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A group of investors gave promissory notes in return for investment contracts offered by the Calderone-Curran Ranches, Inc. (Ranch),¹ and the Ranch pledged these notes to the Bank of the Commonwealth (Bank) as collateral for loans. During the Ranch's subsequent bankruptcy proceedings, the investors brought suit in federal district court against both the Ranch and the Bank, and alleged that the sale of the investment contracts had violated federal and state securities laws.² When informed by the Bank that it intended to file collection actions on the promissory notes in a number of state courts, the investors filed in federal court a motion for an ex parte temporary restraining order to preserve the status quo until the securities law issues had been litigated in federal court.³ The court did


The investors alleged material misrepresentations in the Ranch's prospectuses offering investment contracts and claimed that the Bank knew or should have known of the misrepresentations because it acted as a control person in issuing the securities, prepared and possessed the notes and sales agreements, imposed credit qualifications on sales, dealt directly with the investors, knew of the Ranch's reputation for fraud and mismanagement, and knew of the Ranch's misleading accounting practices. This knowledge, according to the investors, prevented the Bank from being a holder in due course of the notes under U.C.C. § 3-302, and thereby precluded the Bank from enforcing the notes. Brief for Appellees at 7-9, Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), cert. dismissed per stipulation, 442 U.S. 925 (1979).

3. On August 27, 1976, the plaintiffs filed in federal district court in Michigan a motion for a preliminary injunction to restrain the Bank from instituting any suits in state or federal courts to collect on the promissory notes. Upon the Bank's representation that it did not then intend to initiate any such suits, the court adjourned the motion until November 1, 1976. When the instant action was stayed pending the outcome of a companion federal district court case in
not grant this relief but did schedule a formal hearing on the matter to take place about three weeks later. Prior to the formal hearing, the Bank instituted approximately seventy separate collection actions. One week after the formal hearing the court issued a temporary restraining order, and three months later it issued a preliminary injunction4 prohibiting any separate state civil actions for deficiencies on the notes. The Court of Appeals for the Sixth Circuit reversed and remanded, holding that when none of its express exceptions apply, the anti-injunction statute5 absolutely bars a federal court from issuing an injunction staying state court proceedings instituted before the injunction was granted, even if the motion to enjoin was made before the state court proceedings were instituted.6 Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), cert. dismissed per stipulation, 442 U.S. 925 (1979).

The potential for conflict that exists when state and federal courts both entertain proceedings on the same controversy7

New York, the Bank notified the federal court that it did not plan to initiate collection actions until some time beyond November 1. The parties therefore agreed to postpone indefinitely the hearing on the preliminary injunction. In early March 1977, the Bank informed the plaintiffs that it would soon initiate collection actions on the notes. The plaintiffs sought an ex parte temporary restraining order against the institution of the suits so that they might conduct discovery vital to their previous motion for a preliminary injunction. The court denied this application but scheduled a conference for March 14, 1977. At this conference, the court granted the parties two weeks to brief the issues, including the possible application of the anti-injunction statute, 28 U.S.C. § 2283 (1976). After the conference, but before the formal hearing of March 28, the Bank commenced approximately 70 collection suits in state and federal courts. One week after the formal hearing, the court finally issued the temporary restraining order requested by the plaintiffs. 583 F.2d at 529-30.

4. The plaintiffs had originally prayed for a preliminary injunction, but the hearing on the motion was postponed indefinitely pending the outcome of a companion case in the federal district court for the Western District of New York. 583 F.2d at 529; see note 3 supra. The court granted the preliminary injunction to protect the investors against the effect of the stay of their suit, to prevent duplicative proceedings and inconsistent rulings in state and federal courts, and to prevent the investors from being compelled to raise their federal securities law claims as mere defenses in state courts not competent to grant affirmative relief. 583 F.2d at 530-31 (quoting district court's memorandum opinion of July 8, 1977).


6. The Court of Appeals also held that the anti-injunction statute does not prohibit federal courts from staying federal diversity proceedings, that the district court did not err in considering the "possibility" of litigation success as a standard for the exercise of equity power, and that the district court did err in not considering the need for the moving party to provide security for the enjoined party. 583 F.2d at 536-39.

creates a need for rules that minimize needless inter-court friction. In an attempt to deal with an aspect of this conflict, Congress in 1948 enacted the current version of the anti-injunction statute,\(^8\) section 2283 of title 28: "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."\(^9\) In addition to this statutory prohibition, the principles of equity,\(^10\) comity,\(^11\) and federalism\(^12\) govern the

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8. Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 968. The original anti-injunction statute provided: "nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335. The congressional intent underlying the original act is not clear. See Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 COLUM. L. REV. 330, 335 n.35 (1978); Note, Federal Power to Enjoin State Court Proceedings, 74 HARV. L. REV. 726, 727 (1961). One commentator has argued that the Act of 1793 was not directed at federal courts, but only at individual Supreme Court justices. See Mayton, supra, at 333.

