noting that litigation typically involves "nonrecoupable" expense). Under the "American Rule," litigants ordinarily must bear their own litigation and counsel costs, whether they win or lose. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (rule applies absent legislation to contrary). Recovery in tort for the harm of litigation generally is limited to cases of improper purpose in the use of legal process. *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 897-98 (5th ed. 1984) [hereinafter PROSSER & KEETON] (discussing tort actions for abuse of process and malicious prosecution).

gests that the kind of extraordinary, irreparable harm sufficient to trigger its exceptions, and thus to allow federal interference into pending proceedings, only arises when the state court system cannot fully and fairly protect against the loss of federal rights.[36]

Younger, however, leaves a number of questions unresolved. It fails to indicate, for example, when a particular state court remedy is inadequate, and why state remedies are less adequate in the context of anticipatory, as opposed to ongoing proceedings. It also is unclear how the concern for adequacy of state remedies relates to *Younger*'s articulated equity, comity, and federalism concerns. Some attempt to resolve these issues will assist in understanding the extraordinary circumstances that can warrant federal court intervention into ongoing state proceedings.

A. *The* Young-Younger *Continuum*

1. Equity

Younger's reliance on equity as a basis for its nonintervention rule has been roundly criticized.[37] Equity's traditional reluctance to intervene in ongoing criminal prosecutions is an incomplete argument for the *Younger* doctrine, because *Younger* bars interference with some civil proceedings as well. Also, equity's refusal to act when there is an adequate remedy at law does not fully explain the *Younger* doctrine, because federal equity courts customarily considered only the legal remedies available in federal courts.[38] *Younger*, however, stretches this equity rule across jurisdictional lines by looking to adequate remedies in state proceedings. Only the vaguer concerns of comity and federalism can explain federal court nonintervention into state civil proceedings and the willingness to look to state court remedies.

These usual criticisms, however, do not mean that the *Younger* doctrine is uninformed by equitable considerations, or that equitable concerns cannot help to explain the relationship between *Younger* and *Young*. *Younger* continues to allow litigants who have not yet violated an arguably unconstitutional statute to enjoy *Young*'s promise of a federal equity forum in which they may enjoin a statute's enforcement in advance, assuming they can show a sufficiently "genuine threat" of its enforcement against them.[39] When there has been no violation

36. *See* Juidice v. Vail, 430 U.S. 327, 337 (1977) (*Younger* not applicable absent "an opportunity fairly to pursue . . . constitutional claims"); *accord* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 237 (1984); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 436 n.14 (1982). Adequacy of remedy and irreparability of harm are two sides of the same coin insofar as an adequate remedy is one that prevents irreparable harm, and a harm is reparable if there is an adequate remedy for it. *See* Whitten, *supra* note 34, at 601-02; Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEX. L. REV. 1065, 1070-71 (1979).

37. *See, e.g.*, O. FISS, *supra* note 13, at 61-68; Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1107-08, 1112-15 (1985).

38. *See* O. FISS, *supra* note 13, at 9, 63; *cf.* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1009-10 (2d ed. 1973) [hereinafter HART & WECHSLER] (observing that, prior to merger of law and equity, adequate legal remedy that would bar federal equitable relief was not remedy in state courts, but remedy on "law side" of federal court).

39. *See* Steffel v. Thompson, 415 U.S. 452, 475 (1974) (declaratory judgment action). Jus-

of state law, there will be no ongoing state proceeding with which to interfere, and equity's traditional reluctance to enjoin criminal proceedings is not fully implicated. Also, equity's requirement that there be no adequate remedy at law arguably is satisfied if there is no ongoing state proceeding in which to raise the federal issues.

However, the difference in equity terms between interference with an ongoing state proceeding and interference with one that has not yet begun is but a matter of degree. Federal litigants must satisfy traditional equitable prerequisites, including a showing of irreparable harm, to secure even anticipatory injunctive relief under *Young*. Nevertheless, those equitable requirements may be easier to satisfy than *Younger*'s requirement of irreparable harm "both great and immediate."[40] In addition, parties seeking anticipatory relief are not wholly without a remedy at law. They could test the law by violating it, and become defendants to a state court proceeding in which they could raise their constitutional questions by defense. That, however, would put them in the classic equity bind of having to choose between compliance with the law and possible loss of constitutional rights, and violation of the law and risk of penalties.[41] By contrast, state court defendants actually being prosecuted for past violations of the challenged statute already have made the hard choice between compliance and violation. Provided they do not intend to engage in similar conduct in the future, they no longer face the choice that equity is prepared to save them from making. Raising the federal issue as a defense to state court proceedings is thus an adequate legal remedy in the sense that it is not for the "pre-action" litigant[42]

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ticiability concerns, therefore, may be harder to satisfy in advance of a violation of the statute. *See id.* at 476 (Stewart, J., concurring). *Compare* City of Houston v. Hill, 107 S.Ct. 2502, 2508 n.7 (1987) (sufficiently genuine threat of enforcement) *with* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (threat not shown).

40. *Younger*, 401 U.S. at 45-46 (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926)). *But cf. Steffel*, 415 U.S. at 471-72 (traditional equitable prerequisites not required for declaratory relief). Justice Black's opinion for the Court in *Younger* arguably meant to apply its "great and immediate" harm rule to suits for federal injunctive relief when, as in *Young*, no prosecution was yet pending against the federal plaintiff. Much of the precedent on which *Younger* relied, including *Fenner* (the source of the "great and irreparable" harm rule), involved only prospective injunctions in the absence of any ongoing state proceeding. *See* Soifer & MacGill, *supra* note 26, at 1148-63. The same was true of Dombrowski v. Pfister, 380 U.S. 479 (1965), in which an injunction was sought against merely threatened proceedings. *See* Laycock, *supra* note 26, at 663-69; *see also* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 295 (1980) (noting that *Dombrowski*, if limited to injunctions against future prosecutions involving first amendment challenges, is "considerably narrower than *Young*"). *Compare* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (applying "traditional standard" for preliminary injunction against state law's enforcement when no pending prosecution against federal plaintiff) *with* Wooley v. Maynard, 430 U.S. 705, 712 (1977) (intimating that "exceptional circumstances" of *Younger* authorized permanent injunction even though no pending prosecution).

41. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 392 (1948). One commentator refers to this hard-choice predicament as the "*Young* dilemma." Laycock, *supra* note 26, at 641.

42. Pre-action litigants are ones who have not yet violated the law that they challenge. Post-action litigants (those who have violated the law) also have an anticipatory remedy if they are not being prosecuted. If such federal plaintiffs seek anticipatory relief against a statute's enforcement and have violated the statute in the past, they may seek federal relief respecting future prosecutions. *See* Steffel v. Thompson, 415 U.S. 452 (1974) (declaratory judgment). *But cf.* Hicks v. Miranda, 422 U.S. 332, 349 (1975) (*Younger* triggered if state proceeding is commenced after filing of federal lawsuit, but before proceedings of substance on the merits in federal court); Wells, *supra* note 37, at 1114-15 (observing that contrary to *Hicks*, equity ordinarily only would take into account adequate

who can obtain a remedy only at the risk of violating the law.

Nevertheless, state court defendants wishing to engage in arguably protected conduct during the resolution of already pending charges against them for similar conduct are still in *Young*'s equity dilemma. They cannot know if their conduct is protected until the state courts have finished with their case. Thus, they risk further prosecution if they again violate the statute while the state proceedings against their prior violations are still active. The Supreme Court, however, has denied a federal trial forum to state court defendants who seek to enjoin future, but not ongoing, prosecutions against them, because of the disruptive effect that any such federal court adjudication would have on the ongoing state proceeding.[43] That interference would not be much greater than the practical interference arising from a simultaneous anticipatory attack in federal court by parties who face a genuine threat of enforcement, but who are *not* being prosecuted—a form of interference the Court still permits.[44] Thus, even if *Younger*'s rule ordinarily makes sense, its application to future conduct of a defendant already in an ongoing proceeding does not.

In any event, supremacy concerns more strongly favor equitable intervention at the pre-action stage. A truly Draconian statute may so successfully chill any would-be violator into compliance with the law that no challenge to it ever would be attempted. Unless a litigant could bring an anticipatory attack, no judicial review of such a law would ever take place. In this sense the state remedy also is inadequate. In addition, although equity's abhorrence of enjoining criminal proceedings is implicated when injunctions are issued against anticipated as well as ongoing actions,[45] the harm is somewhat more diffuse in the anticipatory suit context when no state court trial is yet underway.

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legal remedies available at the time equity suit was filed). Law violators who have already been prosecuted and sentenced for their past violations of a challenged statute also may seek anticipatory relief against threatened future prosecutions. *See* Wooley v. Maynard, 430 U.S. 705, 711-12 (1977).

43. *Compare* Roe v. Wade, 410 U.S. 113, 125-27 (1973) (because of interference that federal judgment might have on pending prosecution, doctor being prosecuted for violating state law banning abortions could not seek prospective relief against future enforcement of statute) *with* Cline v. Frink Dairy Co., 274 U.S. 445, 451-53 (1927) (allowing injunctive relief against future enforcement of statute that formed the basis of then-pending state court enforcement proceeding against federal plaintiff). *See generally* Laycock, *supra* note 27, at 204-07 (criticizing *Younger*'s failure to allow for prospective relief in such situations).

44. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 929-30 (1975) (preliminary injunction granted to two nightclubs complying with unconstitutional obscenity ordinance; *Younger* barred relief to another similarly situated club that was being prosecuted for violating ordinance); Steffel v. Thompson, 415 U.S. 452, 475 (1974) (declaratory judgment granted to party who complied with antitrespassing statute while cohort was prosecuted under same statute); *see also infra* note 48 (discussing potential impact on state proceeding). Once a prosecution is underway against someone who has risked violations of the law, there is at least a chance that the question of unconstitutional state action eventually will be reviewed by a federal court—either in the Supreme Court on direct review, or collaterally on posttrial habeas corpus. *Cf.* Laycock, *supra* note 26, at 665-69 (noting obstacles to eventual review). *Younger* gave short shrift to the argument, successfully made in Dombrowski v. Pfister, 380 U.S. 479, 486-89 (1965), that the continuing chill to first amendment rights engendered by prosecutions based on an overbroad statute was sufficient to warrant equitable relief. *See Younger*, 401 U.S. at 50 (recharacterizing *Dombrowski* as a case of bad faith prosecution). But *Younger*'s rejection of the "chill" argument as a ground for injunctive relief in the context of pending prosecutions does not mean that the argument lacks force in the preprosecution context.

45. Even a purely prospective injunction under *Young* tells the state not to enforce its own laws in its own courts. *See* Redish, *supra* note 13, at 475.

2. Comity (and Federalism)

Comity, which *Younger* dubbed a "more vital consideration" than equity, is a principle of deference and "proper respect" for state governmental functions in our federal system.[46] Although such concerns propelled the result in *Younger*, which involved an ongoing state proceeding, they also are implicated in the anticipatory context. Injunctions under *Young* order a state's law enforcement machinery to grind to a halt and effectively disable the state courts from processing state law claims.

When federal courts issue injunctions against merely threatened proceedings, however, principles of comity and federalism are less seriously affected than when federal court injunctions interfere with a proceeding that is actually pending. If there is a state court action already underway, a federal court lawsuit multiplies the proceedings and arguably casts doubt on the competence of the state judiciary to decide federal issues with which it is presented.[47] Once the state court suit has commenced, there is also a greater need for treating the state court action as a single package on direct review (or postconviction collateral attack) rather than carving out federal issues for immediate adjudication in federal court. State law or factual issues may render a decision on the federal questions unnecessary, or cast them in a different light. The main difference in federalism and comity terms, however, is the high visibility of the federal court disruption of a state proceeding by terminating a particular ongoing proceeding as opposed to arresting one not yet commenced.

Nevertheless, similar impacts on comity and federalism interests can sometimes, if less frequently, arise in the anticipatory context. Injunction suits filed by parties who are not being prosecuted may proceed in federal court alongside the state court prosecution of others similarly situated, despite a comparable potential for "insult" to the state judiciary.[48] Further, the visible affront of arresting an ongoing proceeding can arise in an anticipatory suit, as it did in *Young*: if the enforcement officials decide to ignore the federal court's prospective injunction against the bringing of proceedings, the federal court may hold the officials in contempt.[49]

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46. *Younger*, 401 U.S. at 44.

47. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974) (*Younger*'s concerns have "little vitality" in the no-prosecution-pending context).

48. *See id.* at 475 (plaintiff threatened with arrest could attack constitutionality of antitrespassing statute while arrested cohort faced prosecution for violating same statute). A comparable potential for interference in these cases exists because a federal suit by someone who is not being prosecuted will draw the federal court into passing on the constitutionality of the state statute forming the basis of the ongoing state court proceeding. At the very least, this will have a practical impact on the state court's decision on the constitutional question. *Cf.* Samuels v. Mackell, 401 U.S. 66, 69-72 (1971) (*Younger* bars issuance of declaratory judgment on behalf of defendant in ongoing state court enforcement proceeding because it would have a "practical impact," if not preclusive effect on ongoing proceedings).

49. *Ex parte* Young was a contempt proceeding brought against a state attorney general for violating a lower federal court injunction against the enforcement of state rate regulations. 209 U.S. 123, 126 (1908).

3. Harmonizing *Young* and *Younger*

Admittedly, *Younger* does imperfect service to the policies on which it purports to rest. It stands in open tension with *Young* and the policy that federal courts should not refuse jurisdiction when Congress has conferred it.[50] Both *Younger* and *Young*, however, implicate questions of equity, comity, and federalism, as well as the interests of the judicial system that feed those considerations. The difference between their results can be partially explained by the fact that the underlying concerns of the judicial system expressed in *Younger* are, in the pre-action *Young* context, less drastically implicated. In addition, the interest in accurate federal law decisionmaking weighs more heavily on the side of intervention in the pre-action context. Currently, *Younger*'s analysis is largely, if not wholly, informed by timing. Articulation of the reasons underlying that analysis helps to delineate when the Court might find state remedies inadequate as a general matter. The *Younger* analysis thus provides a framework for deciding when, if ever, litigants might be able to establish the extraordinary circumstances sufficient to invoke the exceptions to *Younger*'s noninterference rule, even if the litigants are already embroiled in an ongoing state proceeding.

B. *Substantive Self-Correction Problems*

Younger suggests that, despite its ordinary rule against interference, there may be times when federal courts can intervene into already pending state court enforcement proceedings.[51] Although equity, comity, and federalism are imperfectly served by *Younger*, these doctrines—along with the interest in efficient dispute resolution and accurate decisionmaking—are the driving forces behind the recognized exceptions to the *Younger* rule.

1. Bad Faith Prosecutions

The scope of *Younger*'s "bad faith" exception is not altogether clear. Although the Court has never found a bad faith proceeding since its decision in *Younger*, it consistently has recognized that abstention would not be required in such a case.[52] The Court has linked bad faith both with prosecutorial "harassment" and with the absence of any reasonable hope of success on the merits.[53]

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50. *See* Redish, *supra* note 16, at 78-79.

51. *See Younger*, 401 U.S. at 44.

52. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 432 (1979); *cf.* Kugler v. Helfant, 421 U.S. 117, 124-26 (1975) (rejecting bad faith claim, although recognizing viability of bad faith claim as basis for intervention). The *Younger* Court offered as an example of the bad faith exception its earlier decision in Dombrowski v. Pfister, 380 U.S. 479 (1965), in which state proceedings had been brought and were threatened with an eye toward deterring defendants' exercise of federal rights. 401 U.S. at 48. *See also* Cameron v. Johnson, 390 U.S. 611, 620-22 (1968) (refusing to find bad faith prosecution despite allegations of improper motivation when there was some evidence to support charges); *cf.* Gelpe, *Exhaustion of Administrative Remedies: Lessons From Environmental Cases*, 53 GEO. WASH. L. REV. 1, 47-48 (1984-85) (treating agency bad faith as exception to requirement of exhaustion of administrative remedies).

53. *Compare* Cameron v. Johnson, 390 U.S. 611, 621 (1968) (pre-*Younger* case in which Court viewed bad faith prosecution as one "with no expectation of convictions but only to discourage exercise of protected rights") *with* Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975) (prosecution in bad faith if brought "without a reasonable expectation of obtaining a valid conviction"). *Cf.* Enochs

Relying on these various characterizations, lower courts have on occasion found bad faith sufficient to warrant federal injunctive relief against ongoing state proceedings when state actors have undertaken a prosecution because of the defendant's membership in a traditionally suspect class or have retaliated against the exercise of a federally protected right.[54] This focus on discriminatory intent is consistent with the modern equal protection analysis that these cases most nearly resemble.[55] Some courts have found bad faith, absent discriminatory or retaliatory animus, when the prosecution has been frivolous or undertaken without any objectively reasonable hope of success.[56]

There is, of course, a conflict between *Younger*'s rationale and its bad faith exception.[57] A prosecution without any objectively reasonable hope of success presumably will not succeed, thus obviating the need for *any* federal intervention, either before or after trial. If state courts are presumed to be as capable as federal courts at dismissing wholly bogus cases, a bad faith objection conceivably could be raised as a defense in the state court proceedings. Moreover, putting the prosecution on trial in federal court by inquiring into prosecutorial motivation while the state proceeding is still pending raises substantial federalism and comity concerns.[58]

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v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962) (noting in dictum that injunction could issue against *federal* tax collection, despite anti-injunction command of 26 U.S.C. § 7421(a) (1982), "if it is clear that under no circumstances could the Government ultimately prevail"). Harassment is a kind of subjective bad faith, and thus should be a ground for intervention, quite apart from the absence of any reasonable expectation of conviction. *See* Redish, *supra* note 13, at 473-74 n.98; *cf.* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1372(7), at 308-09 (1969) [hereinafter ALI STUDY] (allowing an injunction when state law "plainly" cannot be constitutionally applied, *or* when enforcement is "plainly" discriminatory); Perez v. Ledesma, 401 U.S. 82, 118 n.11 (1971) (Brennan, J., concurring in part and dissenting in part) (citing ALI STUDY, § 1372(7), at 308-10, and distinguishing between harassment and "no reasonable hope of conviction" as separate grounds for finding bad faith). *But see* Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1115 n.34 (1977) (arguing that harassment and bad faith invariably are two sides of the same coin); *cf.* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535, 586 (1970) (viewing *Cameron* as a motivation-plus-no-evidence test).

54. *See, e.g.*, Rowe v. Griffin, 676 F.2d 524, 525-26 (11th Cir. 1982); Heimbach v. Village of Lyons, 597 F.2d 344, 346-47 (2d Cir. 1979) (per curiam); Wilson v. Thompson, 593 F.2d 1375, 1381-83 (5th Cir. 1979); Timmerman v. Brown, 528 F.2d 811, 815 (4th Cir. 1975); Shaw v. Garrison, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972); Wichert v. Walter, 606 F. Supp. 1516, 1521-22 (D.N.J. 1985); *see also* Wingate, *supra* note 16, at 133-43 (discussing recent applications of bad faith exception); Sedler, *Dombrowski in the Wake of Younger*, 1972 WIS. L. REV. 1, 29-42 (discussing early applications of bad faith exception).

55. *See* Washington v. Davis, 426 U.S. 229, 239-41 (1976); *cf.* Wayte v. United States, 470 U.S. 598, 608 (1985) (in selective prosecution claims against federal officers, defendant must show discriminatory intent); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977) (discussing burdens of proof in unconstitutional motivation cases).

56. *See, e.g.*, Central Avenue News, Inc. v. City of Minot, 651 F.2d 565, 570 (8th Cir. 1981); Fitzgerald v. Peek, 636 F.2d 943, 945 (5th Cir.), *cert. denied*, 452 U.S. 916 (1981); Pizzolato v. Perez, 524 F. Supp. 914, 921, 922 (E.D. La. 1981). However, in Cameron v. Johnson, 390 U.S. 611 (1968), a pre-*Younger* decision, the Court indicated bad faith could not be shown when the record was "not totally devoid of support" for the prosecution's claim. *Id.* at 622.

57. *See, e.g.*, Redish, *supra* note 13, at 473-74 & nn.67-70; Comment, *Limiting the* Younger *Doctrine: A Critique and Proposal*, 67 CALIF. L. REV. 1318, 1328 (1979). *But cf.* Maraist, *supra* note 16, at 1340-42 (referring to bad faith prosecution as the "most appealing case for federal intervention").

