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Jean R. Sternlight

University of Nevada, Las Vegas – William S. Boyd School of Law

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FORUM SHOPPING FOR ARBITRATION DECISIONS: FEDERAL COURTS' USE OF ANTISUIT INJUNCTIONS AGAINST STATE COURTS

JEAN R. STERNLIGHT[†]

"The facts of this case demonstrate the quagmire into which federal courts frequently have been thrust in arbitration disputes in which the parties have involved both state and federal tribunals."¹

"This case is about forum-shopping, by one and all."²

INTRODUCTION

Arbitration clauses, which are supposed to do away with litigation, have ironically spawned many complicated and expensive court fights. Some of the most complex cases involve both forum shopping by the parties and jurisdictional turf battles between federal and state courts. Federal courts have, on quite a few occasions, actually gone so far as to enjoin a state court from continuing to consider a pending case because the federal court concluded that the matter ought to be arbitrated.³ The Supreme Court, how-

[†] Associate Professor, Florida State University College of Law; Director of Education and Research, Florida Dispute Resolution Center. J.D., Harvard Law School, 1983; B.A., Swarthmore College, 1979. I received excellent comments on earlier drafts of this Article from Lawrence C. George, Ann C. McGinley, Mary McCormick, and Tom Rowe. I am also grateful to Scott Danahy and Mike Nettles for their work as my research assistants, and to Florida State University College of Law for the financial support that made this research possible. I particularly thank Sylvia Lazos for her support as I worked on this project. The copyright for this work is held by the *University of Pennsylvania Law Review*.

¹ *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1178 (11th Cir. 1981) (refusing to enjoin a state court's determination that a dispute was not arbitrable), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998).

² *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 441 (2d Cir. 1995) ("*Distajo Second Circuit I*") (enjoining state court decisions in which a franchisee had secured rulings that disputes with a franchisor were not arbitrable), *on remand*, 944 F. Supp. 1007 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997) ("*Distajo Second Circuit II*"), *cert. denied*, 118 S. Ct. 365 (1997).

³ *See, e.g., Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997) (affirming, as modified, the district court's injunction proscribing further actions by the state court, which had refused to stay the action pending arbitration); *Distajo Second Circuit II*, 107 F.3d at 136-38 (affirming a district court's grant of injunctions against state courts, despite arguments that they were improper given the *Rooker-Feldman* doctrine or abstention principles); *Distajo Second Circuit I*, 66 F.3d at 458 (affirming a district court's stay of several state court actions in which the state courts had already entered judgment, but denying a stay of

ever, has never ruled on whether or when such "arbitral antisuit injunctions" are permissible. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁴ the Supreme Court expressly reserved ruling on the question of whether, given abstention principles, federal courts "might stay a state-court suit pending arbitration,"⁵ and the Court has not come back to the question since then.⁶

These arbitral antisuit injunction decisions, which often read like intellectual versions of a playground sandbox battle, raise four important and, to some degree, conflicting policy concerns. First, multiple federal courts have held that such injunctions are necessary and appropriate to support the 1925 Federal Arbitration Act's ("FAA's")⁷ pro-arbitration policy.⁸ While

those state courts where state *res judicata* principles would treat state rulings as a final judgment); *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (granting a motion to compel arbitration and staying Texas state court litigation although the Texas court previously refused to grant a temporary restraining order precluding litigation of the suit); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1051-52 (D. Colo. 1991) (granting a motion to compel arbitration and to stay a state court action although the state court previously denied a motion to dismiss or enforce arbitration); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 494-95 (N.D. Ga. 1988) (enjoining a state court action where a federal court action was filed six weeks after the state court suit); *Pervel Indus., Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 870 (S.D.N.Y. 1987) (granting a motion to compel arbitration and staying an action previously filed in a Tennessee state court), *aff'd*, 871 F.2d 7 (2d Cir. 1989); *cf.* *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 783-84 (E.D. Pa. 1984) (granting a motion to compel arbitration but refusing to stay a state court action). *But see* *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 350-51 (3d Cir. 1984) (reversing a district court's stay of a state court action where the state court denied a motion to compel arbitration and where that determination was affirmed on appeal); *Ultracashmere*, 664 F.2d at 1178 (affirming a district court's denial of an injunction that would have barred state court proceedings where the state court previously ruled that arbitration was not required and had gone on to determine liability); *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1316 (M.D. Ala. 1997) (abstaining from compelling arbitration and ruling that it would be improper under the Anti-Injunction Act (the "AIA") to enjoin a previously filed state court action), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998). Federal courts may also issue arbitral antisuit injunctions against one another. *See, e.g., Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 93 (2d Cir. 1961) (vacating a district court's stay of an arbitration pending a court-ordered trial). This subject, however, exceeds the scope of this Article.

⁴ 460 U.S. 1 (1983).

⁵ *Id.* at 25 n.32. It did, however, rule on the related issue of whether a federal court could abstain from ruling on a motion to compel arbitration pending the outcome in the associated state case. The Court concluded that, given the facts of the particular case, the district court had erred in abstaining from a decision on the motion to compel arbitration. *See id.* at 19.

⁶ Neither have any commentators focused on the propriety of such injunctions.

⁷ 9 U.S.C. §§ 1-307 (1994).

⁸ As one district court put it:

We are sensitive to notions of federalism and comity. Yet, the integrity of arbitration under the Federal Arbitration Act constitutes an important federal policy. We do not believe that a contracting party or a state court may act in any way to under-

recognizing that the FAA does not explicitly authorize antisuit injunctions,⁹ such courts have explained that unless they are permitted to enjoin state courts' actions, the parties will be unable to secure the speedy and inexpensive arbitration envisioned by the FAA.¹⁰ This Article examines whether such injunctions are, in fact, necessary and appropriate to support the FAA's approval of arbitration.¹¹ Second, in an era declaimed as resurgent for states' rights and federalism,¹² should federal courts be permitted to enjoin ongoing state court actions? Such injunctions, through which a federal entity completely shuts down the actions of a state court, may be seen as a direct threat to comity¹³ and federalism.¹⁴ Third, do such injunctions support efficient and effective use of judicial resources?¹⁵ And fourth, do such injunctions encourage or discourage inappropriate forum shopping or vexatious litigation behavior?¹⁶

Antisuit injunctions are extremely significant to the parties in arbitration cases because, in the words of two lawyers who have represented mul-

cut that policy, where as here a federal court order compelling arbitration has been issued. A preliminary injunction restraining the [franchisee] from proceeding in state court is necessary in aid of our jurisdiction so as to preserve the integrity of this arbitration process. Otherwise, [the franchisee] can obtain full and complete injunctive relief and money damages in the state court, as it requests in its complaint there. Little or nothing would be left for the arbitrator.

Specialty Bakeries, Inc. v. RobHal, Inc., 961 F. Supp. 822, 830 (E.D. Pa. 1997), *aff'd as modified and remanded sub nom. Specialty Bakeries v. HalRob, Inc.*, 129 F.3d 726 (3d Cir. 1997).

⁹ See *infra* text accompanying notes 102-08 (noting that neither the express language nor the legislative history of the FAA demonstrates the congressional intent to allow federal courts to enjoin state court proceedings in favor of arbitration).

¹⁰ See *infra* text accompanying notes 84-85 (noting federal courts' concern that allowing state court proceedings to continue in the face of federal court-ordered arbitration would make the arbitration process a "hollow formality").

¹¹ See *infra* text accompanying notes 78-113 (discussing whether the issuance by federal courts of injunctions that compel arbitration furthers federal policy). After all, the Supreme Court has observed that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

¹² See *infra* text accompanying notes 128-33 (outlining recent Supreme Court decisions that demonstrate the Court's increased emphasis on federalism and states' rights).

¹³ The principle of comity requires that courts from one jurisdiction should forbear from interfering with courts from another jurisdiction. See *infra* text accompanying note 114.

¹⁴ The doctrine of federalism focuses specifically on the relationship between the federal government and the states and is premised on the notion that federal entities must respect the independent sovereignty of state entities. See *infra* text accompanying notes 114-41.

¹⁵ See *infra* text accompanying notes 142-54 (exploring the judicial efficiency concerns which are raised when one dispute is simultaneously handled by two courts).

¹⁶ See *infra* text accompanying notes 155-63 (discussing the role that a court's determination that a party's behavior is vexatious should play in the granting or withholding of an antisuit injunction).

multiple companies in arbitration actions in both federal and state court, "Federal courts have generally proved more receptive to arbitration than have their state counterparts."¹⁷ While parties may differ in their characterizations of this dichotomy, either calling the federal courts "overenthusiastic" or calling the state courts "hostile" toward arbitration, it does seem that state courts are more likely to refuse to enforce arbitration agreements than are federal courts.¹⁸ Although no empirical studies have been done to verify this anecdotal observation,¹⁹ and while it is not easy to come up with a clear explanation as to *why* the attitudes of federal and state court judges should differ toward arbitration,²⁰ the decided cases do seem to support such a general differentiation. For example, when the Montana Supreme Court initially considered *Casarotto v. Lombardi*,²¹ Justice Trieweller railed against "those federal judges who consider forced arbitration as the panacea for their 'heavy case loads' and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy."²² By

¹⁷ Mark R. Kravitz & Edward Wood Dunham, *Compelling Arbitration*, LITIG., Fall 1996, at 34, 35.

¹⁸ See *infra* notes 58-64 and accompanying text (noting that some experts suggest that larger franchisors interested in compelling arbitration are often best served by filing suit in federal, rather than state, court). Some commentators have argued that state courts are, in general, a dubious forum in which to resolve federal rights, see *infra* note 117, but the Supreme Court has explicitly rejected this position. See *infra* text accompanying notes 116-27 (noting that the Supreme Court has held that principles of federalism require federal courts to be bound by state court decisions, even where these decisions are wrong as a matter of federal law).

¹⁹ Such a study would be extremely interesting but is beyond the scope of this Article.

²⁰ Perhaps state judges' heightened sympathy toward the unfairness claimed by consumers or small businesses can be attributed to the fact that state judges may come from less wealthy or elite backgrounds than do federal judges, or to the fact that their positions are typically more politically accountable than are those of federal judges. For a discussion of the backgrounds of federal appellate judges, see Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Courts of Appeals*, 78 JUDICATURE 101 (1994).