The original Act was revised in 1874 to read: "The writ of injunction shall not be granted by a court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." REV. STAT. § 720 (1875) (enacted during 1873-1874 congressional session). For discussion of the 1874 Act, see Mayton, supra; Taylor & Willis, The Power of Federal Courts to Enjoin Proceedings in State Courts, 42 YALE L.J. 1169 (1933); Warren, Federal and State Court Interference, 43 HARV. L. REV. 345 (1930). In 1911, the 1874 Act was codified as section 265 of the Judicial Code. See Act of Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162. The Judicial Code was amended in 1948 to include the current version of the anti-injunction statute, 28 U.S.C. § 2283 (1976), quoted in text accompanying note 9 infra. See Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 968.


10. The application of equitable principles, because discretionary, varies with the circumstances. See Lemon v. Kurtzman, 411 U.S. 192, 199-201 (1973); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2942 (1973 & Supp. 1979). In determining whether to grant equitable relief, a court may consider the likelihood, extent, and permanence of harm to all parties, the balance of hardships and the availability of adequate security, the public interest, the probability of success on the merits, and the existence of serious and difficult questions requiring deliberation. Id.; see Hamilton Watch Co. v. Benrus-Watch Co., 206 F.2d 738, 740-43 (2d Cir. 1953); Merrill Lynch, Pierce, Fenner & Smith Inc. v. E.F. Hutton & Co., 403 F. Supp. 336 (E.D. Mich. 1975). One court has observed that if one of the statutory exceptions to section 2283 exists, the case usually also meets the requirements of equity. See Tampa Phosphate R.R. v. Seaboard Coast Line R.R., 418 F.2d 387, 396 (5th Cir. 1969), cert. denied, 397 U.S. 910 (1970).


12. The concept of federalism embraces a variety of principles governing the relationship between the federal government and state governments. Federalism is the source of various federal abstention doctrines that operate to bar federal court stays of state proceedings by prohibiting either the federal pro-
propriety of the exercise of federal court power to stay state court proceedings.13

Prior to the 1941 decision of the Supreme Court in *Toucey v. New York Life Insurance Co.*,14 courts interpreted the various predecessors15 of section 2283 as if they established a flexible rule of comity,16 and, as a result, the general rule prohibiting federal courts from staying state court proceedings was qualified by several exceptions.17 In *Toucey*, the Supreme Court rejected or severely questioned all but one of the traditionally judicially created exceptions.18 One commentator has argued that by enacting section 2283, Congress intended to succeed or the federal stay. See C. Wright, *supra* note 11, § 52. For example, federal courts must exercise restraint in deciding constitutional challenges of state action so as not to intrude improperly on a state's right to act or to enforce its laws in state courts. See *id.* §§ 46, 52, 52A. Theoretically, of course, the application of these abstention principles takes place subsequent to the determination that the federal court is not barred from staying state court proceedings either because the anti-injunction statute does not apply or because a statutory exception is present.

13. The doctrines of res judicata and collateral estoppel also serve to reduce the friction resulting from duplication of proceedings in federal and state courts. *See* notes 62-71 *infra* and accompanying text.


15. *See* note 8 *supra*.


17. For a discussion of these exceptions, see *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 123-39 (1941); J. Moore, *Moore's Judicial Code: Commentary* ¶ 0.03(49), at 402-06 (1949); *note* 18 *infra*.

18. 314 U.S. at 139-41.

The *Toucey* Court listed the exceptions created by acts of Congress, *see id.* at 132-34, as well as the three principal exceptions that had arguably been created by judicial action: the res exception, the fraudulently obtained judgment exception, and the relitigation exception. *Id.* at 134-37. Courts applying the res exception have held that in actions in rem, the court, whether federal or state, that first takes control over the res withdraws it from the reach of all other courts.

The rank and authority of the [federal and state] courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.

*Id.* at 135 (quoting *Kline v. Burke Constr. Co.*, 260 U.S. 226, 235 (1922) (bracketed language added in *Toucey*)). For further discussion of the res exception, *see* note 34 *infra*.

The second exception that had arguably been judicially implied allowed federal courts to enjoin litigants from enforcing judgments fraudulently obtained in state courts. One rationale offered for this exception was that a "proceeding" is completed once judgment is secured; therefore, an injunction against the levy of execution does not stay any judicial proceedings. *See
MICHIGAN LAW REVIEW

reestablish the flexible rule of comity that had prevailed prior to Toucey.19

Indeed, the Reviser's Note to section 2283 states that the statute "restores the basic law as generally understood prior to the Toucey decision."20 The Supreme Court, however, has sub-


The third exception discussed in Toucey permitted federal courts to protect and effectuate their judgments, whether in personam or in rem, by enjoining relitigation of the same matter in state court. See J. Moore, supra note 17, ¶ 0.03(49), at 410-11. In refusing to recognize this exception, the Toucey Court characterized it as being based on "loose language and a sporadic, ill-considered decision." 314 U.S. at 139. In addition to these three exceptions, federal courts also developed exceptions to aid their jurisdiction, whether original or removal (exceptions that included the res exception), and to prevent the enforcement of unconstitutional statutes. See Mayton, supra note 8, at 348; Warren, supra note 8, at 386-77.