58. *See* Maraist, *supra* note 53, at 587; *cf.* Wayte v. United States, 470 U.S. 598, 607 (1985)

In their concurrence to *Younger*, Justices Stewart and Harlan argued that an injunction should lie against an ongoing bad faith prosecution, because "the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights."[59] According to this view, the constitutional target warranting prompt federal action is not the unconstitutional statute on which a state court prosecution might be based; it is the bad faith proceeding itself. A baseless prosecution runs afoul of due process; a retaliatory one violates equal protection.[60] Although the burden of undergoing a lawsuit ordinarily is not actionable, it can, like other ordinarily lawful burdens, become actionable when it is distributed on an unconstitutional basis, such as race, or in an arbitrary and capricious manner. Thus, under this rationale, a bad faith prosecution should be actionable in federal court as a constitutional deprivation, even if the underlying statute on which it is based is not challenged.[61]

Moreover, the injury to constitutionally protected interests caused by an ongoing bad faith proceeding, no matter what the statutory basis, is a present and largely irretrievable loss. The constitutional harm of which such defendants complain is not simply a conviction under an illegal statute, but the harm of enduring the enforcement proceeding itself. Subsequent corrective judicial process, either up the ladder of direct review or by postconviction collateral attack, cannot effectively remedy that denial because it will have been complete by the very maintenance and continuation of proceedings.[62] The state officer's intended retaliation or punishment can be perfected partly by the mere bringing of charges;[63] the state proceedings become not only inadequate, but the very harm

(decision to prosecute is particularly ill-suited to judicial review; such an inquiry would "chill" prosecutorial decisionmaking).

59. 401 U.S. at 56 (Stewart and Harlan, JJ., concurring); *cf. Ex parte* Young, 209 U.S. 123, 153 (1908) (suggesting that mere filing of lawsuit may be an actual injury "equivalent in some cases to a trespass").

60. *See* Currie, *supra* note 16, at 332; *cf.* Wayte v. United States, 470 U.S. 598, 608-09 (1985) ("selective prosecution" by federal prosecutors violates Constitution if brought "because of" exercise of federally protected rights or because of other improper basis such as race or religion).

61. *See, e.g.*, Perez v. Ledesma, 401 U.S. 82, 118 n.11 (1971) (Brennan, J., concurring in part and dissenting in part); *see also* Sedler, *supra* note 54, at 40 n. 227 ("Where bad faith is established . . . it does not matter if the underlying law is constitutional."); Whitten, *supra* note 34, at 636 & n.185.

62. *But cf.* United States v. Hollywood Motor Car Co., 458 U.S. 263, 268 (1982) (per curiam) (concluding that claim of prosecutorial vindictiveness in recharging federal criminal defendant in violation of due process can be vindicated on posttrial appeal from a final judgment of federal district court); Flynt v. Ohio, 451 U.S. 619, 622 (1981) (per curiam) (concluding that claim of selective and discriminatory prosecution of state defendant in violation of equal protection clause can be vindicated on Supreme Court review from final judgment following trial). *See also infra* text accompanying notes 257-58 (discussing *Flynt*).

63. This is more likely to happen in those cases in which the prosecution is being used for an improper purpose than those in which it is objectively frivolous, although a frivolous suit may itself reflect subjective bad faith. *See supra* note 53. Thus, immediate review may be more compelling in the bad intent cases. A similar dichotomy exists in ordinary tort law. A "malicious prosecution" suit attacks the substantive baselessness of court proceedings, but must be brought after the initial litigation is completed. An "abuse of process" suit attacks the impermissible purpose for which litigation has been brought, but does not have to await the conclusion of the challenged proceedings. *See* PROSSER & KEETON, *supra* note 35, at 897-98.

to be avoided. A constitutional claim of bad faith, therefore, is more than an ordinary dispositive federal defense; it is a defense to enduring further proceedings altogether.

As noted above, there is not a complete absence of corrective process in the state court system to remedy a bad faith prosecution.[64] For example, a posttrial damage action might provide a limited form of remedy. But the damage calculation in such cases may be speculative, and juries may not value the loss accurately.[65] Also, personal immunities of prosecutors who bring the state's cases would make a subsequent damage remedy impractical.[66] Thus, the justification for equitable relief may flow from the unavailability or uncertainty of monetary relief against these otherwise immune state actors.[67] Similarly, although prevailing on appeal may be a sufficient remedy to the criminal charges, it is not a complete remedy to redress the loss inflicted on valuable federal rights by the state judicial system.[68] Nor can appeal remedy the ability of the bad faith prosecution to stifle protected activity pending the outcome of state process if the prosecution has been brought purposefully to retaliate against or deter protected activity. Moreover, given the usual deference accorded initial factfinders both on direct and on posttrial collateral review, appeal may be a wholly ineffective remedy to the criminal proceeding. Reversal may also result for reasons unrelated to the bad faith claim, thus insulating the issue of bad faith from review.[69] Because the constitutional injury lies in the very act of undergoing the state prosecution, the absence of review would result in a constitutional wrong remaining effectively unremedied.

Although posttrial relief might be ineffective, a state court defendant conceivably could raise the bad faith issue in the ongoing state court proceedings before trial by a motion to quash the indictment or dismiss the suit.[70] But even this remedy, assuming it were available, could be incomplete. What happens, for example, if the state court wrongfully denies the motion to dismiss on bad faith grounds? The defendants will then be forced to undergo proceedings that they have a right to avoid completely. Also, it may not always be possible to seek

64. *See supra* text accompanying notes 57-58.

65. *See Ex parte* Young, 209 U.S. 123, 164 (1908) (indicating that complex constitutional fact issues may be beyond jury's comprehension); *cf.* Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537, 2544 (1986) (denying noncompensatory monetary recovery for "inherent" value of constitutional rights); *see generally* O. FISS, *supra* note 13, at 74-80 (noting difficulties of preferring monetary to injunctive relief in civil rights litigation).

66. *See* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (absolute personal immunity for prosecutors from civil damages liability respecting decision to prosecute). *But cf.* Pembaur v. Cincinnati, 106 S. Ct. 1292, 1298-99 & n.2 (1986) (county prosecutor's instruction to local law enforcement officials may constitute "policy" sufficient to impose municipal liability for prosecutor's unconstitutional acts under Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978), without regard to possible personal immunities of prosecutor).

67. *See* Woolhandler, *Patterns of Official Immunity and Accountability,* 37 CASE W. RES. 396, 419-21 (1987).

68. *See* Laycock, *supra* note 27, at 197-202.

69. Laycock, *supra* note 27, at 200.

70. Exhaustion of state remedies ordinarily is not a prerequisite to a suit under 42 U.S.C. § 1983 (1982). *See* Patsy v. Board of Regents, 457 U.S. 496, 507 (1982). But *Younger,* if applicable, imposes an exhaustion-like requirement, which applies to trial proceedings as well as to state court appellate review. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 611 n.22 (1975).

relief from a federal trial court *after* exposing the bad faith issue to the state court because of preclusion problems.[71] The state trial court's decision might be subject to immediate interlocutory appeal within the state system, but even if it is, the trial court's decision simply may be affirmed. At that point, under a broad reading of the final judgment statute, state court defendants arguably would be able to seek immediate Supreme Court review.[72] If that is the only available avenue, however, the federal trial forum has been completely eliminated. Dispositive issues threatening irreparable harm to federal rights will have been channeled into a distant and uncertain federal forum. These difficult preliminary issues confront any suggestion that extraordinary circumstance defenses such as bad faith be preliminarily submitted to the state courts.[73]

In addition, despite the usual strong presumption of parity, the state judiciary may not be in the best position to judge its own structural failings or the good faith of the quasi-judicial officers who initiate proceedings.[74] Certainly not every constitutional harm about to be inflicted by the state judicial system, particularly one that arises during trial on a case-by-case basis, can or should be policed by immediate federal trial court intervention. Yet failings of a constitutional dimension that go to the fundamental fairness of the process, that are resolvable prior to trial, and that implicate the decision to prosecute—failings that state courts might be especially reluctant to police—are of a different order.[75] Asking the state judiciary to pass on prosecutorial bad faith may not be as impossible a task as asking the state judiciary to pass on its own fairness or self-interest.[76] However, requiring state judges to decide the motivation of a prosecutor who acts in a quasi-judicial capacity in bringing the very litigation that is before their court is much closer to that task than when the judiciary is asked to test the constitutionality of legislative or executive action.[77] Pretrial corrective process in state court may, therefore, be a less adequate remedy to the harm inflicted by a bad faith prosecution than it is against other constitutional harms.[78]

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71. *But see infra* text accompanying notes 257-59.

72. *See infra* text accompanying notes 265-67.

73. *See infra* text accompanying notes 268-70.

74. *But cf.* Batson v. Kentucky, 106 S. Ct. 1712, 1722 (1986) (state violates equal protection clause when prosecutor intentionally discriminates on basis of race in striking individual jurors).

75. An analogous inquiry into the extent that constitutional error may have affected the courts' truth-finding function is undertaken in deciding whether relitigation should be allowed on post-conviction collateral attack on federal habeas corpus. *Compare* Stone v. Powell, 428 U.S. 465, 494 (1976) (full and fair opportunity to litigate search and seizure claim in state court precludes federal habeas relief) *with* Kimmelman v. Morrison, 106 S. Ct. 2574, 2585-86 (1986) (allowing relitigation of competence of counsel claim).

76. *See* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 492-503 (1986); *infra* text accompanying notes 102-04.

77. Only to the extent that bad faith is premised on illicit motive, however, will the state court have to make state-of-mind inquiries. *See supra* note 53.

78. Perhaps a litigant could be required to file a separate suit in state court to enjoin the state proceedings. *See* Whitten, *supra* note 34, at 678. Yet, even assuming that most states had such procedures and that state judges would be willing to enjoin their fellow judges' criminal cases, the suggestion is fraught with even more difficulty than a requirement of preliminary exhaustion of remedies within a given proceeding. Equity, moreover, always looked to the adequacy of legal remedies, not other equitable remedies. *Younger* has never been thought to upset the long-standing prin-

Finally, comity concerns are less strongly implicated when the state's misuse of its own judicial system is the alleged source of the constitutional injury. Forcing involuntary litigants to pursue additional state court avenues, even untainted ones such as pretrial motions or interlocutory appeals, only compounds the harm of being in state court. Such avenues are part of the very process resulting from prosecutorial bad faith. Comity concerns also are diminished insofar as a dispositive defense such as bad faith is independent from and collateral to the merits of any state law claims. Normally, the concern for prompt resolution of disputes and the need for adjudication of federal and state issues in a single suit militate against immediate collateral interference that carves off dispositive federal issues for initial federal inspection. Those same concerns, however, actually favor prompt interference when the dispositive bad faith claim is particularly strong.[79] These factors—the irretrievability of the loss suffered by undergoing the proceedings, the deficiency of state court corrective process, and the relaxed need for attending to comity concerns—provide the underlying rationale for the bad faith prosecution exception to *Younger*'s noninterference rule.

2. Proceedings Violative of Other Federal Rights

In keeping with the bad faith paradigm, injunctive relief ought to be available whenever the mere maintenance of state proceedings would work an independent deprivation of federally protected interests that could not be protected by subsequent appellate review. For example, an equally necessary if not more compelling use of immediate federal intervention exists when a state court defendant seeks to abort a proceeding that is being pressed in violation of the double jeopardy clause.[80] As a constitutional matter, the harm of which the

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ciple that parties need not first file a separate lawsuit in state court before seeking a remedy in federal court; it merely requires them to raise federal defenses in any ongoing enforcement proceeding. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961) (federal remedy under § 1983 is "supplementary" to any state court action that the federal plaintiff might be able to pursue), *overruled in part on other grounds by* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663 (1978). If state law does not permit a federal question to be raised by defense in an ongoing lawsuit, thus necessitating a separate proceeding to test that question, Congress has granted the litigant the option of choosing the federal forum at that point. *Cf.* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105-06 & n.2 (1944) (no "plain, speedy, and efficient" remedy in state court proceeding within meaning of Johnson Act, 28 U.S.C. § 1342 (1982), even though separate state court suit for a declaratory judgment could have been filed). "The *Younger* doctrine has so far been limited to situations where, in the Court's view, the federal claimant is not entitled to become a plaintiff at all, because he has an adequate remedy as a defendant." Laycock, *supra* note 27, at 199.

The uncertainty, if not futility, of attacking one state trial court's refusal to hear federal issues in another state trial court has never been an adequate remedy in analogous contexts. *See infra* note 106. The adequacy inquiry has, therefore, traditionally been limited to consideration of the unextraordinary procedures available in the very proceedings that are pending against the would-be federal litigant. *See also* Moore v. Sims, 442 U.S. 415, 425 & n.9 (1979) (state court counterclaim device was sufficient opportunity to raise due process challenge to state proceedings).

79. The concern for probability of success on the merits is a consideration that goes into the calculus for preliminary injunctive relief, and is thus always an extra check on the precipitous invocation of *Younger*'s bad faith exception. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 430-31, 449-55 (1973); *see also* Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 544-48, 555-56 (1978) (discussing likelihood of success as factor in award of interim injunctive relief).

80. *See* U.S. CONST. amend. V; Willhauck v. Flanagan, 448 U.S. 1323, 1325 (1980) (Brennan,

defendant complains is having to undergo a second trial, rather than a right to be free from conviction after a second run-through.[81] The harm in this case, like the harm of a bad faith proceeding, cannot be vindicated by subsequent corrective process. The postdeprivation remedy is too little and too late. For this reason and regardless of whether the legal issue is a close call or whether the prosecutor is acting in utter good faith, federal intervention is immediately appropriate.[82]

As the double jeopardy claim suggests, *Younger* also should not be an obstacle to federal court interference if other substantively guaranteed federal interests necessarily would be impaired by the mere maintenance of a prosecution, even one in good faith. In *Ohio Civil Rights Commission v. Dayton Christian Schools*,[83] for example, a defendant in a state agency enforcement proceeding claimed a first amendment right to be free from the agency investigation altogether. A similar claim once was raised by a defendant to a state court criminal proceeding who objected to holding trial on her sabbath.[84] The defendants in both cases sought injunctive relief against the ongoing state proceedings, arguing that the very maintenance of the proceedings constituted a violation of their first amendment rights. Although neither of these federal plaintiffs may have been correct on the merits of their constitutional claims, a federal district court should have been able to provide the answer to the constitutional question in those cases, *Younger* notwithstanding. Otherwise, the harm of undergoing a

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Circuit Justice 1980) (noting that question was "an open one," but "that an exception to *Younger* for double jeopardy claims may be appropriate"); *see also* Doe v. Donovan, 747 F.2d 42, 44 (1st Cir. 1984) (finding exception to *Younger*); Allen v. Johnston, 575 F. Supp. 935, 938 (S.D. Iowa 1983) (same).

81. *See* Smalis v. Pennsylvania, 106 S. Ct. 1745, 1748 n.4 (1986) (appealability from state court to Supreme Court under 28 U.S.C. § 1257 (1982)); Abney v. United States, 431 U.S. 651, 658 (1977) (discussing double jeopardy clause in context of appealability from federal trial courts under 28 U.S.C. § 1291 (1982)).

82. To be sure, pretrial disposition of the double jeopardy claim in state court is possible. However, after an adverse determination, problems of immediate federal review or intervention would then arise just as in the bad faith context. *See supra* text accompanying notes 70-73.

83. 106 S. Ct. 2718 (1986). The respondent school claimed a first amendment right to be free from "the mere exercise of jurisdiction over it" by the state employment agency investigating the school's hiring practices. *Id.* at 2724. Although the majority indicated that *Younger* barred interference because there was an opportunity to raise that challenge in the very proceedings the school was undergoing in the state system, nevertheless, it additionally concluded that no first amendment interest was lost by the mere undergoing of state agency procedures. *Id.* However, if it were truly sufficient under *Younger* for the school to have the chance to raise the first amendment issue in the state proceedings, the Court did not need to decide the first amendment question itself. Nevertheless, the Court was right to do so. When a colorable substantive self-correction claim is made that the very undergoing of state proceedings violates constitutional rights, the federal courts must answer the substantive self-correction question itself, even if it decides that a procedural vehicle exists in the state proceedings to raise that same issue. *See id.* at 2726 & n.5 (Stevens, J., concurring).

The school's argument that a state agency decision forcing it to reinstate a particular teacher would also violate its religion clause rights could be answered by the school's ability to raise its first amendment objections to reinstatement in the agency proceeding. Only after an order of reinstatement by the agency would federal district court relief be proper. *See id.*

84. *See* New Jersey v. Chesimard, 555 F.2d 63 (3d Cir. 1977) (en banc). *Compare id.* at 66-68 (*Younger* barred injunctive relief against state court trial of orthodox Muslim held on her sabbath, despite colorable claim that undergoing trial on sabbath violated first amendment rights) *with id.* at 72-74 (Adams, J., dissenting) (extraordinary circumstances exception to *Younger* should have applied) *and id.* at 78 (Gibbons, J., dissenting) ("If the free exercise right . . . is lost *pendente lite* it is lost for all time.").

proceeding that the Constitution arguably prohibits altogether would effectively go uncorrected. As in the bad faith context, a mere opportunity to raise the constitutional issue in state court is inadequate.

3. Patently Unconstitutional Statutes

Younger also left open the availability of an injunction against a proceeding brought under a flagrantly unconstitutional statute.[85] Of course, state corrective process is not completely lacking in these cases either. If the state statute is patently unlawful, the state courts should have no difficulty invalidating the statute. Should the state courts persist in finding the statute constitutional, Supreme Court review would be obligatory.[86] The Court, moreover, seems reluctant to add teeth to this exception.[87]

Nevertheless, attempted enforcement of a patently unconstitutional statute may reflect a lack of good faith by the officials seeking to enforce it or the lawmakers who passed it.[88] Although prosecutors are absolutely immune from damage judgments for bringing and maintaining a prosecution, they are not immune from injunctive relief.[89] Indeed, *Younger* suggests as much by holding out the prospect of injunctions against prosecutions in exceptional circumstances. Allowing an exception to *Younger* when a prosecution is brought against clearly protected activity gives the prosecutor only a qualified or objective good faith immunity[90] from such injunctive relief. Such an approach comports with the Court's suggestion that bad faith can be shown by the lack of any reasonable expectation of success on the merits.[91] In addition, as in the bad faith context, prompt intervention rather than delayed appellate review may further dispute resolution concerns, because the strong likelihood of success should be discernible from the face of the pleadings.[92]

C. *Procedural Self-Correction Problems*

State proceedings, therefore, may be inadequate for *Younger* purposes in a substantive sense, when merely having to defend against them would effect an independent, constitutional violation. In addition, they can be inadequate in a more purely procedural sense, when the state system lacks effective process

85. *See Younger*, 401 U.S. at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). In *Watson*, however, the issue was whether a federal court should refuse to abstain under the doctrine of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See supra* note 27.

86. *See* 28 U.S.C. § 1257(2) (1982) (allowing appeal of right when state statute's validity attacked on federal constitutional grounds and decision in state courts upholds statute's validity).

87. Because of the ease of finding federal law ambiguous or of hypothesizing some constitutional application of the state statute, this "exception" has received short shrift. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 446-47 (1977); *id.* at 461-64 (Stevens, J., dissenting).

88. *See* Whitten, *supra* note 34, at 668-69.

89. *See supra* note 71; *see also* Pulliam v. Allen, 466 U.S. 522 (1984) (officers performing judicial functions not immune from injunctive relief).

90. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (setting out requirements of objective good faith immunity for executive officers in constitutional damage cases).

91. *See supra* text accompanying notes 53-56.

92. *See* Comment, *supra* note 57, at 1329.

either for raising federal questions or for correcting erroneous lower court answers to those questions. Procedural self-correction problems also are present when the state allows federal issues to be raised and reviewed, but does not provide for interlocutory relief that may be necessary to protect against interim loss pending the state court litigation.[93] These procedural self-correction problems mirror the concerns addressed in the Johnson Act[94] and the Tax Injunction Act.[95] Those provisions preclude even wholly prospective injunctive relief by federal courts against state utility rate-making and tax collection efforts, provided there are "plain, speedy and efficient"[96] remedies in the state courts to raise legal attacks on them. Under those anti-injunction acts, federal intervention has been the norm when deficiencies in state procedure could work irreparable injury to a federally protected right.[97] The *Younger* doctrine seems to incorporate a comparable set of limitations in the context of ongoing proceedings.