²¹ 886 P.2d 931 (Mont. 1994), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995).

²² *Lombardi*, 886 P.2d at 939 (Trieweller, J., specially concurring). Justice Trieweller further stated:

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws [provided in courts] are easily avoided by any party with enough leverage to stick a choice of law and an arbitration

contrast, a number of federal courts have interpreted arbitration clauses extremely broadly, proving quite willing to reject asserted defenses of fraud, waiver, unconscionability, and nonarbitrability.²³ Thus, permitting federal courts to enjoin state court interpretations of arbitration clauses is likely to result in more disputes being resolved through arbitration, rather than through litigation.²⁴

Arbitral antisuit injunctions are also very significant, in that certain kinds of parties are more likely to prefer to litigate in federal court, and others are more likely to prefer state court. In analyzing the published decisions involving arbitral antisuit injunctions, one learns that it is virtually al-

provision in its pre-printed contract and require the party with inferior bargaining-power to sign it.

....
... [Such opinions] illustrat[e] an all too frequent preoccupation on the part of federal judges with their own case load and a total lack of consideration for the rights of individuals.

Id. at 940 (Trieweiler, J., specially concurring). Several state supreme courts have issued decisions that might be characterized as hostile toward arbitration. *See, e.g.,* Engalla v. Permanente Med. Group, Inc. 938 P.2d 903, 916, 923-24 (Cal. 1997) (remanding the case to the lower court in order to determine whether a medical group lost the right to arbitration because of possible fraudulent behavior or waiver); Colorado Permanente Med. Group, P.C. v. Evans, 926 P.2d 1218, 1232-33 (Colo. 1996) (holding an arbitration clause unenforceable pursuant to a Colorado statute); Heurtebise v. Reliable Bus. Computers, Inc., 550 N.W.2d 243, 258 (Mich. 1996) (holding that an employee handbook did not create a binding contract requiring arbitration).

²³ *See, e.g.,* Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 797 (10th Cir. 1995) ("Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," and thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985))); Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) ("Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants."); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988) (positing that, since the FAA placed arbitration agreements as equal in weight to any contract previously recognized at law, courts were required to vigorously enforce such agreements).

²⁴ There are, of course, a number of federal court decisions that might be characterized as hostile to arbitration and a number of state court decisions that are very hospitable to arbitration. *See, e.g.,* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1202-03 (9th Cir. 1998) (holding that the Civil Rights Act of 1991 precludes employers from using pre-dispute arbitration agreements to compel employees to arbitrate claims brought under Title VII), *cert. denied*, 119 S. Ct. 445 (1998); Cole v. Burns Int'l. Sec. Servs., 105 F.3d 1465, 1481, 1486-87 (D.C. Cir. 1997) (enforcing an agreement to arbitrate employment discrimination claims only because the agreement required the employer to pay the costs of arbitration and assuming that judicial review of an arbitral award would be meaningful); Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146, 163-66 (Haw. 1996) (upholding an arbitration clause contained in an employment application although the application stated that it did not constitute an employment contract); Sosa v. Paulos, 924 P.2d 357, 364-68 (Utah 1996) (remanding a case to trial court to determine whether or not a doctor-patient arbitration agreement, otherwise held to be procedurally unconscionable, was enforceable because the patient, with adequate notice, had failed to exercise a 14-day revocation privilege).

ways a "little guy," that is a consumer, employee, franchisee, or dealer, who has filed in state court, whereas it is usually a "big guy," such as a manufacturer or franchisor, who has sought the protection of the federal courts.²⁵

These federal arbitral antisuit injunctions are worth studying, not only because of their practical significance, but also because they raise intriguing jurisdictional questions.²⁶ In particular, where a state court has previously issued an order stating that a dispute need not be arbitrated, the federal court must decide whether the Federal Full Faith and Credit statute,²⁷ principles of claim and issue preclusion,²⁸ or the *Rooker-Feldman* doctrine²⁹ prevent the federal court from reconsidering this question. Even where the state court has not issued such a ruling, the federal court must determine whether it is permitted to enjoin an ongoing state proceeding in light of the All Writs Act,³⁰ traditional equitable principles,³¹ the Anti-Injunction Act (the "AIA"),³² and various abstention doctrines.³³ Each of the above doctrines is extremely complex, and many commentators have noted that the entire doctrinal foundation of federal jurisdiction is rather convoluted and con-

²⁵ See *infra* notes 59-64 and accompanying text (noting that legal experts have counseled "big guy" franchisors to avoid state courts on the ground that state courts may be more favorable to franchisees).

²⁶ By contrast, it is clear that a state court may not enjoin a party from proceeding in a federal court. See, e.g., *Baker v. General Motors Corp.*, 118 S. Ct. 657, 665 n.9 (1998) ("This Court has held it impermissible for a state court to enjoin a party from proceeding in a federal court . . ."); *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964) (noting that, although Congress has authorized federal courts to restrain state court proceedings in certain circumstances, it has never "relaxed the . . . rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions").

²⁷ See 28 U.S.C. § 1738 (1994); *infra* text accompanying notes 164-99 (discussing the Full Faith and Credit statute as a doctrine that restricts federal courts from overriding state court decisions).

²⁸ The federal Full Faith and Credit statute requires federal courts to apply the same claim and issue preclusion principles to a state court decision as would the state's own courts. See *infra* notes 164-75 and accompanying text (describing the background of the federal Full Faith and Credit statute).

²⁹ This doctrine precludes lower federal courts from hearing "appeals" from state courts. See *infra* text accompanying notes 200-33 (describing the *Rooker-Feldman* doctrine).

³⁰ 28 U.S.C. § 1651(a) (1994). This legislation gives federal courts the power, absent a prohibition, to issue antisuit injunctions. See *infra* text accompanying notes 234-38 (describing the All Writs Act as granting federal courts authority to issue injunctions).

³¹ See *infra* text accompanying notes 239-43 (noting that "[t]raditional equitable constraints prohibit federal courts from issuing injunctions . . . absent a showing of prospective 'irreparable injury and lack of an adequate remedy at law'").

³² The Act is currently codified at 28 U.S.C. § 2283 (1994). With a few exceptions, this statute generally prohibits federal courts from enjoining state suits. See *infra* text accompanying notes 248-369 (explaining the scope of the AIA).

³³ See *infra* text accompanying notes 370-436 (discussing abstention based on concerns involving both federalism and judicial efficiency).

fused, and perhaps in need of an overhaul.³⁴ Thus, the convergence of all of these doctrines around the issue of federal antisuit injunctions creates a real intellectual and policy morass.³⁵

Unfortunately, most courts that have considered the propriety of issuing an arbitral antisuit injunction have granted the injunction without considering many of the statutes and doctrines that are directly on point.³⁶ Further,

³⁴ See, e.g., David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 322 (1968) (stating that the AIA is shrouded in "dense clouds of ambiguity"); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1769 (1992) [hereinafter Redish, *Reassessing*] ("[A] surprisingly large portion of jurisdictional doctrine makes little sense from any perspective, whether logical, conceptual, or practical."); Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal For Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 290 (endorsing the conclusion of Telford Taylor and Everett I. Willis in *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1172 (1933), that the AIA is an unsatisfactory "thing of threads and patches"). This Article will, indirectly, support such an argument through its detailed exegesis of the many doctrines that must be considered in deciding whether a federal court may enjoin a state court proceeding to support an order to compel arbitration. Rather than propose a total reform of existing statutory and case law, however, this Article will, instead, address the question of how courts should proceed under existing statutes and Supreme Court precedent.

³⁵ This Article will not address the extent to which another extremely complex and confusing doctrine, Rule 19 of the Federal Rules of Civil Procedure, may also be relevant to whether a federal court ought to enjoin a state court's consideration of an arbitration matter. See *Ranger Fuel Corp. v. Youghiogeny & Ohio Coal Co.*, 677 F.2d 378, 380-81 (4th Cir. 1982) (refusing to enjoin a state court's consideration of an arbitration and dismissing a federal suit pursuant to Rule 19 because indispensable parties could not be added); *Green Tree Fin. Corp. v. Holt*, 171 F.R.D. 313, 319 (N.D. Ala. 1997) (same); see also *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1315-16 (M.D. Ala. 1997) (observing that a refusal to enjoin a state court's consideration of an arbitration question is consistent with a Rule 19 approach to the problem in that a grant of a federal court injunction might well be prejudicial to parties to a state court action who could not, due to jurisdictional barriers, join in the federal suit), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

³⁶ See, e.g., *Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726 (3d Cir. 1997) (affirming the district court's grant of a franchisor's request for a preliminary injunction against a franchisee's state court claims pending arbitration); *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (granting an insurer's request for a temporary restraining order to stay the insured's state court breach of contract action pending final disposition of arbitration); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991) (granting a law firm's request to compel arbitration of a legal fees dispute and staying the state court legal malpractice claims pending arbitration); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 495 (N.D. Ga. 1988) (granting the motions of an insurer, general agent, mutual fund company, and others to compel arbitration of a state court claim by a former agent); *Pervel Indus., Inc. v. TM Wall-covering, Inc.*, 675 F. Supp. 867, 870 (S.D.N.Y. 1987) (granting a manufacturer's motion to compel arbitration of a dispute with the distributor and staying the distributor's state court action pending arbitration), *aff'd*, 871 F.2d 7 (2d Cir. 1989); *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 372 (S.D.N.Y. 1983) (granting the motion of oil companies and independent oil producers for an order enjoining plaintiffs from prosecuting antitrust, conspiracy, and breach of contract claims during arbitration), *aff'd*, 742 F.2d 1438 (2d Cir. 1983); *Novik & Co. v.*

almost none of the decisions look in depth at the important policy questions raised by these cases.³⁷ Rather, many are cursory examinations consisting primarily of cites to earlier decided cases, which are themselves lacking in analysis.³⁸ In a typical ruling, the federal court simply: (1) determines it has jurisdiction; (2) finds that arbitration is required by the parties' agreement and thus grants the motion to compel arbitration; and (3) concludes that having compelled arbitration, it is justified in enjoining the state court proceeding either to protect the federal court judgment or to protect federal court jurisdiction.³⁹ While perhaps appearing reasonable at first glance, these decisions often fail to take note of important factual distinctions between the cases, and therefore fail properly to analyze the relevant doctrines and policies.⁴⁰ The decisions also fail to take into account the fact that re-

Jerry Mann, Inc., 497 F. Supp. 447, 450 (S.D.N.Y. 1980) (granting a fabric seller's action to stay state court proceedings and to enforce an arbitration provision); *Burger Chef Sys., Inc. v. Baldwin Inc.*, 365 F. Supp. 1229, 1234 (S.D.N.Y. 1973) (compelling arbitration between an Indiana corporation and Michigan residents and staying a lawsuit brought in Michigan state court); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (granting a movie theater franchisor's motion to compel arbitration of franchising agreement disputes, and staying the franchisee's attempt to litigate same and other disputes in state court); *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 670 (S.D.N.Y. 1966) (granting the sewing machine suppliers' motion to proceed to arbitration, and staying the distributor from proceeding further in its state action). By contrast, in *Distajo Second Circuit I*, 66 F.3d 438 (2d Cir. 1995), and in *Distajo Second Circuit II*, 107 F.3d 126 (2d Cir. 1997), the Second Circuit did, at least, consider the propriety of the requested injunction in light of the federal Full Faith and Credit statute, the AIA, and the *Rooker-Feldman* doctrine. Nonetheless, as discussed *infra* in text accompanying notes 471-89, this Article contends that the Second Circuit failed to adequately consider how the specific factual context of that case ought to impact the application of those doctrines.