Until Toucey, the debate over the scope of the then-existing anti-Injunction statute did not focus on whether the statute imposed an absolute ban, but rather on how the statute could be given some effect as a rule of comity beyond the equitable principles that govern a court's general ability to issue injunctions. See Durfee & Sloss, Federal Injunction Against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145, 1168-69 (1932). Compare Looney v. Eastern Tex. R.R., 247 U.S. 214, 221 (1918) (injunction can be issued to protect and preserve jurisdiction over parties or subject matter until controversy decided in federal court first having jurisdiction) with Kline v. Burke Constr. Co., 260 U.S. 226, 229-31 (1922) (injunction cannot be issued to protect federal court jurisdiction over a controversy but can be issued to protect jurisdiction over a res).

19. See J. Moore, supra note 17, ¶ 0.03(26), at 161-62; id. ¶ 0.03(49), at 407, 415.


An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.

The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The exceptions specifically included the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., [314 U.S. 118 (1941)]. A vigorous dissenting opinion [314 U.S. at 141] notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).

Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.

The Reviser's Note is unclear as to whether the statute is intended to include all exceptions or simply to provide examples of some exceptions. Other legislative history, since sparse, does not clarify this issue. Regardless of the interpretation given to the Reviser's Note, the scope and intended application of section 2283 remain vague. See Mayton, supra note 8, at 350; Comment, Anti-Suit Injunctions Between State and Federal Courts, 32 U. Chi. L. Rev. 471, 482
subsequently declared that section 2283 "is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."21 As recently as 1977, the Court unequivocally reaffirmed its rejection of the notion that section 2283 was intended to reinstate a flexible rule of comity.22

It is now well settled that the anti-injunction statute does not preclude federal courts from enjoining the institution of state court proceedings; rather, it applies only when federal courts attempt to stay state court proceedings that have already been commenced.23 This general rule, however, provides inadequate guidance in cases in which a party to a federal action moves the court to enjoin the institution of state court proceedings and the adverse party subsequently files an action in state court before the federal court concludes its deliberation over whether to grant the injunction. If issued in such a case, the injunction would operate to stay a pending state court proceeding—seemingly a violation of section 2283—even though the motion was initially made for the permissible objective of enjoining the institution of state court proceedings. The problem in such cases is whether the pendency of state court pro-

(1965). Commentary contemporaneous with the passage of the statute emphasized the comity principle and the return of "flexibility," see J. Moore, supra note 17, ¶ 0.03(49), at 407, 411, and many lower courts followed this interpretation, see, e.g., Machesky v. Bizzell, 414 F.2d 283, 287-91 (5th Cir. 1969); Baines v. City of Danville, 337 F.2d 579, 593-94 (4th Cir. 1964), cert. denied, 381 U.S. 939 (1965); C. Wraght, supra note 11, § 47, at 202. See also Smith v. Apple, 264 U.S. 274, 279 (1924) (pre-Toucey principle of comity). Courts eventually began to interpret the statute restrictively, however. See cases cited in note 22 infra. The Supreme Court's view of the statute seems to depend on which parties are before it. The statute was a "clear-cut prohibition," in Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955), a case in which a union sought an injunction requiring an employer to withdraw an action commenced in state court. When the United States sought a stay, however, section 2283 was an "ambiguous statute." Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226 (1957). No statutory language or comment in the Reviser's Note expressly allowed the exception recognized in Leiter Minerals for suits brought by the United States.


ceedings should be determined as of the time that the federal court's injunctive power is first invoked or as of the later time that the injunction is actually issued.

The Court of Appeals for the Seventh Circuit addressed this timing issue in *Barancik v. Investors Funding Corp.* In *Barancik*, the court affirmed a lower court's decision to stay a state court proceeding that had been instituted after the federal court plaintiff moved for an injunction to preserve the status quo, but before the motion was granted. The section 2283 bar against federal court stays of state court proceedings does not apply, reasoned Judge Stevens, when federal injunctive power has been invoked before the state court proceeding is commenced. If it did apply, a defendant could preempt a federal court's ability to rule on a motion simply by filing a complaint in state court before the federal court has ruled on the motion. The *Barancik* court found it "unseemly" that a litigant might be able to deprive a federal court of the power to decide an issue properly before it. The court also expressed concern that conceding this power to litigants would impede rational judicial decisionmaking and would also encourage use of the type of hurriedly issued ex parte temporary restraining orders that the statute was intended to prevent. Despite its holding that the anti-injunction statute did not apply to this situation, the *Barancik* court recognized that the propriety of a federal court stay of state court proceedings is limited "by the principles of equity, comity, and federalism."