1. Inability to Raise Federal Issues

The best example of a purely procedural inadequacy occurs when the state system forbids raising the federal issue that requires a prompt decision in an ongoing state court lawsuit. In *Gerstein v. Pugh*[98] the Court upheld immediate federal intervention to allow a party to litigate his constitutional right to avoid pretrial detention by state officials without a probable cause hearing. The detainee's problem was that the ongoing harm of being incarcerated without a hearing, before trial, could not be addressed in any presently ongoing state court proceedings.[99]

Comity concerns are less seriously affected when there is no pending judicial proceeding that is considering the same issues that the federal action would consider. In addition, the constitutional harm in *Gerstein* was one that could

93. *See* cases cited *infra* note 97. In the criminal context, however, the Court has paid little attention to the litigant who seeks interim prospective injunctive relief while a prosecution is pending. *See* Laycock, *supra* note 27 at 196-99.

94. 28 U.S.C. § 1341 (1982).

95. *Id.* § 1342(4).

96. *Id.* §§ 1341, 1342(4). On the relationship between the "plain, speedy and efficient" criteria and general equitable considerations, see Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 524-25 (1981) (denying that former go as far as latter); HART & WECHSLER, *supra* note 38, at 979; Case Comment, *Federal Injunctive Relief in Tax Cases*: LaSalle v. Rosewell, 93 HARV. L. REV. 1016, 1021-27 (1980).

97. *See, e.g.*, Driscoll v. Edison Light & Power Co., 307 U.S. 104, 108 (1939) (lack of opportunity in state system to seek interim injunctive relief not "plain, speedy and efficient" remedy under Johnson Act); Mountain States Power Co. v. Public Serv. Comm'n, 299 U.S. 167, 170 (1936) (same); Pacific Tel. Co. v. Kuykendall, 265 U.S. 196, 204-05 (1924) (absence of interlocutory stay machinery in state court system permits federal equitable intervention in proper case); *see also infra* notes 105 & 111 (discussing inadequate state remedies in context of habeas and procedural due process claims).

98. 420 U.S. 103 (1975).

99. *See id.* at 108 n.9; *see also* Zablocki v. Redhail, 434 U.S. 374, 380 n.5 (1978) (*Younger* not a bar to suit challenging constitutionality of marriage statute when there was no currently ongoing state court proceeding within which to raise issue); Monaghan v. Deakins, 798 F.2d 632, 637 (3d Cir. 1986) (*Younger* not a bar to suit for injunctive relief to recover document from state grand jury proceeding when it was not possible at time federal suit was filed to seek such relief in ongoing state proceedings), *cert. granted*, 107 S. Ct. 946 (1987).

have been mooted before the ordinary avenues of self-correction could become available. Going to trial would eliminate the detainee's problem by ending the pretrial detention, but it would do so at the cost of nonreviewability. Moreover, to the extent that the pretrial detention problem was systemic, the issue would be crystallized and independent from the merits of any single criminal proceeding. Even from a dispute-resolution perspective, the lack of any opportunity within ongoing state proceedings to litigate ripe federal issues also strongly weighs in favor of prompt federal intervention.[100] Thus, when there is an actual showing of the lack of self-corrective process and a harm that must be addressed now or never, there is no parity in fact.[101]

2. Tribunal Bias

The Supreme Court also allowed federal intervention into an ongoing state optometry license revocation proceeding in *Gibson v. Berryhill*.[102] The licensing board's composition in that case violated due process because its members had a financial incentive to revoke the licenses of competing optometrists like the federal plaintiff.[103] Tribunal bias may be disclosed in the course of many proceedings, and often can be policed on direct review after trial and state court appeals.[104] However, like bad faith, systemic bias that goes to the integrity of the truth-finding functions of the tribunal, and that may be raised in advance of the state proceedings, is different. Such bias negates the presumption of state court parity from the outset. When both the tribunal and the bringing of pro-

100. *See Younger*, 401 U.S. at 46. Another traditional use of equity was to guard against a multiplicity of lawsuits. *See* Whitten, *supra* note 34, at 598-99. *Younger* itself seems to bow to that tradition by noting the defendants in that case did not claim that they would be subject to "a series of repeated prosecutions," and by observing the injury to federal interests had to be redressable in a single proceeding. 401 U.S. at 49. If state law allowed for multiple enforcement proceedings in which the federal defense would have to be raised repeatedly, or simultaneously in a host of forums, this would be a procedural failing akin to the inability to have the federal issue decided at all. *See* Ziegler, *An Accommodation of the* Younger *Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 302-03 (1976); *cf.* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303 (1952) (state law requiring multiple suits to be filed in state courts to obtain refund of unconstitutionally collected taxes does not constitute a "plain, speedy and efficient" remedy barring federal court interference under Tax Injunction Act).

101. The Court has also said that even if it is not procedurally possible to adjudicate *immediately* a federal claim in an ongoing enforcement proceeding, the possibility of eventual state court judicial review in which the issue can be raised is sufficient for *Younger* purposes. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 106 S. Ct. 2718, 2724 (1986). *But cf.* Monaghan v. Deakins, 798 F.2d 632, 636-38 & n.6 (3d Cir. 1986) (because grand jury has "no opportunity to adjudicate anything," *Younger* inapplicable to pre-indictment § 1983 suit to obtain return of allegedly unconstitutionally seized documents), *cert. granted*, 107 S. Ct. 946 (1987).

102. 411 U.S. 564 (1973).

103. State law forbade the practice of optometry by anyone who was not self-employed. The federal plaintiff worked for an out-of-state optical company, but the licensing board consisted of members of a state optometric association made up entirely of independent practitioners. *See id.* at 566-68, 571; *see also* United Church of the Medical Center v. Medical Center Comm'n, 689 F.2d 693, 699-700 (7th Cir. 1982) (following *Berryhill*).

104. *See* Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1584-87 (1986) (participation of state supreme court justice with direct stake in outcome of case in which he cast deciding vote violated due process). In *Aetna Life*, the bias was revealed only after the state supreme court had issued its decision. *Id.* at 1584. The bias in *Berryhill* was apparent and ascertainable before the proceedings and with only a minimal factual inquiry. *See* 411 U.S. at 571.

ceedings are tainted, as in *Berryhill*, arguments for prompt federal court intervention are even stronger.

Moreover, in a case such as *Berryhill* there would have been no meaningful opportunity to raise the federal issue before the administrative board, particularly an issue addressed to the tribunal's own fairness. As in the context of posttrial habeas exhaustion, the abject futility of pursuing state remedies should serve as a ground for immediate federal relief under *Younger*.[105] More importantly, even though unbiased state *appellate* process was available in which to press the bias claim in *Berryhill*,[106] the federal plaintiff would have been denied the benefit of his license and business income pending appellate review—an interlocutory harm that would be harder to remedy in a postdeprivation forum.

3. Procedural Due Process Challenges to Ongoing State Judicial Proceedings

A separate and troublesome category of procedural self-correction problems arises when litigants mount a procedural due process challenge to the ongoing state enforcement proceeding in which they are involved.[107] A strong argument exists that a federal court always should be prepared in the first instance to assess the constitutional adequacy of such state proceedings.[108] If the

105. *See* 28 U.S.C. § 2254(b) (1982) (postjudgment exhaustion excused for federal habeas when "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"); *see also* Wilwording v. Swenson, 404 U.S. 250 (1971) (per curiam) (exhaustion not required when it was "a matter of conjecture" whether petitioner's claims would have been heard in state court); Marino v. Ragen, 332 U.S. 561, 568 (1947) (per curiam) (Rutledge, J., concurring) (exhaustion unnecessary "when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find that none of the [alternatives] is appropriate or effective"); Layton v. Carson, 479 F.2d 1275, 1276-77 (5th Cir. 1973) (exhaustion unnecessary "when it is plain that resort to the state courts would be futile" because of entrenched decisional law); HART & WECHSLER, *supra* note 38, at 1489.

The Court, however, has indicated that the existence of some adverse state court precedent does not render the state courts inadequate for *Younger* purposes. *See* Hicks v. Miranda, 422 U.S. 332, 350 n.18 (1975) ("state courts . . . sometimes change their minds"); *cf.* Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1528 (1987) (noting burden rests on party seeking to obviate *Younger* to provide "unambiguous authority" showing inadequacy of state remedies). Nevertheless, a few lower federal courts have drawn the parallel between the futility doctrine of habeas and the exceptional circumstances rule of *Younger*. *See, e.g.*, W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 491 (7th Cir. 1984) (*Younger* inapplicable when "adverse precedent [in state court system] makes the [state] remedies futile as a practical matter"); *see also* Cleaver v. Wilcox, 499 F.2d 940, 943-44 (9th Cir. 1974) (persistent state court rejection of or refusal to hear particular federal claim shows inadequacy for *Younger* purposes); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 446-49 (1965) (futility of agency relief may also excuse a party from exhausting administrative remedies prior to seeking judicial relief).

106. Appellate review from the board in *Berryhill* was de novo. *See* 411 U.S. at 577 n.16.

107. *Compare* Juidice v. Vail, 430 U.S. 327, 337 (1977) (judicial asset disclosure proceedings challenged by judgment-debtor as violative of procedural due process not enjoinable when constitutional challenge to adequacy could have been raised in proceedings prior to disclosure) *with* Fuentes v. Shevin, 407 U.S. 67, 71 n.3, 96-97 (1972) (prejudgment private attachment ancillary to later-filed state court suit for breach of contract held enjoinable as violation of procedural due process) *and* Lynch v. Household Fin. Corp., 405 U.S. 538, 554-56 (1972) (summary prejudgment garnishment ancillary to later-filed suit for nonpayment of debt held enjoinable as violation of procedural due process).

108. *See* Trainor v. Hernandez, 431 U.S. 434, 469-70 & n.15 (1977) (Stevens, J., dissenting) (suggesting *Younger* is inapplicable, and federal court must decide the constitutional question, whenever challenge is to the "constitutionality of the state procedure itself"); *Juidice*, 430 U.S. at 340 (Stevens, J., concurring) (reaching question of whether challenged state procedures in judgment-debtor proceeding were constitutionally adequate under due process clause, even though opportunity

state court procedures are constitutionally deficient, there is arguably no full and fair opportunity to raise that or any other federal issue in the state court.

Difficulty arises in these situations because "adequacy" operates at two levels. State procedures may be constitutionally inadequate for purposes of effecting a deprivation if they do not comport with procedural due process, yet they may be adequate for the purposes of *Younger* if they provide a full and fair opportunity to raise the due process attack.[109] Frequently, of course, the opportunity to raise the procedural due process claim in the state proceedings also will be lacking when the constitutional challenge itself goes to notice and hearing deficiencies. The two adequacy questions—constitutional adequacy as opposed to *Younger* adequacy—can thus collapse into each other. When they do, a federal court must be able to answer the constitutional question at the outset.

It is not inevitable, however, that a procedurally imperfect proceeding be an inadequate one for *Younger* purposes.[110] In procedural due process cases, the constitutional harm is the eventual unlawful deprivation of liberty or property, not, as in the bad faith and double jeopardy paradigms, the very undergoing of state proceedings. Until an unconstitutional deprivation actually is effected or imminently threatened, there is no irreparable injury. Simply undergoing a procedurally flawed action does not amount to an irreparable injury. Thus, when the state proceedings are still at the predeprivation stage, and an opportunity exists to raise the constitutional objection,[111] *Younger* properly may call for noninterference. On the other hand, irreparable harm already may have commenced if the state court defendant is undergoing state process only *after* a deprivation has taken place. In that situation the federal forum should remain open.[112]

D. *Looking for Full and Fair Procedures*

In sum, irreparable harm presupposes inadequate state remedies. The search for adequacy under *Younger* always looks in two directions: state procedural mechanisms must be up to the task both of answering federal questions, and more particularly, of policing against possible interim or interlocutory

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to raise that issue may have existed in state proceedings); Soifer & MacGill, *supra* note 26, at 1195-1202, 1207-12; Wingate, *supra* note 16, at 139-43.

109. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1318-22 (1977) [hereinafter *Developments*].

110. *See* Moore v. Sims, 442 U.S. 415, 426 n.10 (1979) (attacks on procedural constitutionality of state remedies do not "automatically" require federal intervention at the outset).

111. *Compare* Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1528 (1987) (requiring "unambiguous authority" showing inadequacy of state remedies) *with* Hernandez v. Finley, 471 F. Supp. 516, 519 (N.D. Ill. 1978) (uncertain remedy is an inadequate one), *aff'd sub nom.* Quern v. Hernandez, 440 U.S. 951 (1979); *cf.* Tully v. Griffin, Inc., 429 U.S. 68, 76 (1976) (uncertainty as to how state remedy is sought may not be "plain, speedy and efficient" under Tax Injunction Act); Township of Hillsborough v. Cromwell, 326 U.S. 620, 625-26 (1946) ("uncertainty surrounding the adequacy of the state remedy" lay in decisional law of state courts and in the fact that review to state supreme court was only discretionary); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105-06 & n.2 (1944) ("uncertainty surrounding the adequacy of the [state] remedy" meant that remedy was not "plain, speedy and efficient"). *See also supra* notes 97 & 105 (citing other examples of when an opportunity to raise constitutional objection is lacking).

112. *See Developments*, *supra* note 109, at 1318-19.

harms to federal interests that could not be effectively reviewed later. Even if the state judicial system is replete with fair procedures for the raising of constitutional questions and guarding against interim loss of federal rights, the procedures are nevertheless inadequate if having to resort to them would effect an independent deprivation of constitutional dimensions. The mere opportunity to raise federal issues in the state proceedings is not always an adequate remedy when the involuntary litigant claims that enduring the proceedings itself produces the harm to be arrested.

Thus, when the argument for immediate federal interference is premised on a substantive self-correction claim—the loss of a substantive right by virtue of the mere continuation of the prosecution—the courts have not set up a requirement of "preliminary" exhaustion of immediately available state court remedies.[113] On the other hand, when the nature of the claim is based on the absence of adequate procedural self-correction in the state court system, courts have required exhaustion, but only after ascertaining that state remedies are not clearly absent.[114]

III. THE ANTI-INJUNCTION ACT AND ITS "EXPRESS" EXCEPTIONS

The *Younger* Court expressly borrowed its rationale from the congressional policy underlying the Anti-Injunction Act.[115] The Act squarely commands federal courts not to stay criminal or civil suits filed in state court except in a few specified circumstances.[116] It reflects a preference for letting state courts resolve disputes over which they have obtained jurisdiction, free from federal intervention by injunction.

Nevertheless, the Act produces some awkward results. Because state courts ordinarily cannot enjoin federal court proceedings,[117] the command of the anti-suit injunction statute means that parallel litigation may occur at the same time

113. In cases raising the bad faith exception, courts usually have not inquired into the existence of available state court pretrial remedies by which the same question may be raised. *See supra* note 54. In cases raising double jeopardy claims, however, federal courts have sometimes made reference to exhaustion of pretrial state remedies. *See supra* note 80. In cases alleging interference with other substantive rights (such as religion clause claims) by going through trial, the results have been mixed. *See supra* notes 83-84.

114. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 435 (1977); Juidice v. Vail, 430 U.S. 327, 335 (1977); Lynk v. LaPorte Super. Ct. No. 2, 789 F.2d 554, 568-69 (7th Cir. 1986).

115. 28 U.S.C. § 2283 (1982). *See Younger*, 401 U.S. at 54. In *Younger*, however, the Court left open the question of the applicability of § 2283 to suits for injunctive relief against state court proceedings brought under 42 U.S.C. § 1983 (1982). *Younger*, 401 U.S. at 54.

116. The Act 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." 28 U.S.C. § 2283 (1982). The first version appeared in 1793. *See* Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334. The statute is thought to embody a strong message of federalism and deference to state courts, although that understanding has been the subject of recent criticism. *See, e.g.*, Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978); Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612 (1971).

117. *See* Donovan v. City of Dallas, 377 U.S. 408 (1964). *See generally* Arnold, *State Power to Enjoin Federal Proceedings*, 51 VA. L. REV. 59 (1965) (discussing history of state court efforts to enjoin federal court proceedings).

in both systems.[118] The mere possibility that a state court could reach a preclusive decision ahead of the federal court has never been enough to allow the federal court to enjoin parallel state proceedings "in aid of its jurisdiction."[119] In addition, the statutory language of section 2283 that permits a federal court to stay state proceedings in order "to protect or effectuate its judgments" generally has been limited to preventing state court relitigation of matters already decided in federal court.[120] However, by finding "expressly authorized" exceptions to the Act in congressional statutes that neither mention section 2283 nor specifically refer to injunctions against state judicial proceedings, the Court has allowed federal courts to enjoin state court proceedings when federal law effectively gives the litigant a right not to be tried in state court.

A. *From Express to Not-So-Express Exceptions*

In *Mitchum v. Foster*[121] the Court concluded that suits brought under 42 U.S.C. § 1983, the descendant of the 1871 Civil Rights Act, were expressly authorized exceptions to the Anti-Injunction Act. Even though section 1983 lacks any reference to the Anti-Injunction Act, the Court noted that the civil rights statute grants federal courts the power to entertain suits in equity when a litigant's federally protected rights have been denied under color of state law,[122] and also noted the civil rights statute's framers clearly contemplated that the state judiciary might effect such a denial.[123] The Court reasoned that Congress must have intended that an injunction would lie against state judicial proceedings in the proper case.[124] In order to satisfy the "expressly authorized" exception, the *Mitchum* Court concluded that the congressional statute "must [create] a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding."[125] Elsewhere the Court articulated its test as requiring a congressional enactment that could "be given its intended scope only by the stay of a state court proceeding."[126] At a minimum, therefore, *Mitchum*

118. Absent one of the recognized forms of abstention, federal courts usually will not stay their own hands in deference to a parallel state court proceeding. *See* Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19 (1983).

119. This is true at least for in personam, as opposed to in rem actions. *See* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 294-96 (1970). For criticism of this aspect of the Court's interpretation of § 2283, see Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 753-760 (1977).

120. *See, e.g.*, Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 524 (1986).

121. 407 U.S. 225 (1972).

122. *Id.* at 226, 242.

123. *Id.*

124. *Id.* at 242. *Mitchum* involved a challenge to a bad faith enforcement proceeding. *Id.* at 227.

125. *Id.* at 237.

126. *Id.* at 238. The Court also had other worries in *Mitchum* that contributed to its result. It suggested that a contrary rule would have rendered its *Younger* decision unnecessary, a decision it had issued only the previous Term. *Id.* at 231. The Court in *Younger* had assumed, without deciding, that the anti-suit injunction statute was not a bar to a federal suit under § 1983 that sought injunctive relief against a pending state court proceeding. *Younger*, 401 U.S. at 54. The judicially created noninterference principle developed in *Younger* operated above and beyond any statutory bar to injunctive relief. *Mitchum*, 407 U.S. at 230. Had the *Mitchum* Court decided that the Anti-

means that in the rare case in which state judicial proceedings are themselves an independent violation of section 1983, a federal court may enjoin them.[127]

A scattered majority of the Court appeared to embrace reasoning similar to *Mitchum*'s a few years later in *Vendo Co. v. Lektro-Vend Corp.*[128] Although the issuance of an injunction against state court proceedings was reversed in that case, six Justices agreed that section 16 of the Clayton Act[129] would present an "express exception" to the Anti-Injunction Act.[130] Four of those six were in dissent, and concluded that an expressly authorized exception was made out whenever: (1) the federal statute on which the federal court claim was based had explicitly authorized injunctive relief; and (2) the bringing or maintenance of judicial proceedings itself violated the statute. Using this two-step approach, the dissenting Justices concluded that the state court proceedings against the federal plaintiffs in *Lektro-Vend* were being employed as an anticompetitive device in violation of federal antitrust laws, and would have upheld the issuance of an injunction.[131] Another two Justices joined the plurality in reversing the order of injunction, but nevertheless agreed that section 16 was "an express exception under narrowly limited circumstances" when state court lawsuits were being used as an anticompetitive device.[132] They disagreed with the four dissenters over whether an injunction of the state court proceedings was proper on the facts of the case.