³⁷ See, e.g., *Novik*, 497 F. Supp. 447; *Burger Chef*, 365 F. Supp. 1229; *Network Cinema*, 357 F. Supp. 169; *Necchi Sewing*, 260 F. Supp. 665.

³⁸ See, e.g., *Pervel Indus.*, 675 F. Supp. at 870 (justifying a stay with a cite to *Hunt*); *Hunt*, 557 F. Supp. at 372 n.13 (justifying a stay with cites to various cases including *Novik*, *Network Cinema*, and *Necchi*); *Novik*, 497 F. Supp. at 448 (justifying a stay with a cite to *Burger Chef*); *Burger Chef*, 365 F. Supp. at 1233-34 (justifying a stay with cites to prior decisions in *Necchi* and *Network Cinema*).

³⁹ See, e.g., *Specialty Bakeries v. RobHal*, 961 F. Supp. 822, 829-31 (E.D. Pa. 1997) (enjoining a state court proceeding which had found arbitration inappropriate, and justifying an antisuit injunction as necessary in aid of federal jurisdiction), *aff'd as modified and remanded sub nom.* *Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *Nuclear Elec.*, 926 F. Supp. at 432-36 (concluding that a federal court need not abstain from compelling arbitration, that arbitration was required, and that an antisuit injunction was warranted to aid the federal court's jurisdiction or to protect or effectuate its judgments); *Pervel Indus.*, 675 F. Supp. at 868-70 (concluding that a dispute was arbitrable based on strong federal policy and that an antisuit injunction was warranted to aid federal jurisdiction); see also *TranSouth*, 149 F.3d at 1293 (suggesting, but not holding, that an antisuit injunction might be appropriate after a federal court has compelled arbitration to ensure that the federal court has the opportunity to rule on the validity of a future arbitration award).

⁴⁰ See, e.g., *Specialty Bakeries*, 961 F. Supp. 822 (failing to consider the Full Faith and Credit or *Rooker-Feldman* implications of a prior state court order concluding that a dispute

cent Supreme Court decisions have undercut the reasoning of some of the early cases granting injunctions against state courts.⁴¹ Those few courts that have denied the requested injunctions typically engage in a somewhat more detailed analysis, but even their discussions fail fully to consider the complexly interwoven policy and doctrinal issues.⁴²

This Article thus attempts to determine when, if ever, federal courts should be permitted to enjoin state court determinations in order to allow arbitration to proceed.⁴³ Part I considers the phenomenon of federal

was nonarbitrable); *Pervel Indus.*, 675 F. Supp. 867 (failing to specify when a state suit had been filed or what progress had been made in it, or to consider the possible implications of that suit in terms of abstention); *Novik*, 497 F. Supp. 447 (enjoining state suits but failing to specify when such suits were filed or how far they had progressed; failing to consider the possible Full Faith and Credit, *Rooker-Feldman*, or abstention implications of state action; and failing to discuss the AIA); *Network Cinema*, 357 F. Supp. 169 (enjoining a state court action in which the court had concluded arbitration was not required while failing to consider the possible Full Faith and Credit, *Rooker-Feldman*, or abstention implications of the state court ruling).

⁴¹ *But cf.* *First Franklin Fin. Corp. v. McClollum*, 144 F.3d 1362, 1364-65 (11th Cir. 1998) (recognizing that recent decisions allow state courts to compel arbitration under the FAA); *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1310 n.6 (M.D. Ala. 1997) (distinguishing several previously decided cases on the ground that they are inconsistent with subsequent Supreme Court decisions), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998). See *infra* text accompanying notes 91-96, 372-90 for a further discussion of recent Supreme Court and lower court decisions that have undercut many early cases granting arbitral antisuit injunctions.

⁴² See, e.g., *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 347-51 (3d Cir. 1984) (reversing a district court stay of a state court action after considering the Full Faith and Credit statute and whether *res judicata* would apply under California law, but failing to consider equitable principles, the AIA, or abstention principles); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1180-84 (11th Cir. 1981) (affirming the district court's denial of an injunction after analyzing the concepts of federalism and equity as relating to an injunction of a state court proceeding and concluding that the state ruling was subject to the doctrine of *res judicata*, but failing to analyze the AIA or the *Rooker-Feldman* doctrine), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *TranSouth*, 975 F. Supp. at 1306-16 (ruling that both the injunction and the order compelling arbitration would be inappropriate in light of federal abstention doctrines, the AIA, and Rule 19 of the Federal Rules of Civil Procedure, but failing to consider purely equitable principles), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

⁴³ This Article will not consider, except in passing, whether federal courts should be permitted to enjoin state court decisions issued in *furtherance* of arbitration. *Cf.* *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 715 (9th Cir. 1992) (holding that a state court's grant of a motion compelling arbitration was, given state law, entitled to preclusionary effect as a final order, thereby voiding the district court's contrary order); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1271, 1273-74 (7th Cir. 1976) (granting a motion to compel arbitration but refusing to stay a state court's action where the state court had previously ordered arbitration, where that judgment was affirmed by an intermediate appellate court, and where that judgment was on appeal to the Illinois Supreme

courts' issuance of antisuit injunctions in the arbitration context, analyzing the cases in which such injunctions have been sought, and pointing out some important distinctions among them. Part I focuses, in particular, on four key differences among the cases: 1) whether the federal action was filed prior or subsequent to the state suit, 2) the stage of the state suit at the time the injunction was sought, 3) the stage of the federal suit at the time the federal injunction was sought, and 4) the extent to which either party may be said to have engaged in vexatious litigation.⁴⁴

Part II examines the primary policy concerns that courts should consider in determining whether to grant such injunctions. It takes a close look at each policy and shows that the relative strength of the competing policies at issue will vary according to the factual context of each case.⁴⁵

Parts III and IV examine the various statutes and doctrines that determine whether or not federal courts may enjoin state court actions to ensure that a dispute goes to arbitration. Part III first examines the two doctrines governing whether a federal court may effectively overrule a state determination that a dispute is nonarbitrable: the Full Faith and Credit Statute⁴⁶ and the *Rooker-Feldman* doctrine.⁴⁷ Part IV then discusses those doctrines that govern whether a federal court may enjoin an ongoing state action, regardless of whether the state court has already determined that the dispute is nonarbitrable. After first examining federal courts' power to issue injunctions under the All Writs Act,⁴⁸ Part IV examines the limits imposed by the

Court); *Integrated Pet Foods, Inc. v. Commonwealth*, No. CIV. A. 95-7847, 1996 WL 153216, at *2 (E.D. Pa. Apr. 1, 1996) (dismissing a motion to stay a state court action and granting Rule 11 sanctions against a party who requested an injunction where the state court had previously rejected certain of the defendant's defenses, and where the action was going to proceed to arbitration in the state court); see also *Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248-51, 254 (9th Cir. 1992) (holding that a state court's determination confirming an arbitration award, despite a jurisdictional challenge, was entitled to be treated as *res judicata* under state law and thus must be afforded full faith and credit by the federal court).

⁴⁴ See *infra* text accompanying notes 56-76 (using a hypothetical franchising scenario to illustrate these key differences).

⁴⁵ See *infra* text accompanying notes 77-163 (discussing the following four policies: the FAA's supposed preference for arbitration over litigation; federalism and comity; efficiency; and the discouragement of vexatious litigation).

⁴⁶ See *infra* text accompanying notes 164-99 (discussing the statute requiring federal courts to honor state judicial proceedings).

⁴⁷ See *infra* text accompanying notes 200-33 (discussing lower federal courts' lack of reviewing jurisdiction over state court decisions).

⁴⁸ See *infra* text accompanying notes 234-38 (discussing federal courts' general statutory authority to issue various writs, particularly antisuit injunctions).

traditional equitable constraints on the issuance of injunctions,⁴⁹ the AIA,⁵⁰ and the relevant abstention doctrines.⁵¹ With respect to each doctrine, Parts III and IV first provide background context, then examine whether and how courts have applied the doctrine to arbitral antisuit injunctions, and finally discuss how the doctrine should be applied to such injunctions. These Parts show that although courts have often failed to apply these doctrines properly in the context of arbitral antisuit injunctions, courts' applications of the doctrines in other contexts often draw on precisely the policies discussed in Part II.⁵² These Parts also show the importance of drawing distinctions based on the factual differences noted in Part I: the priority of the state and federal actions, the stage of each suit, and the vexatiousness of the litigants' behavior. In short, Parts III and IV demonstrate that, while courts could easily employ the policy analysis set out in Part II within the constraints of existing doctrine, courts generally fail to do so.