In *Roth v. Bank of the Commonwealth*, the Court of Appeals for the Sixth Circuit faced the same issue that had previously been decided in *Barancik*. Declining to follow *Barancik*, the *Roth* court concluded that, for the purpose of applying the anti-injunction statute, the pendency of state court proceedings should be determined as of the time that the injunction is actually issued, not as of the time that the court's injunctive power

24. 489 F.2d 933 (7th Cir. 1973).
25. *Id.* at 938.
26. *Id.* at 937.
27. *Id.*
28. *See* text accompanying note 53 *infra*.
30. 489 F.2d at 937-38.
31. *Id.* at 938 (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)). For brief explanations of these principles, see notes 10-12 *supra*.
32. 583 F.2d 527 (6th Cir. 1977), cert. dismissed per stipulation, 442 U.S. 925 (1979).
is initially invoked. The *Roth* court held that section 2283 absolutely bars federal courts from issuing an injunction staying state court proceedings that have already been commenced, unless one or more of the express statutory exceptions apply.

The *Roth* court relied primarily on a literal reading of section 2283 which, by its terms, forbids federal courts from granting "an injunction to stay proceedings in a State court." The

33. 583 F.2d at 532-34.
34. *id.* at 534. As well as adopting the *Barancik* rationale that the section 2283 prohibition does not apply when federal injunctive power has been invoked before the state court proceedings are commenced, *see id.* at 530; text accompanying notes 24-27 *supra*, the district court had held that the statutory exception allowing stays "necessary in aid of [a federal court's] jurisdiction," 28 U.S.C. § 2283 (1976), provided an alternative ground for staying the state proceedings. The Court of Appeals for the Sixth Circuit, however, rejected this argument. 583 F.2d at 535. The court reasoned that the district court's earlier stay of the investors' suit pending disposition of its companion case, *see note 3 supra*, was never intended to stay the initiation of collection actions in state court, because the district court in its decree expressly allowed the plaintiffs to seek injunctive relief from the Bank's intended suits if necessary. *See* 583 F.2d at 535 & n.3. Moreover, the *Roth* court found that a concurrent in personam suit in a state court does not necessarily interfere with a federal court's jurisdiction, as the narrowly interpreted "in aid of jurisdiction" exception requires. *See id.* at 535; J. Moore, *supra* note 17, ¶ 0.03(49), at 403-06. Courts commonly interpret the "necessary in aid of jurisdiction" language as embodying the res exception, *see id.* at 535; J. MOORE, *supra* note 17, at 403-06. The interest in rational decisionmaking supports the lower court's grant of a stay in this case, although not absolutely necessary to preserve jurisdiction, is certainly necessary to assist jurisdiction. The "in aid of jurisdiction" exception should thus be construed to "reassert the power and integrity of the federal courts in their relations with [the state courts]." *Redish, supra* at 760; *see Mayton, supra* note 8, at 369-70.
court observed that regardless of when the federal injunctive power was first invoked, "the fact is that the federal district court enjoined . . . state court proceedings which had already been commenced when the injunction was issued." The Barancik rule, argued the court, runs afoul of the plain language of the anti-injunction statute; it is a judicial improvisation that prevents state court proceedings which are commenced in fact from also being commenced in law.

In reaching its decision, the Roth court also considered the policy argument that courts must be allowed to preserve existing conditions while deliberating over whether to grant an injunction to preserve the status quo. The court did not believe, however, that this policy called for a solution like that applied in Barancik; rather, it believed that the problem could be solved simply by having courts issue, at the time the motion to enjoin is made, temporary restraining orders covering only the deliberation period. In the absence of such orders, the Roth court concluded, state and federal courts would be allowed to proceed concurrently and relief from error, if any, would be obtained in appellate courts. Obviously, the court's view of the gravity of this policy consideration was tempered by its judgment that the form of inter-court friction most necessary to avoid is the friction that arises when a federal court interferes with a state court proceeding already in progress.

One major difficulty with the Roth decision is the court's insistence that its holding was compelled by a literal reading of the statute. In light of the timing issue, there is more than one reasonable way to interpret the statutory term "state court proceeding." For the purposes of section 2283, the term could refer

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Supreme Court has repeatedly ruled that the [anti-injunction statute's] ban is absolute and [its] language is to be taken literally." 583 F.2d at 533. The court quoted extensively from Supreme Court decisions that speak of "absolute prohibition," id. (quoting Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 286-87 (1970)), and the "clear-cut prohibition qualified only by specifically defined exceptions." 583 F.2d at 533 (quoting Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955), quoted in Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970)). According to the Roth court, the statute literally prohibits federal courts from enjoining any state court proceedings that have already been commenced. The court found that the district court had in fact enjoined pending state court proceedings and that the statute absolutely barred such action. See 583 F.2d at 533.
either to proceedings already pending at the time the motion to
enjoin is made or to those pending when the motion is finally
granted. There is inferential support in the case law for the
proposition that the state court proceedings covered by the
anti-injunction statute are only those commenced before fed-
eral injunctive powers are invoked.\textsuperscript{41} Since the legislative his-
tory of section 2283 is sparse,\textsuperscript{42} and its chief source—the
Reviser's Note—is silent on the matter,\textsuperscript{43} the Roth
court's re-
sort to literalism raises the fundamental question of whether
the statute was even intended to apply in this type of fact situa-
tion.\textsuperscript{44}