The basis for their disagreement was not altogether clear.[133] Nevertheless, a majority of the Court apparently agreed that an "expressly authorized" exception to the anti-suit injunction statute existed when the institution of state court proceedings was forbidden by federal statute, provided the federal statute au-

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Injunction Act itself barred interference into all ongoing state judicial proceedings whenever § 1983 was the basis for federal injunctive relief, the noninterference principle of *Younger* would have been unnecessary. In addition, the Court stated that such a holding would have forced it to overrule *Younger* to the extent that it had suggested federal intervention into ongoing state proceedings could be appropriate in exceptional circumstances such as bad faith. *Id.* at 231. Therefore, although *Mitchum* carved § 1983 suits out from under the statutory no-injunction rule, *Younger* remained to impose a judge-made set of limits on injunctive relief under § 1983. *See* Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1211-14 (1977).

127. In *Mitchum*, the Court clearly meant to remove the bar of § 2283 in all suits under § 1983. As argued below, however, the Court may not have needed to go so far. *See infra* text accompanying notes 136-41.

128. 433 U.S. 623 (1977).

129. 15 U.S.C. § 26 (1982).

130. *Lektro-Vend*, 433 U.S. at 653-54 (Stevens, J., dissenting); *id.* at 644 (Blackmun, J., concurring).

131. *Id.* at 663 & n.37 (Stevens, J., dissenting).

132. *Id.* at 644 (Blackmun, J., joined by Burger, C.J., concurring).

133. *See* Redish, *supra* note 119, at 740-42. The federal plaintiffs in *Lektro-Vend* argued that a single "anticompetitive" prosecution of a civil suit in state court could violate the antitrust laws. At some points the concurring opinion can be read to say that § 16 itself is violated only when there is a pattern of such suits. *See, e.g.*, 433 U.S. at 644 (Blackmun, J., concurring). If that is true, then the concurring opinion adheres in principle to the basic *Mitchum* approach of the *Lektro-Vend* dissenters, even though the dissent concluded that a single suit of such a nature could violate the antitrust laws. On the other hand, the concurring opinion could also be read to suggest that additional equitable considerations, beyond the two-step requirement articulated by the *Lektro-Vend* dissent, may prevent the issuance of an injunction. *See* Redish, *supra* note 119, at 741. Professor Redish has argued that this second approach would suggest a reading of the anti-suit injunction statute that is somewhat narrower than the dissent's. *See id.* at 740-42.

thorized the issuance of injunctive relief against violations of the statute.[134]

The *Mitchum/Lektro-Vend* "expressly authorized" approach to the Anti-Injunction Act dovetails with the "exceptional circumstances" doctrine of *Younger* by allowing intervention into ongoing state proceedings. Under section 2283, as interpreted in these cases, federal courts may issue an injunction to stay state court proceedings when those proceedings are violations of a federal statute authorizing equitable relief. When federal law proscribes activity that can include the bringing or maintenance of state court lawsuits, and permits equitable relief against it, Congress has in effect created an immediately enforceable right not to endure the state court trial and subsequent corrective process—an earmark of the bad faith and double jeopardy category of *Younger* exceptions.[135] Like *Younger*'s extraordinary circumstances rule, this "defense" to the state proceedings differs from an ordinary dispositive defense to the imposition of liability: it is a defense to having to defend the proceedings altogether. In both instances, subsequent corrective process in the state courts or the Supreme Court on direct review cannot make up for the harm that attends undergoing continued state court judicial process, which has been proscribed by Congress.

This exceptional circumstances approach to the Anti-Injunction Act can be criticized for robbing the term "expressly authorized" of its plain meaning.[136] It is not, however, wholly irreconcilable either with the language of section 2283 or with its revisers' probable intent.[137] The express exception language seems to call for a statute in which Congress has declared in so many words that the Anti-Injuction Act is altogether inapplicable. But a statutory scheme may express a willingness to allow federal court injunctions of state court proceedings in some cases, without having to exempt itself from the command of section 2283 in all cases. Thus, there may be a sufficiently clear statement from a congressional enactment, through ordinary principles of statutory interpretation, that the statute authorizes injunctive relief and that state proceedings are among the possible violations fairly reachable by the statute. If so, there is no reason to second-guess the fair command of Congress, as expressed in such a statutory scheme, to allow such injunctions in the occasional case in which the bringing or maintenance of a state court lawsuit itself constitutes a violation of federal

134. 433 U.S. at 660-62 (Stevens, J., dissenting).

135. *See supra* text accompanying notes 52-92.

136. *See* Redish, *supra* note 119, at 734-36.

137. The stated purpose of the Act was to restore "the basic law as generally understood and interpreted prior to . . . Toucey [v. New York Life Ins. Co., 314 U.S. 118 (1941)]." 28 U.S.C. § 2283 note (1982). Although the reviser's note certainly has specific reference to reinstating the "relitigation" exception that *Toucey* had wiped out, *see* Redish, *supra* note 119, at 729, there is nothing in the note to suggest that the stated purpose was not also true at a more general level. *But see* Redish, *supra* note 119, at 729-30 & nn. 63-64. Prior to *Toucey*, many exceptions were less than fully express. *See* Currie, *supra* note 16, at 322. Although the *Mitchum/Lektro-Vend* approach to the Act's expressly authorized exception may not be the most obvious construction of the statute's language, it harmonizes better with the comity and federalism policies traditionally underlying the anti-injunction statute insofar as it allows interference only when continued state court litigation could leave the supremacy of the federal law unvindicated. *See also infra* text accompanying notes 140-41 (noting that federalism and comity have guided courts in reading § 2283).

law.[138] Despite the Court's own suggestions to the contrary, the strength or weakness of such federalism and comity concerns often have been the touchstone for construing the intended scope of the Anti-Injunction Act.[139]

B. *Noninterference:* Younger *or Section 2283?*

If this approach accurately reflects the Court's concerns in modern Anti-Injunction Act litigation, *Younger* in many ways adds very little. Currently, section 1983 is an express exception to the Anti-Injunction Act. However, the *Younger* doctrine, curiously borrowing from the policy of a statute that *Mitchum* concluded did not reach section 1983 at all, bars injunction actions under section 1983 against ongoing state enforcement proceedings. It was unnecessary, however, to read the Anti-Injunction Act as requiring that a particular federal statute, such as section 1983, be an "expressly authorized" exception every time a suit is brought under it for an injunction to be expressly authorized for *some* violations of the statute. The express exception language only had to cover the handful of cases brought under section 1983 and similar statutes in which Congress made ongoing state court proceedings the fair target of injunctive relief, such as those brought in bad faith. Thus, the Anti-Injunction Act ordinarily might have barred injunctions against ongoing state court proceedings even when, for example, the federal suit was brought under section 1983. Given the overlap between the *Younger* exceptions and the expressly authorized exceptions of section 2283 as outlined in *Mitchum* and *Lektro-Vend*, federalism principles could have been largely vindicated by use of section 2283 alone.[140] Of

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138. For the argument that a bad faith prosecution is itself a violation of § 1983, see *supra* text accompanying notes 59-61.

139. *See* Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-26 (1957) (federal court injunction of state court proceeding sought by United States not barred, despite absence of express or other exception in Anti-Injunction Act); *see also* NLRB v. Nash-Finch Co., 404 U.S. 138, 146 (1971) (*Leiter* rule applies to injunction sought by federal agency); *cf.* Capital Serv., Inc. v. NLRB, 347 U.S. 501, 505 (1954) (upholding as "in aid of its jurisdiction" district court injunction of state court lawsuit at behest of National Labor Relations Board to preserve Board's and, ultimately, federal trial court's exclusive jurisdiction over picketing dispute). *But cf.* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286-87 (1970) (Anti-Injunction Act will not allow injunction unless within one of three specifically defined exceptions). Suits brought by the United States are exempt from the Tax Injunction Act's ban as well. *See* Department of Employment v. United States, 385 U.S. 355, 358 (1966).

140. A similar exceptional circumstances approach to § 2283, but one which eschewed a liberal reading of the Act's "expressly authorized" language, was advanced prior to *Mitchum* in Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *aff'd on reh'g*, 357 F.2d 756 (en banc), *aff'd per curiam*, 384 U.S. 890 (1966). In *Baines* the United States Court of Appeals for the Fourth Circuit noted:

> Since [section 2283] was fathered by the principles of federalism and comity, . . . the statute should be read in light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury.

Id. at 593; *cf.* Currie, *supra* note 16, at 329 (approving the *Baines* test for antisuit injunctions, although rejecting it as a valid reading of § 2283). The Court has resisted such an exceptional circumstances approach to § 2283, even though *Mitchum* and *Lektro-Vend* achieve a similar result by the alternate route of tinkering with the meaning of "expressly authorized" exceptions. *See Atlantic Coast Line R.R.*, 398 U.S. at 286-87 (rejecting contention that § 2283 merely sets out a principle of comity that would allow injunctions in situations not within language of statutory exceptions). Under the approach suggested here, § 2283, like *Younger*, would be inapplicable to civil or criminal

course, *Younger* is stronger medicine than section 2283 in one regard: it can prohibit parallel litigation in federal court altogether, even if no injunction against the state proceeding is sought.[141]

Although the Court has drawn the connection between *Younger* and section 2283,[142] it has not allowed the statute to control the issue of injunctions against state courts in the section 1983 context. In part, the Court made that impossible when, a year before *Younger*, it observed that section 2283 was not simply a "principle of comity."[143] *Mitchum*, however, went a long way toward viewing section 2283 as just such a provision by its loose reading of what constitutes an expressly authorized exception.

If the Court had pegged the no-injunction rule in section 1983 cases to section 2283 instead of *Younger*, it might have produced a few advantages. First, the abstention rule blocking the exercise of federal relief would have remained a congressional rather than a judicial prohibition. Second, it would have placed the problematic judge-made "exceptions" to the judge-made *Younger* doctrine into a category of "expressly authorized" congressional exceptions to a congressional enactment. Finally, the much discussed problem of *Younger*'s applicability to all state civil proceedings, whether or not in the nature of enforcement actions,[144] would have been largely mooted. The Anti-Injunction Act itself would have barred federal stays of ongoing state civil proceedings absent exceptional circumstances. It would not, however, have required the federal court to abstain altogether, as *Younger* does.[145] The presence of what is now a *Younger* exception—bad faith, harassment, patent unconstitutionality, or other structural inadequacy of the state courts to redress the loss of federal interests—could have authorized injunctions under section 2283 against state civil proceedings as express exceptions to the Act. As things now stand, many such suits oddly escape both the bar of the Anti-Injunction Act and the *Younger* doctrine.

In any event, the exceptions to *Younger* and the exceptional circumstances gloss on the scope of the Anti-Injunction Act work in very much the same way. They also seek similar objectives. Under either, interference with ongoing state court proceedings should be avoided unless their continuation would work an

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proceedings that have not yet been instituted. *See* Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965).

141. *See supra* note 10.

142. *See supra* text accompanying note 115.

143. *See Atlantic Coast Line R.R.*, 398 U.S. at 286.

144. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 453-56 (1977) (Brennan, J., dissenting); Huffman v. Pursue, 420 U.S. 592 (1975). Literature abounds on the question whether *Younger* should generally bar federal court injunctions of civil proceedings in state court. *See, e.g.*, M. REDISH, *supra* note 40, at 315-21; Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits That "Interfere" With State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Theis, Younger v. Harris: *Federalism in Context*, 33 HASTINGS L.J. 103, 172-84 (1981); Note, *The New Federal Comity: Pursuit of Younger in a Civil Context*, 61 IOWA L. REV. 784 (1976); Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870 (1975).

145. If *Younger*'s judge-made equitable restraint doctrines were applied with full force when ordinary civil proceedings were pending in state court, federal courts might be barred not only from granting injunctive (or declaratory) relief, but arguably from proceeding at all. *See* Juidice v. Vail, 430 U.S. 327, 339 n.16 (1977) (leaving open question whether *Younger* bars parallel damages action under § 1983 in federal court).

irretrievable denial of a federally protected interest. It might even be possible to reach the *Younger* result in section 1983 cases without looking beyond section 2283. Although the results in most cases seeking to enjoin state enforcement proceedings would be the same, such a statutory approach might better cabin the Court's zeal to create additional and more expansive judge-made rules of noninterference.[146]

IV. CIVIL RIGHTS REMOVAL AND IMMUNITY FROM PROSECUTION

The concern for irreparable harm and adequate state remedies also spills over into removal. Most statutes allowing removal from state to federal court merely shift the trial forum. Although they provide a federally enforceable right not to be tried in state court, they do not let a litigant avoid suit altogether.[147] Sometimes, however, removal can be in the nature of a right not to undergo continued judicial proceedings in any forum. The Court's modern treatment of the civil rights removal statute is a good example.[148] The current version, derived from an 1866 ancestor,[149] allows for removal of civil or criminal actions from state to federal court when a party "is denied or cannot enforce" in the state courts a right granted by federal law relating to race discrimination.[150] The statute is significant because criminal cases ordinarily cannot be removed at all, and because a federal defense, by itself, is not enough to secure removal in civil cases.[151]

Over twenty years ago in *Georgia v. Rachel*[152] the Court construed the language of this civil rights statute to mean that removal of state court proceedings was available when such proceedings were directed at activity that federal statutes protected against suit altogether.[153] Title II of the 1964 Civil Rights Act[154] provided for nondiscrimination in public accommodations and outlawed

146. *See, e.g.*, Redish, *supra* note 16, at 114-15 (criticizing judge-made abstention rules).

147. At one time, however, removal had to be requested from the state court. *See* REV. STAT. § 641 (1874) (precursor of civil rights removal statute, 28 U.S.C. § 1443(1) (1982)). If the state court denied removal when it should have granted it, review of that question lay in the Supreme Court following trial in the state court. *Id.*; *see also* Strauder v. West Virginia, 100 U.S. 303, 311 (1879) (wrongful refusal to allow civil rights removal heard on direct review from state supreme court).

148. 28 U.S.C. § 1443(1) (1982). The statute provides, *inter alia*, for removal of state civil actions and criminal prosecutions "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

149. Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27 (current version at 28 U.S.C. § 1443 (1982)). The Act's history is discussed at length in Amsterdam, *supra* note 16, at 842-82.

150. *See supra* note 148.

151. *See supra* note 8.

152. 384 U.S. 780 (1966).

153. *Id.* at 794; *see also* New York v. Davis, 411 F.2d 750, 753-54 (2d Cir.) (removal statute reaches "prosecutions in which the conduct necessary to constitute the offense is specifically protected by a federal equal rights statute" and prosecution is for that conduct), *cert. denied*, 396 U.S. 856 (1969). Although this is the prevailing interpretation of *Rachel*, an alternative reading would allow removal even when the state criminal charges were not brought, on their face, for conduct protected by federal law, if they were nevertheless brought because of protected activity. *See, e.g.*, Achtenberg v. Mississippi, 393 F.2d 468 (5th Cir. 1968); *see also* Redish, *Revitalizing Civil Rights Removal Jurisdiction*, 64 MINN. L. REV. 523, 540-41 (1980) (proposing broader reading of statute than that articulated in *Rachel*).

154. 42 U.S.C. § 2000a-2(c) (1982).

"punishment" against anyone for exercising or attempting to exercise any right under the statute.[155] In *Rachel*, the State had prosecuted black defendants in state court under a criminal trespass law for seeking service at restaurants and refusing to leave.[156] State law made it a misdemeanor to refuse to leave the premises of another after being asked to do so; defendants charged that the demand to leave was racially motivated.[157] In allowing removal the Court concluded that "[t]he burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964."[158] The Act not only created a right to engage in particular conduct and to be free from the eventual imposition of liability or conviction for such conduct, but also created a separate right that such conduct be "immunized from prosecution"[159] in the state courts.

The result of allowing removal in cases such as *Rachel* is the equivalent of an injunction against the ongoing prosecution. Removal of this variety lets the federal court decide whether or not the state prosecution should be barred at the outset, before trial. It is not a decision that the prosecution should be maintained in the federal as opposed to the state forum.[160] To this extent, the Court's decision that a federal court may abort proceedings in the state courts reflects a concern for the adequacy of state court remedies and the need for immediate federal interference to protect against the possible irreparable loss of federal rights—here, the right not to endure "punishment" in the form of a trial. In terms of the civil rights removal statute, having to raise the federal defense through the state court system "denie[s] . . . in the [state] courts" the rights protected by Title II.[161] The harm of undergoing a proceeding from which a litigant is statutorily immunized is thus analogous to the double jeopardy and bad faith paradigm under *Younger*, and to the "expressly authorized" exceptions to the Anti-Injunction Act.

After *Younger* and *Mitchum*, however, a litigant in a case such as *Rachel*

155. Section 203(c) of the Act, 42 U.S.C. § 2000a-2(c) (1982), provides that "[n]o person shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by [the Act]."

156. *Rachel*, 384 U.S. at 782-83.

157. *Id.* at 783 n.1.

158. *Id.* at 805.

159. *Id.* ("It is no answer in these circumstances that the defendants might eventually prevail in the state court."); *see also* Hamm v. City of Rock Hill, 379 U.S. 306, 311-12 (1964) (interpreting § 203(c) of Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-2(c)(1982), to prohibit not only conviction, but also prosecution); Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 DUKE L.J. 136, 160 n.122 (noting that rights under Title II were to receive removal protection).

160. *See* City of Greenwood v. Peacock, 384 U.S. 808, 846-47 (1966) (Douglas, J., dissenting); Note, *Civil Rights Removal After* Rachel *and* Peacock: *A Limited Federal Remedy*, 121 U. PA. L. REV. 351, 376 (1972). Although removal results in termination of the proceedings in cases following the *Rachel* paradigm, removals traditionally permitted under the statute simply operated as a forum-transfer rule. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (existence of state statute barring blacks from petit juries "denied" state court defendant's ability to enforce his rights within meaning of removal statute; state prosecution was removable and ought to have been tried in federal court).

161. *See* 28 U.S.C. § 1443(1) (1982). As in the *Younger* bad faith and double jeopardy context, however, the state court defendant could, but need not, have raised federal immunity from prosecution as a defense to the ongoing state proceeding.

would not have to seek civil rights removal, because an injunction against the state court criminal proceedings might do the job equally well. Continued maintenance of the proceedings would result in a loss of federal statutory rights—such as the right to avoid punishment in the form of a trial—that could not be fully remedied by subsequent corrective process. Therefore, *Younger*'s exceptional circumstances doctrine would seem to allow for immediate intervention in a suit under section 1983 against the prosecuting official for violating federal law by bringing a state court lawsuit.[162] *Rachel* also might be explained in *Younger* terms as a case involving a prosecution undertaken in bad faith, given the retaliatory nature of the proceedings, and the specific and obvious conflict between the state statute and the federal guarantee. Alternatively, under the current approach to the Anti-Injunction Act, a federal court could find that the state prosecution in *Rachel* violated Title II. It could then issue an injunction against the prosecution if Title II also authorized injunctive relief against "punishment" in the form of state proceedings.[163]

In *Rachel* and many other cases, therefore, injunctive relief might do the trick and do so in a more "elegant" manner.[164] In civil cases removal is effected simply by the filing of papers in the federal and state courts; on removal, federal law commands that state proceedings come to a halt.[165] Federal judicial input comes only afterward, usually on a motion to remand brought by the nonremoving party. An injunction against state court proceedings, by contrast, can only be issued after federal judicial consideration. Even in criminal cases the state court may be prevented from entering judgment until removal is denied, although proceedings are not arrested by the mere act of filing removal papers.[166]

Although the civil rights removal remedy overlaps with other immediate coercive relief, it is, as construed, somewhat less effective. In *City of Greenwood v. Peacock*,[167] decided the same day as *Rachel*, the Court held that removal was unavailable when prosecutions were brought under facially constitutional statutes that criminalized breaches of the peace, even though the prosecutions were alleged to be in retaliation for defendants' exercise of constitutionally and statu-

162. *See Peacock*, 384 U.S. at 829; *see also* Redish, *supra* note 153, at 554 n.153 (allegations of *Peacock* seemed appropriate for injunction under *Younger* exceptions). A violation of a federal statute by a state actor can be a violation of § 1983, *see* Maine v. Thiboutot, 448 U.S. 1 (1980), at least when the federal statute does not set up its own comprehensive enforcement scheme. *See* Middlesex County Sewerage Auth. v. Sea Clammers Ass'n, 453 U.S. 1 (1981).

163. Title II is privately enforceable, and injunctive relief against violations of the statute is expressly granted. *See* 42 U.S.C. § 2000a-3 (1982); *cf.* Dilworth v. Riner, 343 F.2d 226, 230-32 (5th Cir. 1965) (injunction under Title II against state court proceedings held expressly authorized exception to antisuit injunction statute).