Part V concludes by arguing that the federal courts' typical failure to apply many of the doctrines that might preclude arbitral injunctions or to draw the factual distinctions set out above is symptomatic of courts' frequent over-enthusiasm for contractual arbitration. This failure may also allow big businesses to gain an unfair advantage over "little guys."⁵³ As I have argued elsewhere, it is by no means clear that courts' extreme preference for arbitration over litigation is supported either by the legislative history of the FAA or by policy considerations.⁵⁴ Instead, where federal courts issue arbitral antisuit injunctions in defiance of dominant principles of federalism and comity, federal courts disparage state courts' capacity for fairness more seriously than can be justified by the federal supremacy interest. In effect, the federal courts are making an invidious comparison between the state forum and an arbitral forum in the guise of resolving a jurisdictional conflict between the federal and state forums. Moreover, this preference for

⁴⁹ See *infra* text accompanying notes 239-47 (concluding that traditional equitable principles will likely prevent a federal court from issuing an arbitral antisuit injunction except under unusual circumstances).

⁵⁰ See *infra* text accompanying notes 248-369 (discussing the powerful scope of the AIA as well as its limitations and exceptions).

⁵¹ See *infra* text accompanying notes 370-436 (analyzing the issue of whether a federal court that has the authority to enjoin a state court may, or ought to, exercise that prerogative).

⁵² Of course, certain doctrines may emphasize one set of policies more than another.

⁵³ See *infra* text accompanying notes 437-99 (contending, *inter alia*, insufficient attention to federalism and comity concerns as possible explanations for over-enthusiasm).

⁵⁴ See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996) ("When Congress passed the FAA in 1925, it intended only to require federal courts to *accept* arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions.").

arbitration over litigation raises constitutional concerns.⁵⁵ Thus, it is crucial that federal courts carefully consider the permissibility of antisuit injunctions in light of the relevant jurisdictional doctrines and the particular facts of each case.

I. THE PHENOMENON OF FORUM SHOPPING FOR ARBITRATION DECISIONS

A. *A Hypothetical*

Francesca (franchisee) and Big Guys (franchisor) enter into a contractual agreement which, inter alia and in small print, provides for arbitration of certain disputes. When a disagreement ultimately arises between the two, Francesca sues Big Guys in state court, alleging various tort and contract causes of action. Francesca also argues that she should not be required to arbitrate the disputes, reasoning perhaps that the disputes do not arise out of the arbitration agreement, that the arbitration agreement itself was fraudulent or secured under duress, or that Big Guys has, through its behavior or delay, already waived its right to arbitration. Rather than fight this battle in state court or remove the state action to federal court,⁵⁶ Big Guys files a

⁵⁵ See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 10 (1997) ("By expressing and applying a preference for binding arbitration over litigation, the Court is directly countering the Constitution's guarantees of due process of law in all courts, and to a life-tenured judge and jury trial in appropriate matters brought in federal court.").

⁵⁶ There are multiple reasons why a party might choose to file a separate action in federal court rather than to remove the state court action to federal court. First, pursuant to the removal statute, certain actions that give rise to federal jurisdiction are nonetheless not removable. See 28 U.S.C. §§ 1441, 1446 (1994). Where the defendant is a citizen of the state in which the action was filed and the only ground for removal is diversity jurisdiction, no removal is permitted. See 28 U.S.C. § 1441(b). In such a situation, the defendant could, however, file a separate federal court action. See *First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1363-64 (11th Cir. 1998) (stating that the non-removability of a state court action does not affect jurisdiction over an independent federal suit). Second, a party may, at times, miss the deadline for removal, which is just 30 days. See 28 U.S.C. § 1446(b). Third, when an action is removed, it is removed to the federal district in which the state court is located. See 28 U.S.C. § 1441(a). By filing a separate federal action, a party may secure an alternative and preferable federal court venue. Fourth, sometimes the presence of non-diverse parties, see 28 U.S.C. § 1441(b), or of parties who do not consent to removal, see *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245 (1900), will prevent the removal of an entire state action to federal court. In such a situation, a subset of the state court defendants may file a separate federal court action. This occurred in *TranSouth Financial Corp. v. Bell*, 975 F. Supp. 1305, 1306-08 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

Because the filing of a separate federal court action may be seen as an "end run" around the removal statute, it may be inappropriate for federal courts in which such separate suits are brought to enjoin ongoing state court actions. But see *TranSouth*, 975 F. Supp. at 1306-09

separate action in federal court, in the district that is the corporate home to Big Guys.⁵⁷ In this federal action, Big Guys requests the federal court not only to compel arbitration pursuant to section 4 of the FAA, but also to enter an injunction staying any further proceedings in, or the enforcement of, the state action. The federal court enters the injunction, and the state court ceases its activity in the case.

B. *The Hypothetical is Based on Oversimplified Reality*

This scenario is not purely hypothetical, but rather is based on many actual cases. In the vast majority of the reported cases involving requests for federal arbitral antisuit injunctions, a "little guy," such as a franchisee, employee, consumer, or local distributor, filed suit in state court based on a theory of either contract or tort law. The "little guy" argued that the dispute was not covered by the arbitration clause or, in the alternative, that the arbitration clause was void. The state court often agreed. Rather than rely on

(finding that a federal court has jurisdiction to hear part of a non-removable state court action, although ultimately concluding that it should abstain from granting a motion to compel arbitration). In one noteworthy case, the franchisor filed a separate federal action against only those state counter-plaintiffs as to whom diversity existed, but then convinced the district court to use the "active concert or participation" language of Federal Rule of Civil Procedure 65(d) to also enjoin the non-diverse state court plaintiffs. See *Doctor's Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77, 85-86 (D. Conn. 1996) ("The reach of an injunction may extend to non-parties. . . . To enjoin all the class plaintiffs except for the [state court plaintiff], who could then proceed with the . . . lawsuit, would render the issuance of an injunction in this case a nullity."). See generally Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 141-42 (1997) (explaining the use of Federal Rule of Civil Procedure 65(d) to enjoin non-parties).

⁵⁷ Because section 4 of the FAA provides that arbitration proceedings ordered by the court "shall be within the district in which the petition for an order directing such arbitration is filed," 9 U.S.C. § 4, several courts have held that a federal court action to compel arbitration must be filed in the district where, according to the arbitration agreement, the arbitration would be held. See, e.g., *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854-55 (6th Cir. 1997) (holding that, where an arbitration agreement specified Ohio as its forum, only the district court in that forum had the jurisdiction to compel arbitration); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 335 (5th Cir. 1987) (holding that the plain language of a forum selection clause required parties to arbitrate in Iran); *Farr & Co. v. Compañía Intercontinental de Navegación de Cuba, S.A.*, 243 F.2d 342, 347 (2d Cir. 1957) (explaining that "by agreeing to arbitrate in New York a party makes himself as amenable to suit as if he were physically present in New York"); *Doctor's Assocs. v. Stuart*, No. 3:95CV01065 (PCD), 1995 WL 869590, at *1 (D. Conn. July 27, 1995) (holding that the parties were bound by a ruling of a Connecticut court, and not by an Illinois court, because a forum selection clause specified that disputes would be arbitrated in Connecticut), *aff'd*, 85 F.3d 975 (2d Cir. 1996); *In re Home Ins. Co.*, 908 F. Supp. 180, 182-83 (S.D.N.Y. 1995) (holding that a petition to compel arbitration could only be brought in New York where an arbitration clause expressly provided that arbitration would take place in New York). In the text's hypothetical, as Big Guys drafted the arbitration agreement, it had the power to locate the arbitration in a desirable location, such as Big Guys's corporate home state.

the state court to resolve the dispute, the "big guy," such as a franchisor, employer, or manufacturer, instead filed a motion to compel arbitration in federal court, often far from where the "little guy" filed. The "big guy" also asked the federal court to enjoin the state court proceeding.⁵⁸

⁵⁸ See, e.g., *TranSouth*, 149 F.3d at 1294 (borrower filed state action in Alabama, lenders filed federal suit in Alabama); *Distajo Second Circuit I*, 66 F.3d at 447-50 (franchisees filed state actions in Alabama, Illinois, and North Carolina, while franchisor filed federal action in New York), *on remand*, 944 F. Supp. 1007 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997) ("*Distajo Second Circuit II*"), *cert. denied*, 118 S. Ct. 365 (1997); *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 347 (3d Cir. 1984) (employees filed a state suit in California, and employer filed a federal action in Pennsylvania); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1178-79 (11th Cir. 1981) (local clothing retailer filed a state suit in Alabama, while manufacturer filed a federal action in New York), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F. Supp. 822, 825 (E.D. Pa. 1997) (franchisee filed a state suit in New Jersey, and franchisor filed a federal suit in Pennsylvania), *aff'd as modified and remanded sub nom. Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *Ferrari N. Am., Inc. v. Crown Auto Dealerships, No. 94 Civ. 8541 (KMW)*, 1995 WL 614558, at *2 (S.D.N.Y. Oct. 19, 1995) (dealer filed an administrative action in Florida, and manufacturer filed a federal court action in New York), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 470 (D. Mont. 1993) (dealer filed a state action in Montana, and manufacturer filed a federal action in Montana); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1049-50 (D. Colo. 1991) (client filed a malpractice action in Oklahoma state court, and law firm filed a federal suit in Colorado); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 491 (N.D. Ga. 1988) (employee filed defamation and fraud actions in California, while employer filed in federal court in Georgia); *Pervel Indus., Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 868 (S.D.N.Y. 1987) (local distributor filed in Tennessee state court, and manufacturer filed in federal court in New York), *aff'd*, 871 F.2d 7 (2d Cir. 1989); *Burger Chef Sys., Inc. v. Baldwin Inc.*, 365 F. Supp. 1229, 1230 (S.D.N.Y. 1973) (franchisee filed a state action in Michigan, while franchisor filed a federal suit in New York); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 170 (S.D.N.Y. 1973) (franchisee filed a state action in Kansas, and franchisor filed a federal suit in New York); *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 666 (S.D.N.Y. 1966) (local distributor filed a state action in Oklahoma, and manufacturer filed a federal action in New York).

Strikingly, in those cases with facts opposite to those in the hypothetical, the federal courts were much more deferential to the state court decisions. See *Swofford v. Shearson Lehman/Am. Express, Inc.*, 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (refusing to enjoin a state court's refusal to order arbitration where the employer filed a state action in Arkansas, and the employee filed a federal action in Arkansas); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 783-84 (E.D. Pa. 1984) (granting a motion to compel arbitration but refusing to stay a state court action where the employer filed an action in state court in Pennsylvania, and the employee filed a federal action seeking to compel arbitration in Pennsylvania).