\textsuperscript{41} See Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965); McSurely v. Rat-
(1935) (interpreting previous statute). The time that a court's power is invoked
is used as a temporal reference point, which is necessary for deciding issues
such as whether diverse domicile exists, \textit{see}, \textit{e.g.}, Rosado v. Wyman, 397 U.S.
397, 405 n.6 (1970); Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957); Dery v. Wyer, 265
F.2d 804, 808 (2d Cir. 1952); Boesenberg v. Chicago Title & Trust Co., 128 F.2d
245, 247 (7th Cir. 1942), whether an amount-in-controversy requirement is met,
\textit{see}, \textit{e.g.}, Rosado v. Wyman, 397 U.S. 397, 405 n.6 (1970); Commercial Cas. Ins.
Co. v. Fowles, 154 F.2d 884, 886 (9th Cir. 1946), and whether federal removal ju-
sisdiction exists, \textit{see}, \textit{e.g.}, Saint Paul Mercury Indem. Co. v. Red Cab Co., 303
U.S. 283, 291-94 (1938). Generally, the actions of a party taken after jurisdiction
has vested in a court cannot deprive the court of its jurisdiction. Moreover,
when a litigant performs an act during the time a court is considering whether
to enjoin the act, some courts have found the litigant to be in contempt and
have allowed restoration of the subject of the decision. \textit{See} Griffin v. County
School, 363 F.2d 206, 211-12 (4th Cir. 1966); 52 VA. L. REV. 1556, 1568 (1966).
\textit{See also} Jones v. Securities & Exch. Comm'n, 298 U.S. 1, 17-18 (1976); National For-

The Dombrowski case concerned abstention, for which a timing issue
arises twice. Before a court decides whether to abstain from acting, it first
must determine that it has power to act. \textit{See} Dombrowski v. Pfister, 380 U.S.
479, 484 n.2 (1965). The anti-injunction statute governs this determination, and
the timing issue raised in \textit{Barancik} and \textit{Roth} is crucial. \textit{See} text accompanying
notes 45-49 \textit{infra}. If the power to stay exists, then the federal court must still
consider how the timing of the suits and motions influences the propriety of abst-
(1977) (federal court abstention unnecessary if federal complaint was filed
"well before" state court proceedings); Hicks v. Miranda, 422 U.S. 332, 349-50
(1975) (federal court should abstain if state prosecution precedes substantial
federal proceedings on merits); Younger v. Harris, 401 U.S. 37, 49-53 (1971) (it is
seldom proper to stay a state criminal prosecution, even though there is a con-
stitutional defense, if prosecution preceded federal suit). \textit{See generally} 17 C.
WRIGHT, A. MILLER & E. COOPER, \textit{FEDERAL PRACTICE & PROCEDURE: JURISDI-
CTION} \textsection 4252 (1976 & Supp. 1979); Ziegler, \textit{An Accommodation of the Younger
Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safe-

\textsuperscript{42} \textit{See} Redish, \textit{supra} note 34, at 735 n.84.

\textsuperscript{43} \textit{See} note 20 \textit{supra}.

\textsuperscript{44} If the application of any section of the anti-injunction statute were to
be confined to a literal interpretation, logically it should be the exception for
stays "expressly authorized by Congress." \textit{But cf.} Amalgamated Clothing
The *Roth* court criticized the approach taken by the court in *Barancik* as nonliteral and implied that the *Barancik* interpretation was incorrect because it resulted in the application of the anti-injunction statute as if it established a flexible rule of comity.\(^4\) This reasoning, however, emphasizes the *Roth* court's failure to appreciate the significance of the timing issue and the distinction between the power to stay proceedings and the propriety of staying proceedings. The *Barancik* court did not interpret the statute as if it created a flexible rule of comity; on the contrary, the express holding of *Barancik* was that section 2283 did not even apply to the situation before it.\(^4\) The court, therefore, had the power to enjoin state court proceedings.\(^4\) Since the *Barancik* court was not applying the anti-injunction statute, it can hardly be said that the court applied it as a flexible rule of comity.

In fact, the *Barancik* court considered the propriety of the challenged injunction with respect to the principles of equity, comity, and federalism that limit a federal court's power to enjoin proceedings in a state court in situations not controlled by the anti-injunction statute.\(^4\) The *Roth* court was "unable to understand the logic of *Barancik* which seems to say that even though the statute is mandatory, the fact of the pendency of state court proceedings is not binding, although it is an important factor in the court's determination of whether to exercise..."
its equitable powers.” Had the Roth court grasped the full import of the timing issue and the power-propriety distinction, it would undoubtedly have realized that the mandatory language of section 2283 was irrelevant to the Barancik court since the holding in that case was not based on an application of the statute. Rather, the Barancik court was exercising its equitable powers because it found that the situation before it was not covered by the anti-injunction statute; the injunction of state court proceedings is obviously concomitant to a federal court’s exercise of its equitable powers.