164. Bator, *supra* note 12, at 616-17; *see also* Redish, *supra* note 153, at 555 n.155 (arguing that injunctions are less disruptive than removal).

165. *See, e.g.*, 28 U.S.C. § 1446(e) (1982) (commanding that after removal "the State court shall proceed no further.") When federal statutes allow removal, such statutes also constitute exceptions to the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (1982); *id.* § 2283 historical and revision notes; *id.* § 1447(a) (1982).

166. *See* 28 U.S.C. § 1446(c)(3) (1982).

167. 384 U.S. 808 (1966).

torily protected activity.[168] Despite the similarity to the *Rachel* facts, the *Peacock* Court held that the denial in state courts of rights to which the civil rights removal statute refers must be the result of a facially unconstitutional state statute or an equally clear inconsistency between federal law and state action.[169] It could not result from official illegality in the teeth of an otherwise lawful state statute.

This narrow approach stemmed from two century-old cases in which the removal applicants alleged racial discrimination in the petit juries trying them. In one case, which held removal proper, the discrimination against seating blacks on the jury had been mandated by statute.[170] In the other, in which removal was not proper, the discrimination was in violation of state law mandating nondiscriminatory jury selection.[171] The implicit presumption in those cases was that when the removal applicant alleged a denial of federal rights in state court because of the operation of a state statute, only then would the state court fail to redress the injury. In such cases, the state court would instead follow its own statutes. This presumption runs counter to current tenets of federalism suggesting that the states ordinarily can be expected to enforce federal laws, state statutes to the contrary notwithstanding.[172]

The modern Court distilled from those two older cases the principle that the denial of federal rights in the state courts would, respectively, be easier or harder to "predict" depending on whether the civil rights claimant challenged the operation of a statute or charged official illegality—that is, activity contrary to state law.[173] Before trial, a federal trial court could easily predict a denial of federal rights by looking at the face of the state statute and comparing it with the federal law. If the denial of rights was founded on official illegality, however, the court would have to engage in a case-by-case factual inquiry into the basis of the prosecution.[174] In the absence of facial inconsistencies, the federal court must have a basis equally as clear as the facial clash between a state and federal statute on which to premise removal. *Rachel* provided such a basis in Title II's "clear" immunization from prosecution of the activity it protected.[175] State

168. *Id.* at 827-28.

169. *Id.* at 828.

170. Strauder v. West Virginia, 100 U.S. 303 (1879).

171. Virginia v. Rives, 100 U.S. 313 (1879).

172. *See* Redish, *supra* note 153, at 530. The reason for the dichotomy probably lies in the Court's since-discarded analysis of "state action" as reaching only state practices either codified by statute or approved by the state's highest court. *But see id.* (considering this a "possible, but unlikely . . . rationale for the distinction"). A state did not act for the purposes of the fourteenth amendment, and the judicial system did not "deny" rights, unless it did so pursuant to the authoritative command of the legislature; official illegality was not state action until the state courts had refused to give an individual the ability to enforce in the judicial tribunals of the state the rights contemplated by the removal act. *See Rives*, 100 U.S. at 320-22; *id.* at 333-34 (Field, J., concurring); *see also* Monroe v. Pape, 365 U.S. 167, 212 n.16 (1961) (Frankfurter, J., dissenting) (citing Barney v. City of New York, 193 U.S. 430) (1904); HART & WECHSLER, *supra* note 38, at 941-47; *cf.* Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658 (city "causes" deprivation under § 1983 only when its officers act pursuant to custom or policy, not when they act in an unauthorized manner).

173. *See Rachel*, 384 U.S. at 800-04.

174. A factual hearing might still be necessary to resolve the question whether the refusal to serve was itself racially motivated. *See* Redish, *supra* note 153, at 534-35 & n.59.

175. *Rachel*, 384 U.S. at 805-06.

statutes made it a crime to refuse to leave private property when asked. If the request to leave was racially motivated, state law made illegal an activity that was protected under federal law.[176] By contrast, the more generally worded federal statutes and constitutional provisions relied on in *Peacock* lacked any explicit reference to immunity from punishment or retaliation for the exercise of the activities they otherwise protected.[177] In addition, the state breach of the peace statute in *Peacock* did not include within its scope any activities protected by federal law.

The civil rights removal statute reflects a number of the concerns for the adequacy of the state forum to handle certain federal claims, but adds little or nothing to other forms of immediate intervention given the Supreme Court's restrictive gloss on it. The statute gives even less than *Younger*, insofar as it is limited to racial discrimination and precludes the federal courts from making factually based inquiries into, and issuing injunctive relief against, prosecutorial reprisals for the exercise of rights under federal statutes or the Constitution.[178] As the *Peacock* dissent noted, and as the bad faith exception of *Younger* later seemed to account for, a defendant "is denied" federal rights in state court when lawful state statutes are "used as the instrument to suppress his promotion of civil rights."[179]

Perhaps the Court was right to limit removal with a requirement of showing jurisdiction on the face of the pleadings, because removal is potentially more disruptive of state proceedings than injunctive relief. Remand questions can thereby be decided quickly, with minimal factual inquiry. The greater need for a federal factfinder at the trial level when questions of bad faith or harassment are involved, however, suggests that *Younger* actually may have struck a more sensible and, for civil rights litigants, a more favorable balance than that struck in the removal cases.[180]

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176. The clarity of the conflict, however, would seem to make it an *easier* job for the state courts if the "immunity" from prosecution were raised as a defense to the state court suit. *Cf. supra* text accompanying notes 85-92 (discussing patent unconstitutionality exception to *Younger*).

177. *Peacock*, 384 U.S. at 825-27. The federal plaintiffs alleged that the prosecutions in *Peacock* were brought against them in retaliation for assisting others to exercise voting rights. The relevant federal statute only protected voters, not their helpers, from retaliation. *See also* Whatley v. City of Vidalia, 399 F.2d 521, 524-26 (5th Cir. 1968) (allowing removal under amended version of voting statute that protected helpers as well as voters). In Johnson v. Mississippi, 421 U.S. 213 (1975), the Court concluded that Title I of the Civil Rights Act of 1968, 18 U.S.C. § 245 (1982), which protected against "intimidation or interference with" the exercise of certain civil rights "by force or threat of force," did not protect against retaliatory arrests or court proceedings.

178. Even the *Peacock* majority noted that injunctive relief under the then-recently decided case of Dombrowski v. Pfister, 380 U.S. 479 (1965), could provide a broader avenue of federal court access for such claims of prosecutorial retaliation. *See Peacock*, 384 U.S. at 829; *see also Johnson*, 421 U.S. at 228 & n.17 (observing that denial of civil rights removal did not foreclose injunction against state proceeding).

179. *Peacock*, 384 U.S. at 842 (Douglas, J., dissenting).

180. *Cf.* Amsterdam, *supra* note 16, at 857 (observing that a federal trial court "is *least* needed" when a state statute bars enforcement of a federal right); Currie, *supra* note 16, at 330-31; Redish, *supra* note 153, at 547-57 (arguing for construction of removal statute that would allow case-by-case inquiry into adequacy). As a practical matter, the Court's construction robs the removal statute of any independent utility. This alone might be a reason to interpret it more broadly so as to give it meaning apart from other remedies. But the perceived superfluity of § 1443 may be just as much a consequence of the expansive reading that the Court has given to § 1983.

V. PRETRIAL HABEAS CORPUS AND THE "SPECIAL CIRCUMSTANCES" DOCTRINE

There is a similar and parallel rule barring pretrial intervention into pending criminal proceedings by way of federal habeas corpus. Since 1867, federal courts have been given the power of habeas corpus to discharge persons not yet convicted who are in state custody "in violation of the Constitution."[181] Because of an exhaustion rule that is almost as old as the statute, however, federal habeas is generally unavailable before judgment.[182] Intervention by habeas corpus is not immediately available after judgment either, because federal statutes forbid granting the writ to those convicted in state courts until all state court appeals have first been tried.[183] Unlike the posttrial exhaustion requirement, the requirement of pretrial exhaustion remains a judge-made device. Nevertheless, the prohibition on pretrial habeas corpus has not been absolute, and there exists a set of exceptions to the exhaustion rule that is analogous to the set of exceptions the Court has carved out under *Younger*, the Anti-Injunction Act, and to a lesser extent, the civil rights removal statute.

A. Ex parte Royall *and the Exhaustion Rule*

The exhaustion rule that bars federal habeas interference before trial originated in *Ex parte Royall*,[184] in which a federal petitioner, relying on the 1867 statute, claimed that the statutes under which he was being prosecuted in state court were unconstitutional.[185] His petitions were dismissed in the federal trial court for want of jurisdiction, but on this point the Supreme Court unanimously reversed.[186] It disagreed with the lower federal court's conclusion that it lacked jurisdiction over the claim simply because the unconstitutionality of the state law could be raised as a defense at trial in state court.[187]

Prior to *Royall*, the Court had decided in postconviction habeas cases that the writ could issue when the statute on which the lower court judgment had been premised was unconstitutional.[188] The Court concluded in those cases that the unconstitutionality of the underlying statute resulted in a "jurisdictional" failure on the part of the lower courts.[189] The federal courts had the power on habeas corpus to determine the constitutionality of the underlying statutes

181. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241(c)(3), 2254(a) (1982)).

182. *See Ex parte* Royall, 117 U.S. 241, 253 (1886).

183. *See* 28 U.S.C. § 2254(b) (1982). Even after judgment, however, exhaustion is not required if "state corrective process" is absent or "ineffective" to protect the prisoner's rights. *Id.*; *see also supra* note 105 (discussing exceptions to § 2254(b)).

184. 117 U.S. 241 (1886).

185. *Id.* at 245.

186. *Id.* at 250.

187. *Id.* at 250-51.

188. *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371, 374-77 (1879); *cf. Ex parte* Virginia, 100 U.S. 339, 342-43 (1879) (writ could issue when prisoner held by an order beyond jurisdiction of lower federal court to enter); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176-78 (1873) (writ could issue when petitioner's sentence was beyond power of lower federal court to enter).

189. The history of this "jurisdictional" approach is recounted in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 479-83 (1963).

before trial, not just after, because "if the local statute under which [the state court defendant] was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity."[190] To modern ears this jurisdictional failure doctrine is curious. But because of it, the Court was able to preserve the traditional and narrow use of habeas corpus to challenge the want of power in the trial court, instead of using it to correct substantive errors of law, which is its current—but probably not its historic—function.[191]

Nevertheless, the Court in *Royall* went on to consider whether the refusal of the trial court to issue the writ could be sustained on any ground other than the want of judicial power. It was in this context that the Court issued its famous ruling on exhaustion of state court remedies. It concluded that although federal courts had the statutory jurisdiction to grant the writ, the statute did not "imperatively require"[192] them to grant it in advance of trial in the state court. In language that foreshadowed the exceptions to *Younger*'s noninterference rule, the *Royall* Court held that federal courts had discretion not to discharge the petitioner in advance of trial, so long as there were no "special circumstances requiring immediate action."[193] As actually enforced by the Supreme Court, however, this doctrine was apparently not discretionary at all. Rather, it amounted to an almost per se rule of exhaustion in ordinary cases challenging the constitutionality of detention, absent "special circumstances."[194] Even today, exhaustion is viewed as a requirement.[195]

The Court gave some hints in *Royall* as to when special circumstances might warrant immediate federal intervention into pending state proceedings. It noted that federal courts had "frequently interposed"[196] whenever the state court defendant awaiting trial was in custody for acts done in pursuance of federal law or a federal court order, or whenever the defendant was a foreign subject acting under color of foreign law and the case implicated the law of nations. "[S]uch and like cases of urgency, involv[ed] the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations . . . ."[197] Writs of habeas corpus to compel a witness in state

190. *Royall*, 117 U.S. at 248.

191. *See* Bator, *supra* note 189, at 463-65. For a different answer to the question whether habeas was originally intended to do more than reach "jurisdictional" defects, see Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 635-39 (1982).

192. *Royall*, 117 U.S. at 251.

193. *Id.* at 253.

194. *See* Bator, *supra* note 189, at 478. *But cf.* Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 420-40 (1983) (arguing that rigidification of the once discretionary exhaustion doctrine is a comparatively recent development). *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 200-03 (1980) (tracing early application of "special circumstances" rule).

195. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 516 n.9 (1982); Pitchess v. Davis, 421 U.S. 482, 487 (1975) (per curiam).

196. *Royall*, 117 U.S. at 251.

197. *Id.* Shortly after *Royall*, the Court decided a handful of cases in which it upheld pretrial granting of the writ. *See, e.g., In re* Neagle, 135 U.S. 1, 75-76 (1890) (writ granted to Justice Field's bodyguard held by state authorities and awaiting trial for murder of Field's would-be assassin); Wildenhus's Case, 120 U.S. 1, 17-19 (1886) (writ should have issued for Belgian sailors, held by state

custody to testify in federal court were justified on a similar rationale of preserving federal operations and of vindicating the authority of the federal government.[198] The 1867 statute had conferred, as it had for persons detained in violation of the Constitution, habeas jurisdiction over each one of these specific categories of persons in custody as well: Federal officers and others acting under color of federal law, foreign defendants, and federal court witnesses.[199] By treating each of these groups as candidates for the special circumstances rule, however, the Court effectively singled out for its judicial exhaustion requirement *only* those who attacked their custody as "in violation of the Constitution."[200]

The concerns voiced by the Court that prompted its exhaustion rule also foreshadowed the concerns underlying *Younger*'s noninterference rule. Although Congress, by its very enactment of the habeas statute, seemed prepared to tolerate some intrusion into the state criminal process, the Court sought to minimize that interference on its own. To do so, it relied on the presumption that state judges would not disregard the settled principles of federal constitutional law.[201] Nevertheless, most of the special circumstances the Court identi-

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authorities and awaiting trial for murder committed on board Belgian steamship, who claimed detention was in violation of law of nations and treaty requiring that they be tried exclusively in Belgian courts). In neither *Neagle* nor *Wildenhus's Case* did the Court cite *Royall*. *See* W. DUKER, *supra* note 194, at 200-03; Amsterdam, *supra* note 16, at 882-96.

198. *Royall*, 117 U.S. at 251-52.

199. The Act provided:

> The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law or treaty of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

REV. STAT. § 753 (1874).

200. *See supra* note 199. The Court hinted that special circumstances demanding immediate action might surround a habeas request even under this latter provision when it observed that Royall himself had not made any claim "that he [was] unable to give security for his appearance in the state court, or that reasonable bail [had been] denied him, or that his trial will be unnecessarily delayed." *Royall*, 117 U.S. at 250.

201. According to the Court,

> [w]e cannot suppose that Congress intended to compel [federal trial] courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the case as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

117 U.S. at 251.

The observation that the state courts would not ignore the Constitution's impact on nonconforming state laws is in contrast to the Court's conclusion, reached only a few years earlier in the civil rights removal cases, that the state courts were *least* to be trusted when the question was the constitutionality of a state statute. *See supra* note 172.

fied as warranting immediate federal intervention also involved federal questions that could have been raised as defenses to the state court proceedings and ones that the state courts could have initially resolved by themselves. Defenses involving foreign law or treaties, or official immunity for acts under color of federal authority, would not seem to be any tougher for the state courts to handle than complex questions under the Constitution.

Perhaps these exceptions are best explained by the reversal of federalism needs that prompted the exhaustion rule in the first place. Many of the defendants in cases involving the law of nations were foreign nationals, a group toward whom the federal government might be especially protective because of fear of local hostility or the potential impact that a conviction might have on relations with foreign powers.[202] Similarly, fear of local hostility rather than the general ability of state courts to construe substantive law accurately would be a reason for giving federal officers a federal trial forum.[203] In addition, when persons acting under color of federal law, such as federal officers, are involuntary litigants in state court because of their arguably federal activity, sovereignty and law enforcement concerns are present on both the federal *and* state sides of the balance. The federal government has an interest in noninterference with its own efforts at law enforcement and administration that is analogous to the state interest usually served by the exhaustion of state remedies rule. This "reverse" federalism interest[204] places such cases in a separate category from those involving private defendants with constitutional objections to the state proceedings.

However, even this protective jurisdiction rationale for foreigners and federal officers does not wholly explain why federal court intervention on their behalf needs to be pretrial instead of posttrial. Nor does it fully explain why these parties could not be required to raise their federal defenses in state court, unless the potential for damage to federal interests somehow might arise in the mere undergoing of proceedings in the state courts. The presence of a hospitable factfinder for the enforcement of federal interests is, of course, a standard justification for giving parties with federal claims access to the federal trial courts.[205] But that argument would not be unique to these defendants. The sympathetic-

202. *Cf.* U.S. CONST. art. III, § 2 (extending federal judicial power to suits "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); 28 U.S.C. § 1332(a)(2) (1982) (conferring district court jurisdiction over suits between "citizens of a State and citizens or subjects of a foreign state"). Although foreigners who are sued in state courts can remove civil suits to federal court, *see* 28 U.S.C. §§ 1332(a)(2), 1441(a) (1982), the general removal statute does not cover criminal proceedings.

203. *See* Mishkin, *The Federal "Question" in the District Court*, 53 COLUM. L. REV. 157, 184-96 (1953).

204. Federalism is, in theory, a two-way street. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) ("['Our Federalism'] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts."). Thus, it may be somewhat imprecise to refer to "reverse" federalism interests to describe those sovereignty interests that tilt in favor of the federal as opposed to state government. The term "federalism," however, seems to have become something of a code word for "States' Rights" after all. *See* Soifer & MacGill, *supra* note 26, at 1186.

205. *See, e.g.*, Hornstein, *Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 564-65 (1981); *cf.* Mishkin, *supra* note 203, at 172-76 (arguing that hospitable factfinder is rationale for federal officer removal).

federal-factfinder argument could just as easily be raised by ordinary defendants to state enforcement actions who raise due process or equal protection challenges to their detention. Moreover, the possible collateral fallout from a first-in-time state court judgment is not a special circumstance for federal intervention in other areas.[206] Besides, preclusion rules are already relaxed in the habeas corpus context.[207]

However, there may be a marginally greater possibility for interference with supremacy concerns from temporary disruption of federal programs or foreign relations incident to undergoing state trial and ordinary appellate process, than when an ordinary private litigant goes through the same good faith process. In the context of federal officers, the unavailability of a federal trial forum poses the obvious and delicate problem of state courts potentially controlling agents of a paramount sovereign.[208] Although erroneous state court orders pose dangers of state-federal confrontation, similar erroneous decisions by a federal court would not. For those very reasons certain federal officers have long enjoyed the analogous vehicle of removal to extricate themselves from state courts for acts taken under color of office.[209] Also, erroneously forcing a federal officer to stand trial poses a risk of interference with ongoing law enforcement efforts—an interest that typically is not associated with private parties raising ordinary federal defenses. Run-of-the-mill objections to state action on constitutional grounds raised by private litigants in ordinary criminal cases pose only a more generalized potential for injury to federally protected interests, a potential that can more readily be remedied by posttrial process. From a judicial administration perspective, it may have been the very everydayness or frequency of constitutional objections by private parties that weighed against federal intervention, just as it did in the injunction context under *Younger*.[210]

B. *Avoiding Exhaustion After* Royall

So engrained is the exhaustion rule that the modern Court has only rarely permitted intervention into ongoing state proceedings through pretrial habeas. The diminished utility of pretrial habeas derives in part from the fact the federal officers who made such frequent use of it in the nineteenth century now all have recourse to their own special removal statute.[211] Further, because extraordi-

206. *See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 235 (1922).

207. *See infra* notes 270 & 274.

208. *Cf.* Tarble's Case, 80 U.S. (13 Wall.) 397, 411-12 (1872) (holding that state court lacks power on habeas corpus to inquire into validity of federal soldier's enlistment).

209. *See infra* note 211. Interference with federal law enforcement was a starkly real possibility in the nineteenth century even in civil cases, because proceedings could be commenced by physical arrest of the defendant officer. *See* Gibbons, *Federal Law and the State Courts 1790-1860*, 36 RUTGERS L. REV. 399, 410, 434 (1984).

210. *See* Shapiro, *supra* note 16, at 549-50, 587-88.