A few other cases involved disputes between two large powerful companies. See, e.g., *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (issuing a stay for a pending state court action while awaiting the final disposition of an arbitration); *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 371-72 (S.D.N.Y. 1983) (enjoining a plaintiffs' state court action following the district court's ruling that the plaintiff's breach of contract claims were subject to arbitration), *aff'd*, 742 F.2d 1438 (2d Cir. 1983); *Novik & Co. v. Jerry Mann, Inc.*, 497 F. Supp. 447, 448-50 (S.D.N.Y. 1980)

The hypothetical scenario above is also based on a "how-to" article, written by two franchisor attorneys, in which the authors provide detailed suggestions regarding how to avoid a state court environment that may be more favorable to the franchisee than the franchisor.⁵⁹ Their article begins with its own hypothetical:

The general counsel of AJAX Corporation is on the phone. AJAX has just been sued for breach of contract and associated torts in a distant state court renowned for its hostility to outsiders, fondness for hometown plaintiffs, and enthusiasm for heart-stopping punitive damage verdicts. Not surprisingly, the plaintiff wants a jury trial and a modest seven-or-eight figure punitive damage award. In reviewing the file, the general counsel has discovered that the contract between the plaintiff and AJAX contains a standard American Arbitration Association (AAA) arbitration clause requiring, on demand by either party, arbitration of any dispute in AJAX's home state Emphasizing how critical it is to avoid a jury in this inhospitable locale, the general counsel asks you what AJAX can do to enforce its arbitration rights if, as anticipated, the plaintiff refuses to arbitrate and insists on pressing its lawsuit.⁶⁰

The authors conclude that although one's first instinct might be to file a motion in the state court to stay the litigation and compel arbitration, it would be far wiser to file a separate action in the federal court with jurisdiction over the contractually designated arbitration site⁶¹ and to move to enjoin the state court action.⁶² Observing, somewhat wistfully, that federal jurisdiction will not always exist,⁶³ the authors recommend opting for federal court whenever possible, to take advantage of the fact that federal precedent is almost certainly more pro-arbitration than is state law precedent.⁶⁴

(staying state court proceedings and enforcing an arbitration provision agreed to by the parties).

⁵⁹ See Kravitz & Dunham, *supra* note 17. Kravitz and Dunham note that they have each represented Doctor's Associates, Inc., the franchisor for Subway sandwich shops, in multiple cases. See *id.* at 34. These authors have also written several other articles geared toward teaching franchisors and others how to use arbitration to avoid liability. See, e.g., Dunham, *supra* note 56, at 141 (explaining that franchisors can use arbitration clauses to prevent class actions, thereby deterring suits and dramatically reducing exposure); Edward Wood Dunham et al., *Franchisor Attempts to Control the Dispute Resolution Forum: Why the Federal Arbitration Act Trumps the New Jersey Supreme Court's Decision in Kubis*, 29 RUTGERS L.J. 237, 239 (1998) (suggesting that forum selection provisions contained within an arbitration clause "should be immune to attempted state interference").

⁶⁰ Kravitz & Dunham, *supra* note 17, at 34.

⁶¹ See *id.* at 37.

⁶² See *id.* at 40.

⁶³ See *id.* at 36. As will be discussed, see *infra* text accompanying note 111, the FAA is an anomalous federal statute which does not give rise to federal court jurisdiction.

⁶⁴ See *id.* at 36; *supra* text accompanying notes 17-24, 58 (explaining that the state courts tend to favor the franchisee, while the federal courts tend to grant franchisor motions to compel arbitration).

It is very important, however, to focus on certain significant facts that are ignored in these two hypotheticals and in the actual cases in which federal courts have been requested to enjoin state court actions. First, it is important to focus on whether the federal action was filed before or after the state court action was filed.⁶⁵ Second, one must focus on what stage the state court proceeding was at when the federal court was requested to enjoin the state court proceeding, and if the parties had yet exchanged discovery.⁶⁶ Had the state court been requested to stay litigation or compel arbitration?⁶⁷ Had it denied such a motion?⁶⁸ Had the state court entered a judgment on the merits?⁶⁹ Was that judgment fi-

⁶⁵ In *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 370-71 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1438 (2d Cir. 1983), the court granted the requested injunction of state court proceedings, observing that the federal court action had been filed seven years prior to the state court action, and that the federal court had issued a judgment ordering arbitration four years prior to the state proceeding. Much more frequently, however, federal courts enjoin state court proceedings even though such proceedings are filed prior to the federal court action. With the exception of *Hunt*, this is true of all of the cases granting antisuit injunctions cited *supra* in notes 3, 36.

⁶⁶ In *Ultracashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981), *overruled on other grounds by Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998), the appellate court affirmed the district court's refusal to enjoin a state proceeding where the federal court plaintiff did not file suit until "four days before the state court trial and almost nine months after initiation of the state court proceedings."

⁶⁷ In *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1307-09 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998), the district court abstained from ruling on a motion to compel arbitration and to enjoin the state court proceeding where the state court had been asked to grant a motion to compel arbitration but had not yet ruled on that motion. The Eleventh Circuit reversed the abstention on the motion to compel and remanded the case so that the district court could reconsider whether to grant the motion to compel and whether to stay the state action if arbitration was compelled. *See TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1296-97 (11th Cir. 1998).

⁶⁸ *Compare Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997) (affirming a district court's injunction of a state court proceeding, even though the state court had refused to stay an action pending arbitration), *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (granting a motion to compel arbitration and to stay a state court proceeding where the state court had previously denied a motion for a temporary restraining order to stay the state action), *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1050-52 (D. Colo. 1991) (granting a motion to compel arbitration and to stay a state court action although the state court had previously denied a motion to dismiss or enforce arbitration), *and Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169 (S.D.N.Y. 1973) (granting a motion to compel arbitration and staying a state action although the state court had already ruled that arbitration was not required), *with Ultracashmere*, 664 F.2d at 1183 (affirming a district court's denial of an injunction which barred state proceedings where the state court had already determined that arbitration was not required and that liability was appropriate).

⁶⁹ *Compare Distajo Second Circuit II*, 107 F.3d 126, 135-36 (2d Cir. 1997) (affirming the district court's stay of state court actions in which the state court had already entered judgment), *cert. denied*, 118 S. Ct. 365 (1997), *with In re Arbitration Between Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 351 (3d Cir. 1984) (reversing the district

nal?⁷⁰ Third, the actual cases may vary as to the stage of the federal action at the time the injunction was sought. Was the federal action just filed?⁷¹ Had substantial discovery already taken place? Had the federal court already made a ruling on whether or not arbitration should be compelled?⁷² And, had the federal court actually issued a final judgment in the case?⁷³ Fourth, it is important to determine whether either party engaged in any kind of vexatious, strategic conduct or inappropriate forum shopping.⁷⁴ In considering whether particular litigation strategies were vexatious, it may be appropriate to look at issues such as which party was the first to file in state court⁷⁵ and how long a period of time passed before the action was filed in

court's stay of a state court action where the state court had denied a motion to compel arbitration and where that determination had been affirmed on appeal).

⁷⁰ In *Distajo Second Circuit I*, the Second Circuit concluded that a district court's right to enjoin a state court proceeding should depend, at least in part, on whether any judgment already issued by the state court was deemed to be "final" under that state's own jurisprudence. See *Distajo Second Circuit I*, 66 F.3d 438, 446-51 (2d Cir. 1995), on remand, 944 F. Supp. 1007 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997) ("*Distajo Second Circuit II*"), cert. denied, 118 S. Ct. 365 (1997). Reviewing judgments arising out of various state courts, the Second Circuit concluded that although one state's judgments should be deemed to be final, other states' judgments should not. See *id.* at 446-51.

⁷¹ Compare *Ultracashmere*, 664 F.2d at 1179 (affirming a district court's refusal to enjoin a state court proceeding where the federal court suit had just been filed, and where the state suit had been in progress for nine months), with *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 666 (S.D.N.Y. 1966) (enjoining a state suit although a federal suit was filed just a few months prior to the decision and although the state suit had been pending for five years).

⁷² See, e.g., *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 370-72 (S.D.N.Y. 1983) (enjoining a state proceeding where a federal action had been ongoing for eight years, and where five years prior to the filing of the state action, the federal district court had dismissed the state court plaintiff's claims on the merits, sending certain claims to arbitration), *aff'd*, 742 F.2d 1438 (2d Cir. 1983).

⁷³ The *Hunt* court characterized its determination as a judgment and made a determination under Federal Rule of Civil Procedure 54(b) that "there was no just reason for delay." 557 F. Supp. at 370. Nonetheless, when the court held that it still retained jurisdiction over the parties and the claim it had sent to arbitration, see *id.* at 372, the determination was apparently not final.

⁷⁴ Compare *Hunt*, 557 F. Supp. at 372 (granting an antisuit injunction where the party that the federal court had sent to arbitration five years earlier then filed an action in state court seeking to vacate the alleged arbitral final award), and *Ultracashmere*, 664 F.2d at 1179 (affirming a denial of an antisuit injunction where the party did not file a federal court motion to compel arbitration until four days before state court trial), with *Distajo Second Circuit II*, 107 F.3d at 135-36 (enjoining a state court action even though it was the franchisor who originally brought the action in state court, and even though the contract required the franchisee to arbitrate all claims but allowed the franchisor to use court eviction proceedings against the franchisee in the event of an alleged breach of contract).

⁷⁵ In *Distajo Second Circuit I*, 66 F.3d at 456, the court reversed and remanded the case for further consideration of the district court's determination that the franchisor, Doctors Associates, did not waive its right to arbitration by filing an action in state court. See also *id.* at 441 ("When problems did arise . . . neither side invoked the arbitration clause. First, DAI

federal court.⁷⁶ This Article contends that these distinctions, too often blurred by the courts, are essential to a proper determination of whether a federal court may legitimately enjoin state court action in a particular case.