The conflict between the Roth and Barancik courts, then, is not over the issue of whether the anti-injunction statute should be interpreted literally or as a flexible rule of comity. The real dispute concerns at what point in the motion-making process the federal court should determine whether there are any state court proceedings pending. The question is thus whether section 2283 will limit the federal court’s power to issue an injunction to preserve the status quo. Since the answer to this question is not evident from either the language or the legislative history of section 2283, the balance of this Comment will examine the broader question of the relationship between state and federal courts. This analysis suggests that the Barancik rule is clearly preferable to the rule announced in Roth.

Three basic policies underlying the relationship between state and federal courts also affect the section 2283 timing issue: first, avoiding needless inter-court friction; second, efficiently utilizing the expertise of each forum; and third, minimizing unnecessary duplication of proceedings in state and federal courts.

The policy of avoiding needless friction between federal and state courts is central to the discussions of the status quo problem in both Roth and Barancik. Both courts relied on United States v. United Mine Workers51 for the proposition that a federal court may preserve existing conditions while it deliberates over its power and over the propriety of issuing an injunction to preserve the status quo. In United Mine Workers, the defendant union threatened to terminate unilaterally its labor agreement with the United States government, which was at that time operating the nation’s coal mines. The government sought a declaratory judgment confirming that the union had

49. 583 F.2d at 534.
no right to terminate the agreement, and obtained an ex parte temporary restraining order forbidding the union from striking until the federal court could determine whether it had jurisdiction over the matter. Despite the order, the union went on strike, and the lower court found the union guilty of civil and criminal contempt. Affirming and modifying the lower court order, the Supreme Court declared that regardless of whether the court had jurisdiction to restrain the union from striking, the court did have the power to preserve the status quo pending its decision on the jurisdictional question.52

From United Mine Workers, the Barancik court took the principle that once a party invokes a federal court's power to enjoin some act, the adverse party may not preempt the issue simply by performing the act before the court can conclude its deliberation:

During its process of deliberation, the court, not the defendant, should have the ultimate power to determine the scope of its authority. It may be argued that the [anti-injunction] statute requires the federal court to protect its authority by promptly issuing a temporary restraining order. But such a construction might encourage the liberal granting of the kind of protective orders the statute was intended to prevent. Moreover, it might require the court to take action without notice to the opposing party lest the court's power be defeated before it can rule with deliberation.53

The Roth court narrowly limited this principle and concluded that a federal court would not be able to issue any injunctive relief more disruptive than a temporary restraining order covering the deliberation period.54 Thus, the rule followed in Roth would force a federal court to restrain temporarily the institution of state proceedings every time a motion for an injunction to preserve the status quo is made, if the court wanted to retain its power to decide the motion. Under the Barancik rule, however, courts would issue stays, if necessary, at later dates rather than restrain every conceivable state court proceeding in advance.

Since one purpose of the anti-injunction statute is to prevent "needless friction"55 between federal and state courts, it is in this light that the Roth rule concerning injunctions to pre-

52. See id. at 262-69, 289-95.
53. 489 F.2d at 937-38 (footnote omitted).
54. See 583 F.2d at 532.
serve the status quo should be examined. Inter-court friction might result whenever a federal court stays state court proceedings; the federal court may be seen as questioning the state court's ability to decide certain issues. Needless friction might also result, however, from the failure of a federal court to stay certain state court proceedings.56 A state court may welcome a federal stay if it relieves the court of a duty to adjudicate some difficult issues of federal law,57 such as the federal securities law issue presented in Roth. In Roth, a federal court decision on the issue would either preclude the Bank's actions in state courts or would allow the Bank to enforce the promissory notes expeditiously. Thus, the repeated issuance of temporary restraining orders, which would result from the application of Roth, would probably cause more needless inter-court friction than the selective issuing of stays urged by the court in Barancik. The reasoning of Barancik makes it clear that a federal court should issue such stays only when the federal court's power is invoked in a timely manner and only if the stay is calculated to reduce needless friction.

The second policy consideration underlying the relation-

56. Voluntary stays by state courts in their own proceedings would not adequately solve this problem. When there are multiple state court proceedings, the danger exists that not all the state courts will stay their proceedings; thus, the objective of judicial economy would not be achieved. A federal stay would provide the uniformity necessary to prevent friction which might arise between state courts that voluntarily stay proceedings and those that do not. The federal stay of state court proceedings also forces the state court plaintiff to direct its attention to the federal proceedings rather than to collateral state proceedings. The federal stay is thus especially appropriate when the federal proceeding addresses a question the answer to which expedites states proceedings or requires federal court expertise. See text accompanying notes 58-59 infra.