211. *See* 28 U.S.C. § 1442(a)(1)-(4) (1982). In the nineteenth century, federal habeas promised that most federal defenses of federal officers in state-initiated criminal cases would be heard originally by a federal court. Across-the-board federal officer removal in civil and criminal cases did not exist until 1948. *See* HART & WECHSLER, *supra* note 38, at 422-23, 1335-38. Before then, federal officers in civil suits had to rely on the handful of specific removal statutes that covered their position. *See* Collins, *supra* note 8, at 767 & nn. 225-28 (discussing federal question removal in civil

nary circumstances warranting pretrial habeas ordinarily will constitute an exception to *Younger*'s noninterference rule as well, injunctive relief often is available to criminal defendants without having to meet the extra requirement of custody.[212] For example, double jeopardy claims, which can present appropriate occasions for the exercise of equitable relief against an ongoing state proceeding under the *Younger* exceptional circumstances formula, also have prompted courts to abort trial through the vehicle of pretrial habeas.[213] In addition, injunctive relief may sometimes be preferable to habeas because it is a procedurally more convenient vehicle for seeking class-wide or systemic relief.[214]

In its only recent pretrial habeas decision, the Court in *Braden v. 30th Judicial Circuit Court*[215] approved pretrial relief to compel a speedy trial in a state court on an outstanding charge for which the federal petitioner, who was in state custody for other crimes, was not then being tried. The majority distinguished *Royall* by finding that the petitioner in *Braden* had not sought to adjudicate a defense to a prosecution, but had simply demanded enforcement of the constitutional right to be brought speedily to trial.[216] As to that present denial, there was no state forum in which he could get relief. The dissent urged that the petitioner was seeking, *Younger*-style, to enjoin state officials "to litigate a question that otherwise could only be raised as an absolute defense in a state criminal proceeding" against him.[217] The dissent was correct insofar as the effect of a successful pretrial habeas ruling was the equivalent of an injunction directed to state officials either to commence prosecution against someone in unquestionably lawful custody or to drop it altogether. But it was wrong to the extent it understood that such issues always could be raised effectively by defense to a state proceeding. In many cases habeas applicants could languish indefinitely without ever being brought to trial, unless there was some way to challenge their continued confinement by demanding a speedy trial. *Braden* is, therefore, the habeas corpus analog to the *Younger* exception, recognized in *Gerstein v. Pugh*,[218] that allowed an injunction to force the state to compel probable cause

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cases). The modern statute appears to allow for removal whenever the defendant officer engaged in acts "under color of office," even if no federal defense or immunity is raised. The courts of appeals, however, are divided on the question. *Compare* California v. Mesa, 813 F.2d 960 (9th Cir. 1987) (federal officer status alone will not secure removal; some federal defense must be raised) *with* Pennsylvania v. Newcomer, 618 F.2d 246 (3d Cir. 1980) (federal officers may remove any action brought against them in state court for acts within scope of employment).

212. *See, e.g.*, Dolack v. Allenbrand, 548 F.2d 891, 893 (10th Cir. 1977); Kolski v. Watkins, 544 F.2d 762, 766 (5th Cir. 1977); Moore v. De Young, 515 F.2d 437, 447-48 (3d Cir. 1975); *cf.* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 491 (7th Cir. 1984) (applying habeas doctrine of futility to *Younger*).

213. *See, e.g.*, Robinson v. Wade, 686 F.2d 298, 302-03 n.7 (5th Cir. 1982); Gully v. Kunzman, 592 F.2d 283, 287 & n.8 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979); Drayton v. Hayes, 589 F.2d 117, 120-21 (2d Cir. 1979); United States *ex rel.* Webb v. Court of Common Pleas, 516 F.2d 1034, 1039 n.18 (3d Cir. 1975); Fain v. Duff, 488 F.2d 218, 221-24 (5th Cir. 1973), *cert. denied*, 421 U.S. 999 (1975).

214. *See* Ziegler, *supra* note 100, at 300-05.

215. 410 U.S. 484 (1973).

216. *See id.* at 489-90. The federal petitioner was serving a sentence in an Alabama prison, and he sought habeas to compel trial in Kentucky on unrelated charges. *Id.* at 487.

217. *Id.* at 503 (Rehnquist, J., dissenting).

218. 420 U.S. 103 (1975).

hearings for pretrial detainees.

Braden might have been decided differently had the federal petitioner then been in an ongoing proceeding in which he could actually raise the speedy trial objection. The Court has since concluded that, unlike the double jeopardy guarantee, the speedy trial guarantee is merely a freedom from criminal liability because of an insufficiently speedy trial, and not a right to avoid going through a stale prosecution.[219] Lower courts have accordingly refused to extend *Braden* to allow pretrial federal habeas intervention when the defendant is already in a judicial proceeding and can raise the speedy trial issue by defense in state court.[220] *Braden*, therefore, only parallels the *Younger* exceptions for procedural inadequacies, such as *Gerstein*, rather than those exceptions in which the harm arises from simply having to go through the state court trial. By contrast, when lower federal courts use pretrial habeas in the double jeopardy context, the harm they redress is a substantive one: the undergoing of state court trial itself.[221] Thus, even though an ongoing state proceeding may exist within which to raise the double jeopardy issue by defense, the federal pretrial forum remains open.

Occasionally, the Court has intimated that pretrial habeas will lie when the state crime charged is in the exclusive jurisdiction of the federal courts.[222] But the argument that the state courts lack subject matter jurisdiction over a crime typically has not, by itself, been enough to secure pretrial habeas.[223] A similar result occurs in cases of pretrial habeas to abort military court martial proceedings for crimes over which the military arguably has no jurisdiction: litigants need to show something more than a simple claim of no-power-to-proceed in the court that is trying them.[224] These habeas decisions are analogous to decisions

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219. *See* United States v. MacDonald, 435 U.S. 850, 859-61 (1978) (deciding appealability from federal district court).

220. *See, e.g.*, Brown v. Estelle, 530 F.2d 1280 (5th Cir. 1976); Moore v. DeYoung, 515 F.2d 437 (3d Cir. 1975); *see also* Note, *The Right to a Speedy Trial and the Exhaustion Requirement of Federal Habeas Corpus*, 1977 DUKE L.J. 707, 718-19 & nn.60-62 (discussing impact of *Younger* on pretrial habeas).

221. *See* cases cited *supra* note 213.

222. *See Royall*, 117 U.S. at 253; *see also Braden*, 410 U.S. at 508 (Rehnquist, J., dissenting) (concluding that pretrial habeas was available when state court defendants asserted "lack of jurisdiction, under the Supremacy Clause, for the State to bring any criminal charges against the petitioner"); *In re* Loney, 134 U.S. 372, 376-77 (1886) (upholding pretrial grant of writ in criminal proceeding to state court defendant charged with perjury before notary public in disputed election of member of Congress; defendant claimed exclusive federal court cognizance of crime).

223. *See, e.g.*, New York v. Eno, 155 U.S. 89 (1894). In *Eno*, the president of a national bank, charged in state court with forgery, claimed on pretrial federal habeas that the crime was exclusively within the cognizance of the federal courts. The Supreme Court reversed the lower court's grant of the writ, observing that a bare defense of exclusive federal jurisdiction did not amount to special circumstances under *Royall* for pretrial habeas. The federal defense could be raised in the state courts and reviewed after the trial, either directly by the Supreme Court or collaterally in the lower federal courts on postjudgment habeas. *See id.* at 96-97 (distinguishing *In re* Loney, 134 U.S. 372 (1886), discussed *supra* at note 222, as a case involving exigent circumstances).

224. Recently, the Court held that military courts have jurisdiction over crimes committed by servicemen, whether or not they are service-related. *See* Solorio v. United States, 107 S. Ct. 2924 (1987). Prior to that decision the Court had held that criminal acts of persons who were no longer in the service when charged were not "service related offenses" within the meaning of the relevant military court jurisdictional statute. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 1 (1955). Civilians, therefore, succeeded on federal pretrial habeas in halting court martials that they claimed lacked jurisdiction to try them for crimes they had previously committed while on active duty. *Id.*

in the Anti-Injunction Act context, in which the Court has prevented private litigants from shutting down state court proceedings that adjudicate matters claimed to be within exclusive federal agency jurisdiction.[225] They are also analogous to those cases refusing to carve out an exception to the *Younger* doctrine when the state court defendants argue that state regulatory power has been preempted by federal law.[226]

The parallel thinking behind the exceptions for pretrial habeas and the

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The Court did not require them to raise the jurisdictional claim as a defense in the military court proceeding.

Later, however, the Court denied pretrial injunctive relief to a defendant still in the military who had made a substantial claim that his own crime was not service-related for other reasons, so that the military courts had no jurisdiction to try him. *See* Schlesinger v. Councilman, 420 U.S. 738 (1975). The Court, expressly drawing support from the *Younger* doctrine of "Our Federalism," distinguished its earlier precedent. It explained that the rationale for immediate intervention in *Toth* hinged on the jurisdictional objection being raised by a civilian rather than a serviceman. *Id.* at 754-56, 759. Even if the military court, prior to *Solorio*, lacked jurisdiction over the serviceman, the claim could be raised as a defense and through appeals within the military court system; ultimate review would remain in an Article III court. *Id.* The *Councilman* dissent argued that the federal petitioners in both *Toth* and *Councilman* had " 'raised substantial arguments denying the right of the military to try them at all,' " *id.* at 763 (Brennan, J., concurring in part and dissenting in part) (quoting Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969)), and that immediate federal intervention was proper in both cases in order to consider the jurisdictional question in advance. *Id.*

At some level every claim of a lack of subject matter jurisdiction is an attack on the right of the tribunal to proceed. But no-power-to-proceed defenses rarely have been the basis for immediate collateral intervention into trial proceedings. *See supra* note 209; *cf.* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (exhaustion of administrative remedies required even though challenge made to jurisdiction of agency). Certainly, the want of power in a court of limited jurisdiction, particularly a military court that could provide only a "rough form of justice" in a setting that lacks many civilian freedoms, Reid v. Covert, 354 U.S. 1, 35 (1957), presents a jurisdictional objection warranting closer and more immediate scrutiny. By focusing on the civilian or noncivilian status of the petitioner, the Court at least took into account the respective loss of personal liberties that would be entailed in the absence of immediate intervention.

225. *See* Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955) (union's effort to enjoin state court proceeding against its picketing barred by Anti-Injunction Act, despite claim that National Labor Relations Board had exclusive jurisdiction over picketing); *cf.* HART & WECHSLER, *supra* note 38, at 1250-51 n.8 (no-power-to-proceed arguments do not get around § 2283). However, a claim of federal agency jurisdictional exclusivity may sometimes be a basis for stepped-up appealability under a liberalized reading of the final judgment statute, 28 U.S.C. § 1257 (1982). *See infra* note 255. Also, when the United States or a federal agency seeks to vindicate the exclusive jurisdiction of the agency over a matter that is pending in the state courts, it may be able to do so by injunction. *See supra* note 139.

226. *Compare* Potomac Elec. Power Co. v. Sachs, 802 F.2d 1527, 1532 (4th Cir. 1986) (*Younger* applicable despite defense of federal agency preemption) *and* New Orleans Pub. Serv., Inc. v. City of New Orleans, 798 F.2d 858, 863-64 (5th Cir. 1986) (same), *cert. denied*, 107 S. Ct. 1910 (1987) *with* Kentucky-W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n, 791 F.2d 1111, 1116-17 (3d Cir. 1986) (*Younger* not applied when federal agency preemption is at issue) *and* Middle South Energy v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404 (8th Cir. 1985) (same), *cert. denied*, 106 S. Ct. 884 (1986). The claim of federal agency preemption in these cases does implicate federal law enforcement and regulatory interests that tend to counterbalance ordinary comity concerns underlying *Younger*. However, analogous arguments of an absence of state court subject matter jurisdiction regularly have proved insufficient to deprive the state courts of the opportunity to decide that preemption question in the first instance. Even if preemption of the subject matter reflects congressional doubt about state court parity in a particular area, the question whether state regulations are in fact preempted is a separate issue that the state courts are presumably capable of answering as well. *Cf.* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (ordinary preemption defense may be heard by state courts). Furthermore, rejection of the jurisdictional preemption defense may be a good candidate for accelerated direct review in the Supreme Court. *See infra* note 255 (discussing Local 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963)). Of course, the same reasons that make the preemption question immediately appealable apply to the argument in support of prompt collateral intervention.

framework for halting ongoing proceedings developed by *Younger*, the Anti-Injunction Act, and the civil rights removal statute suggests that relief under the exceptions to these latter rules often will mirror relief under pretrial habeas. To be sure, there are differences between injunctive relief and habeas. Habeas is available only to persons in custody, and it supplies the exclusive remedy for parties who seek release from or a shortening of their confinement.[227] Furthermore, habeas, unlike injunctive relief under section 1983, ordinarily would require exhaustion of state remedies. However, if pretrial habeas is available because of the existence of special circumstances, there is necessarily no need to further exhaust state remedies. The "special" circumstances for pretrial habeas thus seem indistinguishable from the "exceptional" circumstances that allow for injunctive relief against ongoing proceedings. As a result, the difference in outcomes between a suit for injunctive relief and pretrial habeas corpus should not be significant.

VI. FLEXIBLE FINALITY AND ACCELERATED SUPREME COURT REVIEW OF STATE COURT JUDGMENTS

The extraordinary circumstances exceptions to the noninterference rules considered thus far have dealt with immediate intervention by federal trial courts. Congressional postponement of direct Supreme Court review of state court decisions until the conclusion of state trial and appellate process serves a similar goal of nonintervention into ongoing state judicial proceedings.[228] The Supreme Court, however, has softened the seemingly unambiguous statutory requirement of a "final judgment" to allow it to grant review while state court proceedings are still pending.[229] The considerations that have moved the Court to bend the clear-cut finality rule are roughly analogous to those that have prompted it to allow immediate federal trial court intervention in the injunction, pretrial habeas, and civil rights removal contexts.

A. *"Final" Decisions on Collateral Federal Questions*

In *Cox Broadcasting Corp. v. Cohn*[230] the Court illustrated these considerations by marking out four categories of state court judgments it treated as final even though state proceedings were not yet complete.[231] The most intriguing

227. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973). If parties in custody seek to attack the length or fact of their confinement on constitutional grounds, habeas corpus, which ordinarily has an exhaustion of state judicial remedies requirement, provides the sole remedy. The parties may not immediately bring an injunction suit under § 1983 even if it otherwise would be available. *Id.*

228. *See* 28 U.S.C. § 1257 (1982) (limiting review of decisions from state courts to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had").

229. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (state court finality); *cf.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (relaxing requirement of federal district court finality as prerequisite to review by federal appeals courts under 28 U.S.C. § 1291 (1982)).

230. 420 U.S. 469 (1975).

231. *See id.* at 477. The first three categories dealt with cases that (1) were completed as a practical matter because the merits had been fully decided, (2) would necessarily turn on a federal issue that had already been conclusively resolved, and (3) involved state procedural rules that would have barred review later. *Id.* at 479-81; *see also* Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1012-14 (1978) (discussing *Cox* categories).

and potentially expansive of the four *Cox* categories allows review of cases before the conclusion of state court proceedings when the federal issue has been finally decided by the state court system and when "a refusal immediately to review the state court decision might seriously erode federal policy."[232]

The examples the *Cox* Court placed in this category constitute a curious collection. In one of the cases, the Court had interfered with state trial court proceedings that had temporarily enjoined labor picketing. Delaying review of this decision, said the Court, "would seriously erode the national labor policy" of having only the National Labor Relations Board initially hear such cases.[233] In another, pretrial intervention had been allowed to review a state court decision upholding venue over two national banks which claimed that a congressional statute prevented suit against them in the particular county in which they had been sued.[234] The Court focused on the prospect that it might reverse on the venue issue after subjecting the parties to litigation " 'which may all be for nought.' "[235] In its last example, which served as the model for *Cox*, a newspaper was sued for refusing to print a political candidate's reply to an editorial. The newspaper had defended by urging the unconstitutionality of the statute requiring it to carry the reply. After the state's highest court rejected that claim, the Supreme Court granted immediate review because of the possible chill to the press arising from the continued existence, pending trial, of an "unsettled" question of the statute's constitutionality.[236]

In each of these exemplar cases, rejection of the dispositive federal defense by the state's highest court was coupled with an order of remand for trial, when the defendants were prepared to raise viable nonfederal defenses that could have mooted the federal issues. The cases thus express one of the traditional concerns of the final judgment rule: the avoidance of irreparable harm pending litigation.[237] In a long line of cases, appellate review was allowed when lower federal courts had ordered an immediate transfer of property, despite the fact that additional lower court proceedings still remained. The Supreme Court granted review in these cases because "irremediable injury"[238] might befall the property

232. *Cox*, 420 U.S. at 483.

233. *Id.* (discussing Local 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963) (alternative holding)).

234. *Id.* at 483-84 (discussing Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963)).

235. *Id.* at 484 (quoting *Mercantile*, 371 U.S. at 558).

236. *Id.* at 484-86 (discussing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).

237. For irreparable harm as a possible explanation of these cases, see Note, *supra* note 231, at 1026-32. *See also* Pennsylvania v. Ritchie, 107 S. Ct. 989, 997-98 (1987) (observing that finality requirements should be construed so as not to cause irreparable injury); Matthews v. Eldridge, 424 U.S. 319, 331 n.11 (1976) (same).

238. Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848). In *Forgay* the Court allowed immediate review of an interlocutory lower federal court order that transferred one party's property pending the conclusion of the additional proceedings still remaining in the trial court. Although Chief Justice Taney's decision to allow an immediate appeal clearly turned on the avoidance of irreparable harm, *Forgay* has traditionally been explained as a case involving practical finality—insofar as the trial was completed and only an accounting of damages remained—rather than as a case involving irreparable harm. *See, e.g.*, *Cox*, 420 U.S. at 480; Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 101 (1975). *But see* Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 298-300 (1966) (viewing *Forgay* as irreparable harm case).

holder if review were delayed until the conclusion of the remaining proceedings, and because the order transferring property was separable from any other issues.[239]

Some degree of irreparable harm was involved in each of the cases to which the *Cox* decision referred. The newspaper freedom of speech case, as well as *Cox* itself, involved "time-bound"[240] rights that could have been lost by the chill that would have arisen from continued litigation without federal intervention. The labor union agency preemption case had analogs in the protection of action under color of federal law from state interference though pretrial habeas relief.[241] More importantly, in addition to the jurisdictional objection, that case also involved the possible irreparable loss of a federally protected right to picket, an interest akin to time-bound free speech interests. The national bank venue defense case went much further than the others; no traditional irreparable harms were present, even though the case arguably involved the protection of federal instrumentalities in addition to the wrong-forum claim.[242]

Perhaps more easily than it did in these cases, the Court recently held that a

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239. *See also* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 127 (1945) (upholding immediate review of order vacating transfer of radio operating license); Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362, 373 (1914) (upholding immediate review of order commanding surrender of property to State, thereby disposing of federal rights).

240. *See* Note, *supra* note 231, at 1024-25.

241. *See supra* text accompanying notes 196-214.

242. In addition, in a series of cases since its decision in *Cox*, the Court has held that a state high court's pretrial rejection of a constitutional due process defense of insufficient minimum contacts for the exercise of personal jurisdiction can be immediately appealed as a final judgment. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 196 n.12 (1977); *see also* Rosenblatt v. American Cyanamid, 86 S. Ct. 1 (Goldberg, Circuit Justice 1965); *cf.* Rush v. Savchuk, 444 U.S. 320 (1980) (allowing immediate appeal without discussion of issue); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (same). Like a rejected defense of lack of subject matter jurisdiction, which is usually not enough for immediate district court interference, *see supra* note 225, this defense involves a claim by defendant that he has something akin to a right not to be tried, at least in a particular forum. Although minimum contacts analysis may be driven in part by concerns of the judicial system, the interest due process protects is primarily a personal one. *See, e.g.*, Burger King v. Rudzewicz, 471 U.S. 462, 471-72 (1985); *Shaffer*, 433 U.S. at 215-16. The defense is both a protection against having to appear and defend in a distant and unfamiliar forum, and a freedom from such a forum's imposition of liability after trial.

Still, the harm of having to endure such proceedings can be mitigated to a large extent by success at trial on the merits, by reversal of the jurisdictional holding, or by reversal of a judgment of liability on subsequent appeal. Potentially unreviewable harm only arises in the unusual case in which defendants who have unsuccessfully contested personal jurisdiction by a special appearance in state court are then faced with the hard choice of having to waive objections to jurisdiction in order to litigate the merits. Like the defendants facing the *Young* dilemma of choosing between a waiver of rights or risking penalties, the Court has assisted these litigants through its flexible finality doctrine.