II. A PROPOSED ANALYSIS

Federal courts should consider four sets of policies in deciding whether or not to enjoin an ongoing state court action in connection with an injunction compelling arbitration: (1) any federal policy favoring the issuance of such injunction, (2) federalism and comity principles that might weigh against the injunction, (3) efficiency concerns that might either support or oppose an injunction, and (4) the goal of deterring vexatious or harassing litigation that might also either support or oppose an injunction.⁷⁷

directed its wholly owned real-estate leasing companies to bring summary eviction proceedings against the franchisees in local state courts.”); *see also Distajo Second Circuit II*, 107 F.3d at 132-33 (finding no waiver of arbitration although the franchisor initiated an action in state court).

⁷⁶ *Compare* A.L. Williams & Assocs., Inc. v. McMahon, 697 F. Supp. 488, 494-95 (N.D. Ga. 1988) (enjoining a state court action where a company filed in federal court just six weeks after its opponent filed a state court action), *with Necchi Sewing*, 260 F. Supp. at 668-70 (enjoining a state court action even though the party seeking to compel arbitration waited five years after the commencement of the state court action to file in federal court).

⁷⁷ Other commentators have come up with their own lists of factors that courts or policymakers should consider in determining the propriety of antisuit injunctions, or, more generally, in allocating business between state and federal courts. *See, e.g.,* COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 5.04(b) cmt. d (1994) (proposing that federal courts be given discretionary power to enjoin ongoing state actions after considering how far state actions have progressed, the degree of duplication between federal and state actions, the extent to which actions involve issues of federal law, and the interests of non-parties); Redish, *Reassessing*, *supra* note 34, at 1770-85 (urging that allocation of cases between federal and state courts should turn on factors of desirability of “intersystemic cross-pollination, systemic representativeness, litigant choice, litigation efficiency, fundamental fairness, institutionalism, and logical consistency”); Edward F. Sherman, *Antisuit Injunction and Notice of Intervention and Preclusion: Complementary Devices to Prevent Duplicative Litigation*, 1995 BYU L. REV. 925, 927-46 (1995) (describing and advocating the aforementioned 1994 ALI Complex Litigation Proposal’s antisuit injunction provision, which sets out procedures and standards to be followed when enjoining a state action); Paul W. Werner, *Antisuit Injunctions Under the Complex Litigation Proposal: Harmonizing the Sirens’ Song of Efficiency and Fairness with the Hymn of Judicial Federalism and Comity*, 1995 BYU L. REV. 1041, 1065-78 (1995) (criticizing those who advocate the American Law Institute’s 1994 Complex Litigation Proposal for failing to give sufficient weight to principles of comity and federalism, and urging that the federal transferee court should instead evaluate the following factors: the extent of progress in both courts, the extent of commonality of issues between the two suits, the effect on the party excused from the action, forum inconvenience, party gamesmanship, and principles of comity and federalism); Diane P. Wood, *supra* note 34, at 319-20 (urging that the AIA be rewritten to allow a federal court to enjoin pending state court proceedings “only when necessary to prevent irreparable harm to the parties or to federal interests, giving due regard to the interests of the state and the adequacy of the remedies in the state courts”). My own analysis is distinct from each of these in that I have attempted to focus

A. Does Federal Policy Support Arbitral Antisuit Injunctions?

Courts and commentators have sometimes concluded that a federal court is, or should be, justified in issuing an antisuit injunction where failure to issue such an injunction would frustrate federal policy.⁷⁸ For example, in *Mitchum v. Foster*,⁷⁹ the Supreme Court held that because a purpose of the Civil Rights Act of 1871⁸⁰ was to prevent state courts from depriving persons of their federally protected civil rights, the AIA did not preclude a federal court from enjoining a pending state court proceeding seen as a threat to free speech.⁸¹ Also, in *Dombrowski v. Pfister*,⁸² the Court cited federal policies in order to reverse a federal district court's abstention from enjoining a criminal prosecution in state court where such prosecutions were alleged to be part of an attempt to prevent the state court defendants from "asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."⁸³

on those particular policy considerations that tend to be the most relevant in the arbitration context. My analysis is also distinct from the others in that I have separated out the overarching policy considerations from the specific factual circumstances that may dictate how such a policy should be applied.

⁷⁸ Nonetheless, as discussed *infra*, at text accompanying notes 114-63, other policies may preclude a federal court from enjoining a state court action, even though the injunction might further federal policy. See *Dombrowski v. Pfister*, 380 U.S. 479, 484-85 (1965) ("It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."). Some believe that federal courts should be allowed to be more protective of federal interests. See *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 509-10 (5th Cir. 1988) (Rubin, J., concurring) (calling on Congress to revise the AIA contending: "It is time . . . for Congress to reconsider the statute that we are obliged to follow, for it is no longer adequate to assure the protection of federal rights"). The Fifth Circuit was frustrated that, while "there can be little doubt that the [federal Longshoremen's and Harbor Workers' Compensation Act] preempts state jurisdiction over suits involving failure to pay compensation under the Act," *id.* at 510, the federal court lacked authority to enjoin an erroneous state court interpretation and instead was forced to rely on state courts to enforce the federal right, with the remote possibility of review by the U.S. Supreme court. See also Wood, *supra* note 34, at 319-20 (arguing that the AIA should be amended to make clear "that a sufficiently strong federal interest must and will permit an anti-suit injunction").

⁷⁹ 407 U.S. 225 (1972).

⁸⁰ Section 1 of the Civil Rights Act of 1871 is currently codified at 42 U.S.C. § 1983 (1994).

⁸¹ See *Mitchum*, 407 U.S. at 240. The federal court plaintiffs were attempting to enjoin a state court from closing down a bookstore as a supposed public nuisance, arguing that there had been a violation of their First Amendment right to free speech.

⁸² 380 U.S. 479 (1965).

⁸³ *Id.* at 482. The Supreme Court therefore reversed the district court's conclusions that the federal court plaintiffs had failed to show irreparable injury, and that the district court was required to abstain. See *id.* at 489.

Applying this approach in the arbitration context, federal courts have cited the supposed federal policy favoring arbitration in order to enjoin state court actions that might undermine federal rulings which compel arbitration.⁸⁴ As one court put it, allowing the state court suit to proceed "would eviscerate the arbitration process and make it a 'hollow formality,' with needless expense to all concerned."⁸⁵

A superficial reading of the Supreme Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁸⁶ seems to lend support to the idea that the FAA justifies using federal antisuit injunctions to support arbitration. That decision reversed a federal district court's stay of its consideration of a motion to compel arbitration based on the existence of a previously filed state suit.⁸⁷ The Supreme Court held that the district court abused its discretion in abstaining from hearing the case. The Court reasoned, in part, that the abstention was inconsistent with Congress's "clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."⁸⁸ Noting that "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction,⁸⁹ the Court also explained that abstention would be inappropriate because the state courts were

⁸⁴ See, e.g., *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F. Supp. 822, 830 (E.D. Pa. 1997) (holding that an injunction which restrains a party from proceeding in state court is necessary to preserve the integrity of arbitration under the FAA), *aff'd as modified and remanded sub nom. Specialty Bakeries, Inc. v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *Pervel Indus., Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 869-70 (S.D.N.Y. 1987) (holding that the parties must submit their dispute to arbitration, and stating that an exception to the AIA provides federal courts with the authority to stay state court proceedings where it is necessary for the purposes of jurisdiction), *aff'd*, 871 F.2d 7 (2d Cir. 1989); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (holding that although the federal arbitration statutes do not grant federal courts the power to stay state court proceedings, a stay is authorized under the AIA when the dispute in question is subject to the provisions of the FAA).

⁸⁵ *Specialty Bakeries*, 961 F. Supp. at 830 (citing *United States v. District of Columbia*, 654 F.2d 802, 810 (D.C. Cir. 1981)).

⁸⁶ 460 U.S. 1 (1983).

⁸⁷ *Moses H. Cone* involved a dispute between a hospital and a contractor. When the contractor asserted a right to additional payment, the hospital filed an action in state court seeking declaratory relief to the effect that the contractor was not entitled to arbitrate the claim and also alleging that the claim was invalid on the merits. The contractor subsequently filed an action in federal court seeking an order to compel arbitration under section 4 of the Arbitration Act. Upon the hospital's motion, the district court stayed consideration of the suit pending resolution of the state claim, citing the abstention principles set out in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Fourth Circuit reversed, concluding that the stay was inappropriate. See *Mercury Constr. Corp. v. Moses H. Cone Mem'l Hosp.*, 656 F.2d 933 (4th Cir. 1981), *aff'd*, 460 U.S. 1 (1983).

⁸⁸ *Moses H. Cone*, 460 U.S. at 22.

⁸⁹ *Id.* at 26.

not necessarily obliged to grant an order to compel arbitration under the FAA.⁹⁰

Nonetheless, for two important reasons *Moses H. Cone* does not show that the FAA justifies federal courts' issuance of injunctions against state courts. First, the Supreme Court's decision explicitly reserved the question of "whether a federal court might stay a state-court suit pending arbitration under [the AIA,] 28 U.S.C. § 2283,"⁹¹ recognizing that such an injunction would raise issues not addressed in the abstention opinion. Specifically, such an injunction would implicate concerns of federalism and comity that are not raised by a mere federal court issuance of an order to compel arbitration. Second, part of the premise of *Moses H. Cone* no longer appears to be good law.⁹² Whereas the Supreme Court explained that state courts might not be obligated to grant a motion to compel arbitration requested under the FAA,⁹³ today the contrary appears true. Since 1983 the Supreme Court has, on multiple occasions, made it clear that the FAA requires state courts, as well as federal courts, to enforce parties' arbitration agreements.⁹⁴ Technically, those holdings only explicitly address section 2 of the Act,⁹⁵ but it nonetheless seems clear that state courts have the same obligation as federal courts to enforce the statute by granting a motion to compel.⁹⁶

⁹⁰ See *id.* at 26.

⁹¹ *Id.* at 25 n.32.

⁹² See *id.* at 26-27 n.36 (discussing the "probable inadequacy" of state court proceedings to protect rights to arbitration).

⁹³ See *id.* at 26 (stating that although state courts, as well as federal courts, are required to grant stays of litigation requested under section 3 of the FAA, it is not clear from the language of the statute that they must grant motions to compel arbitration requested under section 4).