The federal stay also resolves most efficiently the issue of whether state courts should stay their own actions, because a federal stay precludes the necessity to move for state court stays. The possibility that a state court may defer to federal proceedings does not argue against the exercise by federal courts of the power to control disputes before them. Moreover, allowing federal courts to stay state proceedings instituted after the motion to stay diminishes the problem of state court plaintiffs (federal defendants) seeking to escape an unfavorable federal forum, and protects the federal court plaintiffs' original choice of the federal forum. This is especially important in cases such as Roth, in which the issues are within exclusive federal jurisdiction.

The goal of the federal court in Roth was the careful protection of its jurisdiction. The investors made several motions for temporary restraining orders and preliminary injunctions staying state proceedings in order to conduct the discovery necessary for arguing the stay motion. The district court consistently granted the minimum relief necessary for the investors to proceed. See note 3 supra. The lower court in Roth obviously viewed reasoned argument and prompt but unrushed deliberation as methods of limiting needless friction with the state courts.

57. See Mayton, supra note 8, at 353-54.
ship between state and federal courts involves the procedural advantages of proceeding in a federal court and the expertise of that court. These considerations also support an interpretation of section 2283 in accord with the *Barancik* rule, because that rule allows a federal court to preserve its jurisdiction and utilize its expertise when necessary. For example, there are strong reasons for allowing a federal court to stay state court proceedings instituted after a motion for injunctive relief when the federal suit involves an area of exclusive federal jurisdiction, as did the investors' class action in *Roth*. Congress provided such jurisdiction to “ensure the vindication of federal laws” by promoting uniform application and interpretation, to utilize the expertise of the federal courts in interpreting complex federal legislation, and to provide the advantages of federal procedure, especially in comprehensive discovery and in rules of evidence. State courts are permitted neither to exercise jurisdiction over claims arising under federal laws that grant exclusive jurisdiction to federal courts nor to grant affirmative relief on counterclaims within exclusive federal jurisdiction. There is a danger that state court judgments may be either incomplete or inconsistent with federal court judgments when they include issues committed to exclusive federal jurisdiction.

The third policy consideration involves the problem of duplicative state and federal proceedings. The inadequacy of the *res judicata* and *collateral estoppel* doctrines as factors limiting

58. *See* note 2 *supra* and accompanying text.


60. Although some state courts have ruled that they are even barred from considering defenses arising under exclusive federal jurisdiction, the supremacy clause requires a state court to enforce all federal law claims over which it has jurisdiction, and thus state courts must consider as a defense, but not as a counterclaim, a claim arising within the exclusive jurisdiction of the federal courts. *See id.* at 1285-86, 1303.

61. A state compulsory-counterclaim rule, parallel to Fed. R. Civ. P. 13(a), could also cause problems because a party would lose a federal claim if it is not asserted as a defense in state court. Yet, if the claim is asserted, issues of fact resolved by a state court might be precluded from federal determination. *See* text accompanying notes 65-69 *infra*. If the preclusive effect were not recognized in federal court, the state court defendant would have two chances to prove the same facts. *See* Note, *supra* note 59, at 1293. If a subsequent federal judgment was contrary to a state judgment, the federal court conceivably would have to include the amount of the erroneous state judgment in its damage award. In *Roth*, if the investors prevail, the federal court would have to award them damages for all the erroneous deficiency judgments they suffered in various state courts. This result, which in effect would void nearly seventy state court judgments, would create more needless inter-court friction than a stay.
such duplication favors the *Barancik* rule. Although res judicata—claim preclusion—serves to eliminate a threat of duplicate proceedings, a litigant must obtain final judgment before pleading res judicata as a defense to a subsequent action. Thus, the doctrine provides no relief from concurrent suits. Moreover, res judicata is different from injunctive relief because a litigant must appear and plead res judicata in every court in which the opponent brings suit. The prospect in *Roth* of appearing and pleading res judicata in seventy separate suits illustrates the inadequacy of the relief provided by the doctrine. The court entertaining the motion for an injunction, however, has already been fully informed of the nature of the controversy and has the litigants appearing before it.

Suits proceeding concurrently in federal and state court also raise the possibility of conflicting judgments. An adverse judgment in state court must be appealed through the state appellate system rather than be attacked collaterally in a federal court entertaining a duplicate proceeding. In *Roth*, the prospect of seventy state court suits, subsequent appeals, and the almost inevitable inconsistencies and conflicts among the state and federal decisions illustrates the inefficiency of allowing state proceedings to proceed before questions of federal law have been resolved.

The doctrine of collateral estoppel—issue preclusion—also limits duplicative adjudications by precluding relitigation of issues already litigated by the parties or their privies, assuming that a full and fair opportunity to litigate existed. Generally, state court determinations of fact, of state law, or of federal law within areas of concurrent jurisdiction receive preclusive effect in federal courts. State court determinations of federal law or

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62. The doctrine of res judicata is intended to prevent courts from deciding a controversy between the same parties that has already been finally decided in another court. *See Comment, supra* note 20, at 474 n.17.