In *Shaffer* and *Rosenblatt* defendants objecting to personal jurisdiction were faced with the hard choice of waiving their jurisdictional objection or facing a default judgment. In *Rush* and *World-Wide Volkswagen*, however, the Court took an immediate appeal without addressing the question of finality. The hard-choice rationale probably explains why pretrial denials of motions to dismiss for want of personal jurisdiction in the federal courts are not appealable of right under the collateral order doctrine. *See infra* text accompanying note 245. *See generally* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351, at 567-68 & n.40 (1969) (noting that denials of motions to dismiss for lack of personal jurisdiction are not immediately appealable). Because the federal court system does not condition trial on the merits on waiver of personal jurisdiction defenses, *see* FED. R. CIV. P. 12(g)-(h), federal defendants with minimum contacts defenses can litigate that defense on appeal after trial. They do not face the same hard choice that a state court litigant might face. Of those who unsuccessfully raise personal jurisdiction questions, therefore, it is arguably only the hard-choice litigants who should be able to seek immediate Supreme Court review.

conclusive state court rejection of a double jeopardy defense is immediately appealable under *Cox*, even though trial has not yet begun.[243] The Court's reasoning implicitly tracked the reasoning behind *Younger*'s exceptional circumstances doctrine as well as the justification for pretrial habeas, both of which also have successfully accommodated intervention for double jeopardy claims.[244] Analogous concerns over irreparable harm have been expressed by the Court as the basis for its "collateral order" doctrine governing appeals from the federal district courts to the federal appellate courts.[245]

B. *Constructively Final Decisions*

In each of the scenarios described in *Cox*, the Court interfered only after an actual and conclusive decision of the state's highest court on the federal issue. Nevertheless, the liberal finality rules also have been extended to interlocutory orders and judgments of state *trial* courts that the state system has refused to

243. *See* Smalis v. Pennsylvania, 106 S. Ct. 1745, 1748 n.4 (1986).

244. *See supra* text accompanying notes 80-82 & 213.

245. Under the Court's "collateral order" doctrine a party may appeal district court orders that conclusively determine a particular issue which is separate from and collateral to the merits and is effectively unreviewable on appeal later from a final decision. *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374-75 (1981); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The Court explained this last requirement as aimed at denials of rights that would be "destroyed if not vindicated before trial." United States v. MacDonald, 435 U.S. 850, 860 (1978). *See also* United States v. Ryan, 402 U.S. 530, 533 (1971) (collateral order appeal will lie only when "denial of immediate review would render impossible any review whatsoever").

As in the context of immediate collateral intervention and direct review of final judgments from the state courts, the concern is that continued litigation and resort to ordinary appellate process would work an injury and thus by definition could not provide an adequate forum to protect against it. *See Firestone Tire*, 449 U.S. at 376 ("[T]he finality requirement should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' ") (quoting Matthews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) (pretrial denial of motion to reduce unconstitutionally excessive bail held immediately appealable, because right to be released during trial would be lost if vindicated only after appeal).

Other collateral order doctrine appeals have focused on defendants who claimed similar rights not to "endure a trial." *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 743 (1982) (district court's rejection of former President's defense of absolute immunity from civil damages in case seeking only monetary relief); Heltoski v. Meanor, 442 U.S. 500, 501 (1979) (congressman claiming absolute immunity from criminal prosecution under the speech and debate clauses); Abney v. United States, 431 U.S. 651, 653 (1977) (defendants who lost motion to dismiss federal criminal proceeding on double jeopardy grounds). Denials of ordinary dispositive federal defenses, on the other hand, have not sufficed for immediate appellate intervention. Even though defendants in such cases would not have to undergo trial should the appellate court reverse, they stand to suffer no more than the harms that always attend good faith litigation.

Discovery and other interlocutory orders have rarely presented a compelling case for appellate interference under *Cohen*. *See, e.g.*, United States v. Ryan, 402 U.S. 530, 533 (1971); Cobbledick v. United States, 309 U.S. 323 (1940); *cf.* Stefanelli v. Minard, 342 U.S. 117, 122 (1951) (use of unconstitutionally seized evidence in state court not immediately enjoinable when "[n]o such irreparable injury [is] clear and imminent"). Such orders typically do not involve unreviewable harms, even though parties are in a *Young*-like dilemma of being forced to violate an order to get review of it. *But see* United States v. Nixon, 418 U.S. 683 (1974) (holding denial of motion to quash subpoena for presidential tapes to be final decision without requiring President to risk contempt). The rule is different, and appealability is allowed, when the objections are to discovery of a nonparty, because the nonparty cannot so readily be expected to risk contempt to test the discovery ruling and to protect the rights of someone who is a party to the litigation. *See* Gravel v. United States, 408 U.S. 606, 608-09 n.1 (1972); Perlman v. United States, 247 U.S. 7, 13 (1918). *See generally* André, *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time For a Change*, 55 N.Y.U. L. REV. 1041 (1980) (discussing differences in party versus nonparty appealability).

review—once to let a Nazi demonstration go forward,[246] once to allow the press access to a criminal trial,[247] and once to allow a drive-in theatre to continue showing an allegedly obscene film.[248] These cases were even less final than those discussed in *Cox*. The state's appellate machinery had not yet ruled on the federal issue, because the state courts either could not or would not hear an interlocutory appeal of the trial court's pretrial ruling.

Each of these cases, however, also involved rulings that, unless reviewed promptly, would have worked an immediate and irremediable loss of federally protected rights. Thus, the state appellate system's inability or refusal to provide immediate review of a claimed injury to a time-bound federally protected right effectively constituted a final decision allowing the present injury to federal interests to go unabated. In this sense, the state system's nonanswer was also an answer "by the highest court of [the] state in which a decision could be had."[249] Although it may be difficult to see how the irreparable loss of a federal interest would make an otherwise nonfinal judgment any more final, these cases show that the presence of substantial irreparable harm can do just that.[250] These decisions, therefore, operate as judge-made equivalents in the state court system to the statutory appeals available from federal trial courts on a grant or denial of injunctive relief.[251]

C. *Asymmetries Between Immediate Supreme Court and Trial Court Interference*

The symmetry of immediate appellate and collateral intervention has been less than perfect. The scope of liberalized finality as a vehicle for immediate interference into ongoing state proceedings is somewhat broader than immediate collateral intervention. Although most of the harms that would trigger intervention by way of injunction, civil rights removal, or pretrial habeas also would

246. *See* National Socialist Party v. Village of Skokie, 432 U.S. 43, 44 (1977) (per curiam) (observing that separate issue of legality of state trial court's injunction against an imminent march would have to be reviewed immediately, lest first amendment right to demonstrate be irretrievably lost pending ordinary appellate process in state system).

247. Nebraska Press Ass'n v. Stuart, 423 U.S. 1319, 1325 (Blackmun, Circuit Justice 1975) (noting that valuable rights of press access might be lost pending completion of state court proceedings).

248. M.I.C., Ltd. v. Bedford Township, 463 U.S. 1341, 1342-43 (Brennan, Circuit Justice 1983).

249. 28 U.S.C. § 1257 (1972) (cited in *Nebraska Press Ass'n*, 423 U.S. at 1329).

250. According to one decision, for example,

> Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action . . . the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that the restraint on the media will persist. In this sense, delay itself is a final decision.

Id.

251. *See* 28 U.S.C. § 1292(a) (1982) (allowing for immediate appeal from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"). Congress has not provided a similar rule to govern the appeal of injunctive relief or its denial in the state courts when such relief is based on federal law.

warrant prompt appellate review after the state system had considered them,[252] the converse is not true. All of the harms the Court sought to prevent under *Cox* probably would not warrant immediate federal trial court relief. The potential chill to free speech interests of third parties from continued state court litigation under an overbroad state law, which the Court focused on in *Cox*, was offered and rejected as a ground for federal district court intervention in *Younger*.[253] The wrong-forum defenses of improper venue and agency preemption that *Cox* approved as candidates for immediate review would not, standing alone, have provided a basis for removal, injunctive relief, or pretrial habeas.[254] Those examples involved interlocutory harms of somewhat less magnitude than those for which district court intervention has been successfully invoked. Indeed, the more open avenue of direct review by the Supreme Court may be a necessary safety valve to allow prompt federal input, given the restrictions on immediate district court relief under similar circumstances.[255]

The broader scope of intervention associated with liberalized finality makes sense in terms of the competing interests at stake. The entire range of comity and dispute resolution concerns is enormously reduced, although not eliminated, when the state courts have conclusively reviewed the relevant federal issue, even if only by interlocutory appeal. The interest in issue crystallization is satisfied once the federal question has been resolved and self-corrective process actually has been exhausted. Traditional equitable concerns such as the likelihood of success on the merits and the magnitude of the harm are no doubt unspoken factors in the Court's calculus in deciding questions of finality.[256] Yet it considers such cases at the expense of docket concerns to the extent that more litigants increasingly will seek piecemeal review in hopes of coming under one of the *Cox* categories.

In addition, there is at least one asymmetry that indicates the scope of accelerated direct review sometimes may be *narrower* than immediate district court interference. In *Flynt v. Ohio*[257] the Court denied an immediate appeal from a state supreme court's conclusive rejection of an equal protection defense of selective and discriminatory prosecution, calling the judgment below nonfinal. *Younger*'s exception permitting immediate federal court intervention to abort a

252. The obvious exception to this rule is Flynt v. Ohio, 451 U.S. 619 (1981) (per curiam). *See infra* text accompanying notes 257-59.

253. *See supra* note 44. *Cox* was a civil rather than a criminal case, thus arguably making federal court intervention less intrusive. *See supra* note 144.

254. *See supra* notes 8 (federal defense removal), 224 (military court jurisdiction, and pretrial habeas and injunctive relief), 225 (exclusive federal agency jurisdiction and injunctions against state courts), 242 (personal jurisdiction and appealability).

255. *Compare* Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955) (anti-injunction statute barred injunction sought by union against employer's state court lawsuit to stop union's picketing, despite claims that jurisdiction over picketing was exclusively National Labor Relations Board's and that time-bound rights could be lost absent prompt intervention) *with* Local 438, Constr. & Gen. Laborers' Union v. Curry, 371 U.S. 542 (1963) (under similar facts, state court order enjoining picketing held immediately appealable to Supreme Court under 28 U.S.C. § 1257 (1982)).

256. *See, e.g.*, Redish, *supra* note 238, at 101; *cf.* Leubsdorf, *supra* note 79, at 551-55 (noting irreparability considerations that enter into traditional calculus for preliminary injunctive relief).

257. 451 U.S. 619 (1981) (per curiam).

bad faith prosecution suggests that the right to be free from such a proceeding would be irreparably lost in the absence of immediate interference. If the resolution of claims of discriminatory prosecution in violation of the equal protection clause can await the outcome of litigation on the merits without being seriously eroded, as claimed in *Flynt*, then either the Court was wrong in *Younger* when it suggested the contrary, or it was wrong in *Flynt* where it made no reference to the *Younger* bad faith analogy.[258] The decision should signal litigants to raise bad faith issues in federal court *before* trial. This may even be an institutionally preferable choice given the ease with which a federal trial court, in contrast to the Supreme Court, can police fact-laden denials of federal rights. A similar nonappealability rule in federal prosecutions faces defendants who raise a claim of vindictive prosecution;[259] but they at least have had one federal forum in which they could present the question.[260]

VII. CHOOSING AMONG OVERLAPPING MODES OF INTERVENTION: COLLATERAL OR APPELLATE INTERFERENCE?

A. *The Dilemma in Choosing a Federal Forum*

Given that each of the exceptions to these noninterference rules makes a similar inquiry into the adequacy of state court remedies, which way should involuntary state court litigants turn, assuming they can show the exceptional circumstances that give them a right to avoid further state proceedings? As

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258. *See* D. CURRIE, FEDERAL COURTS 821 n.2 (3d ed. 1982).

259. *See* United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (per curiam) (denial of motion to dismiss criminal charges based on prosecutorial vindictiveness in modifying indictment after defendant's change of venue held not immediately appealable). As in *Flynt*, the Court in *Hollywood Motor Car* failed to consider the *Younger* bad faith prosecution analogy.

260. Another "reverse" asymmetry was created by United States v. MacDonald, 435 U.S. 850, 857 (1978), in which the Court held that a denial of a motion to dismiss for want of a speedy trial was not immediately appealable under the collateral order doctrine. The Court concluded that the speedy trial right was merely one to be free from liability because of an insufficiently prompt trial, and not, like double jeopardy, a guarantee not to undergo trial at all. *Id.* at 858-59. It also concluded that the prejudice from state court proceedings could not be assessed until after they had been tried to a conclusion. *Id.* at 861. Previously, however, the Court had held that a party in state custody could, through pretrial habeas, force the state to come to trial in a timely fashion or else drop its charges. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); *see also supra* text accompanying notes 215-21 (comparing *Braden* with *Younger*). Thus, the Court had suggested that the harm from the denial of the speedy trial can arise and be addressable not just after trial, but also before.

Nevertheless, *Braden*, which allows pretrial intervention on the basis of speedy trial claims, can be harmonized with *MacDonald* insofar as it focuses on the irreparable harm of continued, unreviewed detention in the absence of trial rather than the litigational harm of undergoing stale proceedings. This may explain why *Braden*-style pretrial habeas in federal court generally is unavailable to those who seek a dismissal of pending state court proceedings. *See supra* note 220 and accompanying text. If litigants wish to make a successful speedy trial objection to a state prosecution on habeas corpus, they must do so in advance of any state judicial proceedings, and they must couch their claims as an attack on custody by affirmatively requesting prosecution. This scheme makes some sense for persons already in state custody, who can be expected to make their colorable speedy trial claim in federal court before trial. For them such a claim would seem less compelling if first raised only after trial in state court has commenced. The scheme makes less sense for persons not yet in custody who would have no real reason to want to push the state prosecution along. *See* Note, *supra* note 220, at 710-15 & 720-24.

noted previously,[261] there is substantial overlap in the availability and effect of the various modes of collateral intervention. Although there are a few procedural and substantive quirks peculiar to civil rights removal and pretrial habeas, the choice of relief through either of those two avenues—if available—or through injunctive relief should not matter much. Their results are also the same: each aborts the ongoing state proceedings.

A distinct and more troublesome set of issues is presented by the overlap between immediate collateral relief in the district courts and immediate appellate interference by the Supreme Court under a liberalized final judgment rule. The difficulty arises because circumstances presenting the possible irreparable loss of federal rights that would warrant prompt federal trial court interference can resemble the extraordinary circumstances under which the Court would be prepared to find a final judgment under *Cox*, and so warrant prompt Supreme Court interference. Indeed, the collateral nature of a present denial of federal rights, which itself argues for finding a final judgment, also argues for finding an independent federal violation over which a party may originally sue in federal court.[262] However, if a decision in the state court system can be considered final, then, according to *Rooker v. Fidelity Trust Co.*,[263] direct Supreme Court review may be the *only* proper mode of federal interference. Even assuming a federal trial court had the jurisdictional power to hear the case, there also might be preclusion problems at that point in allowing relitigation of issues already passed upon by the state courts.[264]

At the extremes, there may be no question as to which way litigants must turn. If they have presented federal questions to the state courts and obtained a conclusive answer to them—not just from the trial court, but from the state's highest court, as in *Cox*—direct review is probably the only option even if trial has yet to begin. At that point, the exclusivity of Supreme Court review makes sense, even though a suit for injunctive relief, pretrial habeas, or civil rights removal might have been available at the outset.[265] In addition, some claims of irreparable harm, including those catalogued in *Cox*, may be cognizable in the Supreme Court alone to the extent that the scope of the liberalized final judgment doctrine is broader than the scope of immediate trial court intervention. Only if the litigant were in custody and thus able to seek habeas corpus, might he resort to a federal district court without first having to exhaust avenues of direct review by the Supreme Court.[266] In sharp contrast are parties who, prior

261. *See supra* text accompanying notes 135-46, 178-80 & 224-27.

262. *See* Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1531 (1987) (Brennan, J., concurring).

263. 263 U.S. 413, 416 (1923); *see also* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983) (holding lower federal courts lack jurisdiction to review final state court decisions); 28 U.S.C. § 1257 (1982) (giving Supreme Court power to review final judgments from state courts).

264. *See generally* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978) (discussing relationship between res judicata and finality).

265. *See supra* note 80 and accompanying text (discussing injunctive relief to remedy double jeopardy claims at pretrial stage); *see also* Smalis v. Pennsylvania, 106 S. Ct. 1745, 1748 n.4 (1986) (allowing direct review of finally decided double jeopardy claim at pretrial stage).

266. A federal habeas applicant need not first seek Supreme Court review as a precondition to federal relief. *See* Fay v. Noia, 372 U.S. 391, 435-36 (1963).

to trial, have not yet presented to the state courts the federal issue that otherwise warrants prompt intervention into the ongoing proceedings. They could hardly be said to have secured any judgment, much less a final one.[267] If immediate federal relief is otherwise available, the district court will be their only federal pretrial forum.

The hard questions arise when there has been a ruling in the state courts on the federal issue that is less than conclusive. For example, instead of going directly to federal court, litigants with a ground for immediate interference into the state proceedings, such as a double jeopardy defense, might present that issue in the state courts by pretrial motion.[268] They could, however, lose that challenge, and interlocutory state court review might prove unavailable. Such litigants then face a new dilemma. The unreviewed order arguably is a final judgment requiring direct review. If irreparable harm is imminent—as it would be, for example, in the double jeopardy context—the state courts' failure to review the trial court decision is tantamount to rejecting the claimed right to avoid the harm.[269] Even if the case were considered nonfinal for purposes of Supreme Court review, there would remain problems with securing injunctive relief from the district court. At that point federal plaintiffs would face a troublesome nonjurisdictional question of issue preclusion unless they were in custody and could seek habeas corpus.[270] The obvious danger is that in allowing (or forcing) litigants to test even the quick-fix avenues of state court relief against proceedings that would otherwise be enjoinable, they might lose the federal trial forum each of these exceptional circumstances exceptions seems to make available.

Without discussion of the problem many federal courts, including the Supreme Court in *Younger*, have sanctioned a pattern of limited state court exhaustion and federal court "relitigation," even outside the habeas context.[271]

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267. Until a state court decision is final for final judgment purposes, *Rooker*'s limit on federal trial court jurisdiction is not implicated. *See* Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 564 (7th Cir. 1986) ("An essential strut beneath the [*Rooker*] policy is the existence of jurisdiction in the Supreme Court . . . ."); *see also infra* note 287 and accompanying text (discussing *Rooker*).

268. *See supra* text accompanying notes 70-78 (suggesting that when litigants claim undergoing of proceedings is a constitutional injury, preliminary resort to state court should not be required under *Younger*). In civil cases still not covered by *Younger* and its progeny, such a preliminary exhaustion requirement is doubtful when the federal court plaintiff invokes § 1983. *See supra* note 144-46 and accompanying text.

269. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 423 U.S. 1327, 1329 (Blackmun, Circuit Justiace 1975) (not reaching issue whether similar irreparable harm can arise in cases not implicating free speech).

270. Under the rule of Brown v. Allen, 344 U.S. 443, 500 (1953), preclusion principles, discussed *infra* at note 274, are not fully applicable to relitigation in federal court on habeas corpus.

271. In *Younger* the litigants initially had raised their first amendment claims by pretrial motion in the state trial court and then sought, but were denied, interlocutory review in the state appellate and supreme court. *See* 401 U.S. at 60 (Douglas, J., dissenting); *cf.* Willhauck v. Flanagan, 448 U.S. 1323, 1325 (Brennan, Circuit Justice 1980) (indicating that double jeopardy claim would merit exception to *Younger* doctrine "at least when all state remedies have been exhausted"); Traughber v. Beauchane, 760 F.2d 673, 684 (6th Cir. 1985) (Wellford, J., concurring) (finding state remedies inadequate for *Younger* purposes after state courts refused interlocutory appeal from trial court's order of attachment, and only extraordinary appeal was then possible under state law). In Miofsky v. Superior Court, 703 F.2d 332 (9th Cir. 1983), a defendant in a state court civil suit had sought without success a protective order to restrain the disclosure of his psychiatric report on constitutional grounds. The district court concluded it had no jurisdiction over the state court defendant's § 1983 action seeking an injunction prohibiting disclosure of the confidential information. *Id.* at

Other lower federal courts have avoided this dilemma simply by letting litigants seek injunctive relief without first having to pursue pretrial avenues that might be available in the ongoing state proceeding. Those litigants claiming to fall within one of the exceptions to the noninterference rules generally have been able to raise their federal claims immediately in federal court, even though there might be a ready means to abort the state proceeding on those same grounds within that state proceeding. The Court needs to confront this untidy issue.