⁹⁴ See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269-70 (1995) (reversing an Alabama court's finding that the FAA was inapplicable to a local contract and the court's subsequent refusal to enforce an arbitration agreement); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984) (reversing a California court's refusal to compel arbitration and holding that California law was preempted by the FAA); see also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 1133-34 (1996) (holding that the FAA preempted a state law that required notice to be provided in contracts calling for arbitration).

⁹⁵ Section 2 is the central provision of the FAA, providing that covered arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). The Court has, in fact, reserved ruling on the question of whether sections 3 and 4 of the Act, calling for courts to stay litigation and compel arbitration, also apply in state court. See, e.g., *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477 (1989) (holding that even if sections 3 and 4 of the FAA are applicable in state court proceedings, they do not prevent application of a state law staying arbitration); *Southland*, 465 U.S. at 16 n.10 (holding that although the FAA preempts a state law that removes the power to compel arbitration, sections 3 and 4 of the FAA do not categorically apply to state court proceedings).

⁹⁶ As the authors of the leading arbitration treatise explain, even if sections 3 and 4 are not held to apply in state court, it is now clear that section 2, and its emanations, impose on state courts duties that are indistinguishable from those imposed by sections 3 and 4 of the

These rulings sharply undercut any argument that federal courts are somehow better suited to enforce the statute than their state counterparts. In sum, one cannot simply justify federal arbitral antisuit injunctions with a cite to *Moses H. Cone*, but must instead look closely at the relevant issues to determine whether and when federal policy might support such an injunction.

Once one takes a fresh look at the FAA, it is by no means clear that a federal court's injunction of ongoing state proceedings in the arbitration context will further federal policy. Even if it were true (as this Article disputes below) that federal policy generally favors arbitration over litigation, no federal policy justifies taking arbitration decisions out of the hands of state courts in a typical situation.

Some might argue that federal antisuit injunctions are necessary to procure speedy, inexpensive arbitration because they believe that federal policy favors arbitration over litigation, regardless of the intent of the parties. Dicta in certain Supreme Court decisions admittedly seem to support this interpretation,⁹⁷ and it has certainly been adopted by some courts.⁹⁸ However, a number of recent Supreme Court decisions undercut such an argu-

FAA. See IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 10.8.1.3 (1994). Because section 2 requires state courts to enforce parties' agreements to arbitrate, state courts must grant motions to compel arbitration and also stay proceedings that regard issues referable to arbitration. See *id.* § 10.8.3.2. A contrary result would create the bizarre situation of binding a state court to enforce an arbitration agreement without giving it the tools to do so. See *id.* § 10.8.1.3; see also *TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1295 (11th Cir. 1998) (recognizing a state court's ability to grant complete relief by issuing a motion to compel arbitration under the FAA); *First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1365 (11th Cir. 1998) (distinguishing *Moses H. Cone* on the ground that the state court had recognized its ability to compel arbitration under the FAA); *GAF Corp. v. Werner*, 495 N.Y.S.2d 312, 317-18 (1985) (concluding that the FAA effectively requires state courts to enforce the statute in the same way as would federal courts, at least where the state has a statutory procedure for compelling arbitration).

⁹⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing federal policy favoring arbitration to hold that claims under the Age Discrimination in Employment Act are arbitrable); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-81 (1989) (taking note of the federal policy favoring arbitration to hold that securities fraud claims can be arbitrated); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that although "the parties' intentions [as to arbitrability] control, . . . those intentions are generously construed as to issues of arbitrability"); *Moses H. Cone*, 460 U.S. at 24-25 (recognizing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

⁹⁸ See, e.g., *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (noting that, because the FAA not only reversed judicial hostility to enforcement of arbitration contracts but also created a rule of contract construction favoring arbitration, a securities industry employee was required to arbitrate a claim that did not become arbitrable pursuant to industry rules until after the employee's termination); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 798 (10th Cir. 1995) (concluding that the federal policy favoring arbitration over litigation requires that an arbitration clause be given the broader of two possible interpretations).

ment because they rely on the original interpretation of the Act, which stated that arbitration clauses should be treated with favor only to the extent the parties actually opted for arbitration.⁹⁹ This distinction is crucial because if federal policy only favors parties' allowance to arbitrate disputes once they have opted for that dispute resolution mechanism, then a state court's ruling that a dispute is nonarbitrable is not necessarily inconsistent with federal policy and should not therefore be enjoined. Rather, such a state court decision would be entirely consistent with federal policy if the parties did not, in fact, choose to arbitrate the particular dispute.

Moreover, even assuming federal policy does favor arbitration over litigation, this does not mean that federal policy favors allowing federal courts to enjoin state proceedings to ensure that disputes are arbitrated. As the Supreme Court and commentators have repeatedly enunciated, our jurisprudence typically assumes that state courts can be relied upon to enforce federal policies,¹⁰⁰ and that federal and state actions can proceed concurrently until either court reaches a judgment that can then be used to preclude further proceedings in the other forum.¹⁰¹

⁹⁹ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57 (1995) (respecting the parties' determination not to exclude punitive damages in the contract at issue); *Volt*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

[T]here is no strong arbitration-related policy favoring First Options After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . , but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms . . . and according to the intentions of the parties.

First Options v. Kaplan, 514 U.S. 938, 947 (1995) (citations and internal quotations omitted). I have argued elsewhere that neither the language, the legislative history, nor valid policy arguments support such an interpretation. See Sternlight, *supra* note 54, at 674-701 (arguing that the Supreme Court's strong preference for arbitration over litigation is inappropriate); see also Sternlight, *supra* note 55, at 40-47 (arguing that the Supreme Court's imposition of such a preference constitutes state action). One appellate court has recently attempted to draw an important distinction between labor arbitration and commercial arbitration. See *United Bhd. of Carpenters & Joiners, Local No. 1780 v. Desert Palace, Inc.*, 94 F.3d 1308, 1310-11 (9th Cir. 1996) (attempting to draw a distinction between labor arbitration, which the Supreme Court has repeatedly deemed a favored means of ensuring industrial peace, and commercial arbitration, where such a policy is irrelevant).

¹⁰⁰ See, e.g., *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 518 (1955) ("The prohibition of [28 U.S.C.] § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts. We cannot assume that this confidence has been misplaced."); see also *infra* notes 114-27, 161-72 and accompanying text (discussing principles of federalism and comity).

¹⁰¹ See, e.g., *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) ("In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts."); *infra* notes 116-25, 244-61, 280-92 and accompanying text (discussing the concurrent jurisdiction issue).

Nothing in either the language or the legislative history of the FAA shows that Congress intended to allow federal courts to enjoin state actions to support the enforcement of arbitration agreements. Turning first to the express language of the FAA, it is immediately evident that the statute does not specifically authorize federal courts to enjoin ongoing state proceedings. Rather, as many courts have noted, sections 3 and 4 of the statute merely allow courts to stay litigation brought before them and to compel arbitration.¹⁰² Nor does the legislative history or policy underlying the FAA show that Congress believed the statute would be ineffective if the federal courts were not empowered to enjoin state court proceedings.¹⁰³ Instead, this history shows that the FAA was passed to supplement, and not supplant, an ongoing effort to modernize state arbitration laws.¹⁰⁴ The federal law was said to be needed because federal courts might well hold that state laws did not apply in federal court.¹⁰⁵ At no point did the drafters indicate that the

¹⁰² 9 U.S.C. §§ 3, 4 (1994); *see, e.g.*, *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1180 (11th Cir. 1981) (noting that while 9 U.S.C. § 3 "compels courts to stay their own proceedings where the issues to be litigated have . . . been committed to resolution by arbitration . . . , it does not specifically authorize federal courts to stay proceedings in state courts."), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1309 (M.D. Ala. 1997) (noting that § 3 of the FAA applies only to allow federal courts to stay cases pending in federal, not state, courts), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991) (granting an injunction against the state court based on 28 U.S.C. § 2283); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (noting that a stay of state proceedings is authorized by 28 U.S.C. § 2283 once a matter has been found to be subject to the FAA arbitration provisions); *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 669 (S.D.N.Y. 1966) (noting that "[p]lainly authority to stay the Oklahoma action is not to be found in § 3 of the Federal Arbitration Act," but finding such authority in 28 U.S.C. § 2283).

¹⁰³ *Cf. Mitchum v. Foster*, 407 U.S. 225, 237-39 (1972), discussed *infra* at text accompanying notes 264-70 (concluding that the legislative history of the Civil Rights Act of 1871 did reveal an intent to control or correct state actions, and therefore finding that notwithstanding the normal strictures of the AIA federal courts might enjoin state civil rights actions in support of that statute).

¹⁰⁴ *See Joint Hearings on S. 1005 & H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10 (1924) [hereinafter *Joint Hearings*] (statement of W.H.H. Piatt, Chairman of the ABA Committee on Commerce, Trade and Commercial Law) (noting a continuous effort to promote the adoption of uniform state arbitration statutes); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213, 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 2-3 (1923) [hereinafter *Senate Subcomm. Hearing*] (statement of Charles L. Bernheimer) (urging passage of a federal law in conjunction with uniform state laws); S. REP. NO. 68-536, at 3 (1924) (noting that federal legislation follows lines of New York arbitration law enacted in 1920).

¹⁰⁵ *See Joint Hearings, supra* note 104, at 16 (statement of Julius Henry Cohen, general counsel New York Chamber of Commerce) (referring to a federal court's refusal to hold that a New York statute was binding in an admiralty action brought in federal court, and also ob-

federal law might be used to countermand actions taken in state court.¹⁰⁶ To the contrary, one of the drafters of the legislation wrote:

There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect. It is desired only that the Federal Government shall declare the validity of arbitration agreements in the field where necessarily it is supreme and where without this action no remedial action by the States can ever be effected.¹⁰⁷

If the federal law was viewed to allow federal courts to force arbitration on reluctant state courts, one might certainly expect that the bill would have encountered at least some opposition in committee, which it did not.¹⁰⁸ In fact, for many years the FAA was not even applied in state courts, but rather only in federal courts.¹⁰⁹ Despite a vigorous argument from Justice O'Connor and others, the Court ultimately held that the FAA did govern actions brought in state as well as federal court.¹¹⁰ However, no court has ever held that the purpose of the FAA was to allow federal courts to control state courts.