63. *See* 1B *MOORE'S FEDERAL PRACTICE* ¶ 0.405[1], at 624 (3d ed. 1974).

64. *See* C. *WRIGHT*, *supra* note 11, § 107, at 537.

65. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-28 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 328-29 (1971). Collateral estoppel operates to conclude litigation, to prevent the harassment of parties, and to promote efficient use of a court's resources. The doctrine is more flexible than res judicata, which requires the same parties and the same cause of action or claim. Collateral estoppel requires actual prior litigation of an issue, whereas res judicata can bar a claim or defense that should have been asserted in the prior suit but was not.

of both fact and federal law, however, are not afforded similar treatment if the law is within the exclusive jurisdiction of federal courts.\textsuperscript{67} When determining whether to preclude litigation in such cases, courts must weigh several factors: the parties' interests in economical litigation and freedom from vexatious litigation, their interests in having a full opportunity to discover and present evidence in a forum of their choice, and the federal government's interest in the uniform application of its laws by judges possessing the requisite expertise.\textsuperscript{68} There are, however, problems that arise in balancing these interests.\textsuperscript{69}

There are a number of possible solutions to the problem of duplicative litigation. These solutions include the careful redefinition of the application and effect of preclusion doctrine, state court stays of their own proceedings,\textsuperscript{70} and legislation permitting removal of defenses arising within areas of exclusive federal jurisdiction.\textsuperscript{71} "[T]he best equitable remedy [is] a stay of state proceedings"\textsuperscript{72} because only a stay can adequately accommodate the interests of economy, efficiency, and freedom from harassing litigation. Stays eliminate duplicative adjudication

\textsuperscript{67} In resolving the collection actions on the promissory notes at issue in Roth, the state courts may be required to decide matters of federal securities law committed to exclusive federal jurisdiction. See note 2 supra. The problem of the preclusive effect that the findings of law from multiple state proceedings may have on subsequent federal proceedings has not received much attention in the case law. See generally Note, supra note 59; Note, The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934, 46 N.Y.U. L. Rev. 936 (1971); Note, supra note 66. For example, if cases are proceeding concurrently in two or more state courts, it is not clear which state court's findings should preclude the issue in federal court, nor is it clear whether the first state court finding should have a preclusive effect in all subsequent cases. It is also unclear whether a state court finding against a person who later becomes a class representative binds all other class members in federal court. See Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730, 735 (7th Cir. 1976). See also Ballas v. Symm, 351 F. Supp. 876, 882 (S.D. Tex. 1972).

\textsuperscript{68} See Note, supra note 66, at 1365.

\textsuperscript{69} First, the legal theory advanced will define the range of facts received by the court, and different courts have different rules governing discovery and proof of facts. Second, and more importantly, the fullness and fairness of the opportunity to litigate depends partially on the parties' realization of the possible preclusive effect of the action. Full litigative resources might not be used if the claim is considered inconsequential at the time of its litigation. Finally, the doctrines of res judicata and collateral estoppel give insufficient weight to a court's interest in ensuring the integrity of legal findings based on its own jurisdiction's substantive law, when these findings have been made by courts of other jurisdictions. See Note, supra note 59, at 1265.

\textsuperscript{70} See note 56 supra.

\textsuperscript{71} For a discussion of the removal solution as the "optimal" one, see Note, supra note 59, at 1305-68.

\textsuperscript{72} Id. at 1301.
by allowing the state court proceedings to continue, if necessary, after resolution of the federal issue, and by thus resolving most questions of preclusion, inconsistent judgments, and damages. Stays might be dangerous if used to delay the decision on an issue upon which the state court defendant cannot bring a federal complaint, or if used to gain a change of forum when a state court outcome is likely to be unfavorable. These dangers, however, have little to do with determining the narrow issue of the timing of the anti-injunction statute's applicability. They either are more adequately and appropriately handled by the exercise of the discretionary equitable powers of federal courts, or by the enactment of legislation that indirectly reaches the same result as Barancik. Thus, a federal court stay of state court proceedings commenced after the motion for the stay provides an effective and relatively nondisruptive remedy for some problems engendered by complex litigation.

Federal court stays of state court proceedings commenced after the motion for the stay has been made should be permitted. The language of the anti-injunction statute does not "literally" dictate this rule, but neither does it forbid it. Moreover, sound policy considerations, including the functioning of the statute within the general framework of federal procedures, support this conclusion. The Roth court's interpretation of section 2283 is inadequate and should not prevail.

73. An example would be a declaratory judgment of patent infringement. Id. at 1304-05.
74. See text accompanying notes 48-49 supra.
75. For example, a new federal defense removal statute, although perhaps desirable, would provide an indirect means of obtaining a federal stay within the accepted interpretation of the exception to the anti-injunction statute for stays necessary in aid of jurisdiction. See note 20 supra.