B. *The Desirability of Maintaining Collateral Avenues of Intervention*

1. Pretrial Intervention

The conflict between immediate direct review and immediate collateral intervention highlights two competing goals: Effective protection against irreparable harm to federal interests and a desire to have litigants make prompt use of available state court pretrial remedies before seeking extraordinary federal intervention. These two goals can best be served if mere pretrial presentation of the issue threatening immediate harm to the state trial court did not inevitably lock the litigant into the direct review model. If it turns out that the state courts cannot or will not provide a pretrial forum or an interlocutory appeal of an adverse pretrial decision, the option to proceed in a federal trial court should remain open. Otherwise, involuntary state court litigants would have to rely on the uncertain chance of immediate Supreme Court assistance and lose their federal trial forum simply because they checked to see if state remedies were indeed inadequate.[272] However, this wait-and-see approach might be difficult to implement without either modifying accepted preclusion rules or holding that, despite the *Rooker* doctrine, some arguably final state court decisions are not subject to exclusive Supreme Court jurisdiction.

Preclusion principles present a troublesome but not insurmountable barrier. Under the full faith and credit statute,[273] federal courts must give preclusive effect to state court decisions, including not-yet-reviewed decisions, if a state court would give that decision preclusive effect.[274] One solution, therefore,

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334. The United States Court of Appeals for the Ninth Circuit reversed, concluding that federal jurisdiction could attach once the state appellate courts had refused review. *Id.* at 334-35. There was no discussion of *Rooker* in this case.

272. *See also* University of Tenn. v. Elliott, 106 S. Ct. 3220, 3221-22 (1986) (holding unreviewed state agency fact findings can have preclusive effect in subsequent action under § 1983); Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 58 (1986) (federal court injunction under exception to antisuit injunction statute to halt relitigation in state court of matters previously decided by federal court may have to come before, not after, state trial court has resolved preclusion question); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 80-87 (1984) (preclusion can bar subsequent § 1983 suit in federal court when federal plaintiff might have, but did not raise § 1983 claim in connection with prior successful state court breach of contract suit); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (pursuing state court appeal of state agency decision can have preclusive effect in federal court action under Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(c) (1982)). In each of these cases the litigant could have avoided the preclusive effect of the state tribunal's decision only by never having invoked the initial state remedy in the first place.

273. 28 U.S.C. § 1738 (1982).

274. *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 465 (1982) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 99 (1980) (issue preclusion). In Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518 (1986), the Court held that a federal court must give the same preclusive effect to

would be to fashion an exception to this usual rule. Even if the state court would give decisions such preclusive effect, federal courts could treat pretrial decisions of state trial courts on an issue threatening immediate harm to federal rights as not having preclusive effect, at least when pretrial federal intervention otherwise would have been warranted.[275]

A more uncertain barrier is the jurisdictional one. When a decision is final for direct review purposes, the final judgment statute does not seem to give litigants an option of choosing between Supreme Court and federal district court intervention.[276] An alternative and perhaps additional solution would be to limit the *Rooker* doctrine. The Court could allow some flexibility to litigants in the irreparable harm context when their case is "final" only because the state courts cannot or will not review a pretrial decision threatening irreparable harm. A litigant facing the extraordinary circumstance of immediate loss of a federally protected interest in the pretrial context arguably should be able to opt for either the collateral avenues of interference or the route of flexible finality.[277] It is difficult to imagine that, in the Court's desire to reach out and help such litigants in extraordinary circumstances who sought assistance under *Cox*'s liberalization of the finality doctrine, the Court meant to close down collateral avenues and set up its own rather dramatic remedy as the exclusive one. Also, the *Rooker* doctrine loses much of its force when existing state appellate remedies are inadequate.[278] Federal court interference then more strongly resembles mere relitigation, a nonjurisidictional hurdle, than review of a final state court decision that only the Supreme Court has power to hear.

To be sure, a number of general considerations favor the exclusive direct review model, even apart from the argument that it is compelled by the final judgment statute. Exclusive direct review is the most respectful and conclusive means of reviewing federal questions[279] and was the preferred model for doing so for nearly a century. It is usually less intrusive than collateral intervention

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an unreviewed, but reviewable, state court decision that the state courts would give it. Of course, not all states might give preclusive effect to reviewable but unreviewed decisions of their own trial courts, but that would not necessarily prevent the federal courts from giving them such effect. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 88 (White, J., concurring).

275. *See* Haring v. Prosise, 462 U.S. 306, 313-14 (1983) (although ordinary preclusion principles apply in § 1983 suits, "[a]dditional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights' ") (quoting Allen v. McCurry, 449 U.S. 90, 107 (1980)).

276. The final judgment statute, 28 U.S.C. § 1257 (1982), provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed in the Supreme Court . . . ." In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), the Supreme Court stated that the statute meant that "[r]eview of [final] determinations can be obtained *only* in this Court." *Id.* at 476 (emphasis added).

277. *Cf.* HART & WECHSLER, *supra* note 38, at 629 ("[I]s there sufficient reason why, if the question of finality is in doubt, the litigant should not be given the option of choosing his time?").

278. Rooker v. Fidelity Trust Co., 263 U.S. 413, 414 (1923), involved an attempt to relitigate a question that had been conclusively passed upon by the state supreme court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983), involved a similar attempt to review a decision of the District of Columbia's highest court.

279. Congress provided for direct review in the first Judiciary Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73. Habeas corpus for state prisoners, civil rights removal, general federal question jurisdiction, and liability for deprivations of federally protected rights inflicted under color of state law were

insofar as it tends to occur only after the contest in state court is completed. Direct review also gives the Supreme Court the exclusive power in each case to decide when federal interference with state courts should take place, if at all. Federal interference would be magnified if such questions could be presented to the more readily accessible and numerous district courts.

Nevertheless, in the interlocutory context, direct review may be a more extraordinary vehicle than collateral intervention for policing ongoing irreparable harms to federal rights. First, enlisting the aid of the Supreme Court as opposed to the federal district courts is a much costlier use of federal judicial resources, not to mention the resources of the parties and their attorneys. Further, the ambiguity inherent in the determination of when a trial court decision becomes a final judgment encourages resort to additional protective filings with the Supreme Court.[280] In addition, some harms for which the Court is prepared to allow immediate intervention into ongoing state proceedings require factual inquiries that a reviewing court is less equipped to perform than a trial court. The often discretionary nature of final judgment review makes the Supreme Court a less than certain protection. Finally, pulling up cases from the state court system in order to stay interlocutory state court decisions enables a single Justice, rather than the whole Court, to pass on questions of irreparability and the adequacy of state remedies.[281] The extraordinary day-to-day task of riding herd on a state court appellate system might be less onerous and no more intrusive if performed by the local federal district judge.

Immediate collateral interference, moreover, is only a slightly greater intrusion than the Supreme Court interference called for by a greatly liberalized concept of finality. Intervention under *Cox*, like collateral intervention, comes before the state contest is completely over, and in some cases before it has barely begun. When a federal court interferes with unreviewed interlocutory orders of state trial courts, the push against comity concerns is the same whether it is the Supreme Court or the federal district court doing the interfering. Under the direct review model, even after the state courts have finished with the case, there may yet remain a second round of Supreme Court review to decide the merits.[282] Therefore, mere pretrial presentation and resolution of dispositive federal

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statutorily enacted all within a decade of the conclusion of the Civil War. *See* Wiecek, *The Reconstruction of Federal Judicial Power*, 13 AM. J. LEGAL HIST. 333, 336-57 (1969).

280. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 512 (1975) (Rehnquist, J., dissenting); HART & WECHSLER, *supra* note 38, at 629.

281. Under 28 U.S.C. § 2101(f) (1982), a single Justice can stay a "final judgment" from a state court that would be subject to direct review. *See* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 679-80 (6th ed. 1986). Only in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), did the entire Court, in a short per curiam opinion, render a recent decision on the appealability of trial court orders. *See also* SUP. CT. R. 43.6 (allowing individual Justice to refer applications for stay to entire Court).

282. Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (Blackmun, Circuit Justice 1975) illustrates the problem. On petitioner's first request to stay a trial court's order barring press access to a state criminal trial, a stay was "neither issue[d] nor finally den[ied]." *Id.* at 1324-25. Instead, Justice Blackmun invited petitioners to return to the Supreme Court if interlocutory review in the state supreme court was not promptly forthcoming. *Id.* One week later, relief was again requested when it looked as though the state supreme court would not hear the case for a few more weeks. A partial stay was granted of the "final" trial court order that had barred the press from the state court

issues in the state courts which otherwise would provide a basis for federal trial court intervention should not automatically foreclose district court interference.

2. Intervention During Trial or After Judgment

Irreparable harms arising during trial or after judgment, and not susceptible to pretrial challenge, should counsel greater hesitation in allowing federal district court intervention as a companion to Supreme Court relief. In these cases, comity concerns are intensified because the state courts already may have invested substantial resources in the suit, even though it is not yet concluded. Federal interference in the middle of litigation, therefore, may be more intrusive than intervention at the beginning or end of a trial. In addition, as a state court decision more closely approximates traditional finality, it comes within the exclusive gravitational pull of direct Supreme Court review. Thus, if the state appellate system will allow for an expeditious challenge to a lower state court's mid-trial or posttrial ruling threatening irreparable harm, the involuntary litigant ought not have the same luxury either to bypass state process altogether or to try out state process without an inevitable loss of the federal trial forum. Even if the state appellate remedy is not sufficiently prompt, interim Supreme Court aid may be available so that the litigant can pursue a meaningful appeal of the lower state court's rulings through the state system, and so that the Court can preserve its own ultimate jurisdiction on direct review.[283]

Nevertheless, a claim sometimes may be raised in the middle of litigation, or as a consequence of trial court judgment, that attacks on constitutional grounds state procedural roadblocks to further state court review. That, essentially, was the nature of the claim recently raised in *Pennzoil Co. v. Texaco, Inc.*[284] In that case, the federal plaintiff complained that the application of state bond-posting and lien provisions posed a constitutionally impermissible barrier to its exercise of a state-granted right to appeal the judgment on the merits. If irreparable harm[285] would arise out of such unforeseeable procedural barriers and if the federal trial court finds that further state court procedural mechanisms for challenging the barriers are clearly unavailable, the constitutional claim should be raisable immediately in federal court even though a noninter-

criminal trial. *Id.* at 1327, 1328-29. Later the Supreme Court ruled on the merits. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

283. Under the All Writs Act, 28 U.S.C. § 1651 (1982), federal courts may grant injunctive relief in aid of their jurisdiction. *But cf.* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 281, at 679 (suggesting that 28 U.S.C. § 2101(f) (1982), which requires a "final judgment" from state court, is sole vehicle by which a single Justice or Court can grant stay of state court proceedings in order to preserve appellate review).

284. 107 S. Ct. 1519 (1987). The federal plaintiff, Texaco, never submitted to the state courts the question of the constitutionality of the bond-posting and lien statutes as applied to it, but instead went directly to federal court. The United States Court of Appeals for the Second Circuit concluded that the futility associated with seeking bond reduction in the state court system obviated any need to resort to the state courts initially, even assuming Texaco ordinarily would have had to do so. *See* Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1145-46 (2d Cir. 1986).

285. Texaco claimed that the bond requirement would cause it to go into bankruptcy. *Cf.* Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975) (concluding that threat of bankruptcy presented grounds for equitable intervention when *Younger* not triggered because there was no pending state proceeding).

vention principle such as *Younger* might apply in such a case.[286] Both *Rooker* and preclusion questions are less seriously implicated in such cases to the extent the federal court does not seek to review any "decision" of the state trial court at all, but instead decides the federal question in the first instance.[287]

In close cases in which the availability of state court relief is uncertain, it might be preferable to avoid the all-or-nothing approach of Supreme Court versus lower federal court intervention. In cases falling within this "twilight zone" of finality,[288] the district courts might be given jurisdiction until it is certain that the judgment really is final and, therefore, subject to exclusive Supreme Court review. Federal district courts could thus share with the Supreme Court the initial task of entering interim injunctive relief when needed. If state courts then provide a vehicle to raise the federal issues and actually render a decision on them, direct review from the state court decision under *Cox* might be appropriate. Absent a prompt answer from the state court, however, the lower federal court could continue its injunctive relief and, if necessary, decide the federal questions on its own.[289]

VIII. CONCLUSION

Perhaps it is not so remarkable after all that the exceptions to the various judge-made and statutory noninterference rules so closely resemble each other.

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286. In *Pennzoil* the Court concluded that such procedures were not clearly lacking. 107 S. Ct. at 1527-28. The Court, however, only obliquely indicated the direction in which Texaco should turn if the state court avenues were lacking, or if the state courts decided against Texaco on the constitutional question. The Court noted that "[i]f, and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner." *Id.* at 1529.

287. *See id.* at 1529-30 (Scalia, J., joined by O'Connor, J., concurring) (finding no jurisdictional bar under *Rooker* to Texaco's federal suit); *id.* at 1531 (Brennan, J., concurring in judgment) (same); *id.* at 1533-34 (Blackmun, J., concurring in judgment) (same); *id.* at 1535-36 n.3 (Stevens, J., concurring in judgment) (same). *But see id.* at 1533 (Marshall, J., concurring in judgment) (*Rooker* should have barred suit).

288. The term "twilight zone" comes from Justice Black's opinion for the Court in Gillespie v. United States Steel, 379 U.S. 148, 152 (1964).

289. *See, e.g.*, Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554 (7th Cir. 1986). In *Lynk* the federal plaintiff claimed in a suit brought under § 1983 that procedural roadblocks arising in the middle of his state court divorce proceeding unconstitutionally prevented him from obtaining a divorce. *Id.* at 568-69. The divorce proceeding was active, but going nowhere, when he unsuccessfully sought federal district court relief. The United States Court of Appeals for the Seventh Circuit, which assumed that *Younger* applied, ordered the district court to take jurisdiction over the case, *Rooker* notwithstanding, in order to let the federal plaintiff explore whether he had any state remedies available in the ongoing proceeding through which he might raise his constitutional challenge. *Id.* The appellate court in *Lynk* observed that an actual conclusion on the merits of the constitutional issue by the state courts would be reviewable in the Supreme Court. If, on the other hand, the state courts refused to consider the federal question, the federal plaintiff was invited back to district court to press his constitutional claim. *Id.* at 569. *Cf.* Dombrowski v. Pfister, 380 U.S. 479, 502 (1965) (Harlan, J., dissenting) (concluding that although abstention was called for, the district court "should have retained jurisdiction for the purpose of affording . . . appropriate relief in the event that the state prosecution did not go forward in a prompt and bona fide manner"); Baines v. City of Danville, 337 F.2d 579, 593-94 (4th Cir. 1964) (district court could preserve status quo pending decision whether permanent injunction should issue in face of Anti-Injunction Act), *aff'd*, 384 U.S. 890 (1966); Allen v. Johnston, 575 F. Supp. 935, 938-39 (S.D. Iowa 1983) (granting temporary injunction in § 1983 case against ongoing state court criminal proceeding claimed to violate double jeopardy clause, so that state court defendant could test avenues of immediate direct review within state court system).

Each exists in order to protect against the immediate and irreparable loss of federally protected rights, although they remain as consistent as possible with the principle of nonintervention in ongoing state proceedings. More surprising is the reluctance of most courts to acknowledge the overlap and the problems that arise from it.

It is also disconcerting that the Court tends not to distinguish between judge-made and congressional noninterference principles in its development of a general common law of federal court noninterference. The Court has, at different times, placed a judicial gloss requiring nonintervention onto Reconstruction-era statutes such as the 1871 Civil Rights Act, the 1866 Civil Rights Removal Statute, and the 1867 Habeas Corpus Act, all of which arguably opened up access to federal courts without regard to the existence of state remedies. Yet it also has placed inverse glosses to allow for intervention in exceptional circumstances under the Anti-Injunction Act and the final judgment statute, both of which seem flatly to disallow it.

Nevertheless, by each of these unrelated actions the Court has brought some consistency of treatment to a statutory framework that sometimes seems to point in inconsistent directions. In the process, the Court has fashioned a minimalist role for federal court intervention into ongoing state proceedings whenever the state courts are inadequate to the task of protecting federal rights.

Although locating the common ground and the conflicts among the exceptions to the various noninterference rules may aid in discovering a rationale for immediate intervention under the Court's current doctrines, it still leaves other important questions unresolved. A "right not to be tried" is a convenient label the Court can apply to a particular interest it wants to protect by prompt federal intervention. Yet it is not always easy to predict when the Court will conclude that some interests, such as those protected by the double jeopardy prohibition, inevitably will be lost by the undergoing of trial, while others, such as that protected by the speedy trial guarantee, will not. Nor is it easy to predict when a particular interest, other than a substantive immunity from litigation, will be irreparably harmed as a consequence of procedural deficiencies in the state court proceedings.

The Court has provided some guidance, however, on these questions. Because adequacy of remedy and irreparability questions go hand-in-hand, the Court's adequacy inquiry in the various noninterference contexts bears a strong resemblance to the traditional calculus for allowing preliminary injunctive relief.[290] In addition, the Court has thrown off its usual state court deference principles in a number of areas when the federal government or its actors have been involved. This, however, probably has less to do with doubts about state court parity than it does with a particular countervailing interest in federal

290. *See generally* Leubsdorf, *supra* note 79, at 544-48. The traditional equitable criteria, particularly the likelihood of ultimate success on the merits, and the requirement of irreparable harm if no relief is granted in the interim, all help to answer the basic question, familiar to procedural due process, whether judicial process is needed before or only after a particular harm. *Id.*

supremacy and federal law enforcement that trumps the federalism-based reasons for deference to the state courts in the first place.

Finally, the justification for intervention offered here has assumed, as the Court has steadfastly maintained, that state courts are ordinarily as competent as federal courts at dealing with federal rights in the first instance. This presumption of parity may be doubtful as a reflection of litigational reality. Moreover, some of the exceptional circumstances that allow for prompt intervention are in open conflict with the ideal of parity. At present, federal courts must assess the adequacy of state court remedies when asked to do so under any of these exceptional circumstances doctrines. This, too, is interference, but the adequacy inquiry is made only at the fringe. In these exceptional circumstances cases the concept of state court inadequacy is a fairly narrow one.

Without the categorical presumption of parity, however, the balance of efficient dispute resolution and accuracy interests would be laid open in each case, even when exceptional circumstances are not alleged. Federal courts then would be called upon to assess the practical ability of the state court to handle the particular federal issue with which it has been presented.[291] Quite apart from any supposed insult to the state judiciary in assessing its ability to handle federal issues, such a case-by-case inquiry would consume substantial federal judicial resources in advance of trial. The modest degree of predictability as to when interests of the judicial system would tip the scale in favor of immediate intervention would be lost if Congress' aged statutes were read to demand such an assessment in every case.[292] Of course, none of these problems would occur if the Court read Congress' statutes always to open the federal courts without regard to available state remedies, but that reading has its own costs and seems to have fallen on deaf ears.

Thus, even if the parity presumption inaccurately reflects litigational reality, or Congress' own assumptions, the primary harm that it inflicts on state court defendants is in forcing them to endure the cost of good faith proceedings in state court and the chance of enduring, maybe only temporarily, an erroneous decision. Most litigants are not in danger of immediate loss of federally protected rights pending such litigation. Those who face such a danger usually can argue an exception to one of the various noninterference rules. Moreover, it is unlikely that the Court intends any time soon to reverse its long-standing views on the competence of state courts to resolve federal issues. Perhaps the most federal litigants realistically can expect is for the Court to give sensitive treatment to the prospects for immediate intervention under exceptions to its well-entrenched noninterference rules, coupled with an approach that accepts parity as its first principle.

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291. *Cf.* Monroe v. Pape, 365 U.S. 167, 171 (1961) (federal courts will not assess adequacy of state court remedies in litigation brought under § 1983), *overruled in part on other grounds by* Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978).

292. A respectable argument suggests that this is precisely what Congress may have intended by its Reconstruction jurisdictional statutes. *See, e.g.*, Amsterdam, *supra* note 16, at 828-42; Redish, *supra* note 13, at 483-84; Weinberg, *supra* note 126, at 1197-99.