Finally, the FAA is premised on an assumption of adequate state enforcement. This conclusion is compelled by the fact that the FAA is an

serving that the statute was part of a tripartite effort to amend arbitration law on the state, federal, and international levels).

¹⁰⁶ No mention of antisuit injunctions is contained in either the House Report or the Senate Report. See H.R. REP. NO. 68-96 (1924); S. REP. NO. 68-536 (1924). Neither were they mentioned in the Joint Hearings or the Senate Subcommittee Hearings. See *Joint Hearings*, *supra* note 104; *Senate Subcomm. Hearing*, *supra* note 104.

¹⁰⁷ *Joint Hearings*, *supra* note 104, at 40 (brief by Julius Henry Cohen, general counsel, New York Chamber of Commerce); see also *Southland Corp. v. Keating*, 465 U.S. 1, 34-35 (1984) (O'Connor, J., dissenting) ("The drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law, patterned after New York's path-breaking state statute, and simultaneously to press for passage of coordinated state legislation.").

¹⁰⁸ Not one person spoke against the bill at the final hearing nor indicated opposition in writing. See *Joint Hearings*, *supra* note 104, at 24.

¹⁰⁹ See *Sternlight*, *supra* note 54, at 649-52 (discussing the historical application of the FAA in state courts).

¹¹⁰ See *Southland*, 465 U.S. at 7-16 (concluding that state as well as federal courts were obliged to apply at least section 2 of the statute); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause."). Many commentators have criticized the Court's interpretation of legislative history in reaching this conclusion. See, e.g., MACNEIL ET AL., *supra* note 96, § 10.5.3 (criticizing the majority's legislative history as a "pillar of sand"). Even assuming, however, that *Southland* and *Terminix* were incorrectly decided, and that the FAA was only intended to apply in federal court, such a limited application would not justify federal courts' refusals to follow pertinent state court decisions; it would only demonstrate, even more clearly, that the state and federal forums were intended to act concurrently.

anomalous federal statute that does not give rise to federal court jurisdiction. As the Supreme Court has repeatedly explained, a claim may be brought in federal court pursuant to the FAA only if the suit involves a dispute under another federal statute or falls under the court's diversity jurisdiction.¹¹¹ Had the FAA been designed to allow for the correction of improper state rulings, one would certainly have expected that the statute would have been written and interpreted to give rise to federal jurisdiction.¹¹²

In sum, it is by no means clear that federal arbitration policy favors federal courts' issuance of arbitral antisuit injunctions. However, the argument that federal courts should be allowed to enjoin state courts in order to support arbitration is strongest where it is clear that action taken, or perhaps about to be taken, by the state court will flout the FAA. Although federal courts normally assume that state courts will adequately enforce federal law, in these situations a state court might prove this assumption to be wrong. Where, for example, a state court either blatantly refused to apply the FAA,

¹¹¹ In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983), the Court stated: "Section 4 [of the FAA] provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." See also *Southland*, 465 U.S. at 15 n.9 (stating that the fact that the FAA does not create independent federal question jurisdiction is "implicit in the provisions in § 3 for a stay by a 'court in which such suit is pending' and in § 4 that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction'" (quoting FAA, 9 U.S.C. §§ 3-4)). Interpretation of this seemingly straightforward, albeit unusual, provision has proved tricky at times. Many arbitration disputes will involve neither a federal question nor a dispute between entirely diverse parties that involves more than \$75,000. Specifically, where a federal court did not have jurisdiction over the entire state court action, but did possess jurisdiction over an action filed by certain parties to the state case, one federal court held that it had jurisdiction to enjoin the state court action. See *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1306 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998); see also *Kaplan v. Dean Witter Reynolds, Inc.*, 896 F. Supp. 1219, 1219-20 (S.D. Fla. 1995) (holding that a federal court lacked jurisdiction to compel arbitration where, although the underlying dispute may have involved a federal question, the petitioner failed to allege it in its "well-pleaded complaint").

¹¹² Nor can federal arbitral antisuit injunctions easily be justified on the ground that arbitration is likely to lead to different substantive results than is litigation. The Supreme Court has repeatedly stated that the choice between arbitration and litigation is a choice merely of procedural forum, and not of substantive results. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court explained:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

473 U.S. 614, 628 (1985); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991) (finding no substantive difference between arbitral and litigation forums in terms of resolving age discrimination disputes).

or woefully misinterpreted that statute in a way that undermined the goals of the statute, enforcement of federal policy might provide a reason for allowing the antisuit injunction to issue.¹¹³

B. *Do Federalism and Comity Principles Oppose Arbitral Antisuit Injunctions?*

Federal courts should and sometimes do hesitate in issuing antisuit injunctions directed toward state courts due to concerns with both federalism and comity. Comity requires that courts in one system offer some degree of deference and respect to courts in a parallel system.¹¹⁴ The federalism doctrine is more specifically targeted at the special relationship between federal and state sovereigns, and provides, *inter alia*, that federal courts should not trample on their state counterparts. This Article will follow the Supreme Court's lead¹¹⁵ and discuss the two concepts together.

In 1971, the Supreme Court spelled out the concept of "Our Federalism" in some detail in *Younger v. Harris*,¹¹⁶ focusing particularly on the need to restrain federal courts from enjoining ongoing state court actions. Writing for the Court, in a decision which sparked a great deal of scholarly

¹¹³ Several district courts that have refused to enjoin ongoing state court proceedings have stated that their decisions might have changed if it had been clear that the state court was failing to properly apply federal law. *See, e.g., TranSouth*, 975 F. Supp. at 1316 (asserting that if state courts "fail to honor adequately the federal policy favoring arbitration . . . then . . . federal relief could be justified"); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 474 (D. Mont. 1993) (refusing to issue an antisuit injunction based on the assumption that the state court would proceed no further); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 783 (E.D. Pa. 1984) (basing a denial of injunctive relief, in part, on the conclusion that there was little danger that the state court's action would undermine the federal pro-arbitration order).

¹¹⁴ *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1067 (1994) (noting that "appeals to comity in Anglo-American law originated in the notoriously fuzzy business of recognizing foreign judgments"); *see also* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922) (stating that comity requires courts from one jurisdiction to exercise forbearance in "inter[fering] with the process of each other" (quoting *Covell v. Heyman*, 111 U.S. 176, 182 (1884))). The term has rarely, if ever, been defined in a precise fashion. One frustrated commentator has called comity "a toothless abstraction, not a rule, invoked in an infinite variety of contexts to justify one governmental body's deference to another." Rehnquist, *supra*, at 1066-67. Professor Shapiro, however, has discussed the history of the comity principle at some length, showing that, whereas in the 1600s, English courts found that they lacked the power to enjoin a foreign suit, this hesitancy was later refined to permit such injunctions under constraints of great delicacy. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 549-50 (1985). Professor Shapiro has also traced the development of the comity principle in this country's jurisprudence. *See id.* at 581-85.

¹¹⁵ *See* *Younger v. Harris*, 401 U.S. 37, 43-45 (1971).

¹¹⁶ *Id.*

commentary,¹¹⁷ Justice Black explained that federal courts' issuance of such injunctions are limited not only by equitable restraints but also by

an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept 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. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. . . . This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal

¹¹⁷ I cannot come close to capturing the entire scholarly discussion in a footnote. There are many articles that criticize the Court's emphasis on states' rights. See, e.g., Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1164 (1977) (discussing the Burger Court's move away from an expansive view of the role of federal courts in enforcing federal rights against the states); John J. Gibbons, *Our Federalism*, 12 SUFFOLK U. L. REV. 1087, 1113 (1978) (criticizing "the Burger Court's primary theme: purposeful insulation of state and local governmental activities from federal supervision"); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194 (arguing that state remedies are often inadequate safeguards for federal rights); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (criticizing the view that state and federal courts provide equally effective fora for the enforcement of federal rights); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 71 (1984) ("The federal courts have assumed [abstention] authority, even in the absence of legislative history or statutory language authorizing such a refusal to act."); Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1141 (1977) (criticizing the Burger Court's move towards the limitation of federal judicial power and a greater state role). Other commentators have defended the Court's emphasis on maintaining a separate state sphere, while at times offering clarifying suggestions to the Court. See, e.g., Akhil Reed Amar, Comment, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646 (1991) (arguing that while federal courts must have the last word on federal constitutional questions, state courts may be adequate as "triers in the first instance"); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981) (arguing that "the state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles"); Rehnquist, *supra* note 114, at 1052 (arguing that "only the friction caused by duplicative litigation warrants federal court abstention"); Shapiro, *supra* note 114, at 588 (urging that "the responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction").

courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.¹¹⁸

Applying these principles more recently, in *Pennzoil Co. v. Texaco Inc.*,¹¹⁹ the Court required a federal court to abstain from using its injunctive powers to bar enforcement of a civil judgment obtained in state court.¹²⁰

In other decisions, the Court has emphasized principles of federalism and comity to explain that the federal and state court systems form a "dual court system," with each system being essentially separate from, and independent of, the other.¹²¹ The Court has discussed how the AIA and other statutory and doctrinal provisions are designed to "prevent needless friction between state and federal courts"¹²² and to "work out lines of demarcation between the two systems."¹²³ Thus, the Court has explained:

Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."¹²⁴

A federal court may not enjoin an ongoing state court proceeding merely because it believes that the state court has made, or will make, an error in interpreting federal law.¹²⁵ Nor does a federal court "have inherent power . . . to enjoin state court proceedings merely because those proceed-

¹¹⁸ *Younger*, 401 U.S. at 44-45.

¹¹⁹ 481 U.S. 1 (1987).

¹²⁰ See *id.* at 10-14 ("[P]roper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand."); see also *infra* text accompanying notes 408-22 (discussing *Younger* and *Pennzoil*).

¹²¹ *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970); see also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 145-46 (1988) (noting the United States's dual court system); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (stating that lower federal courts may not hear appeals from state courts). For a discussion of the Full Faith and Credit statute, the *Rooker-Feldman* doctrine, and the AIA, see *infra* Parts III & IV.C.

¹²² *Atlantic Coast Line*, 398 U.S. at 286 (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)).

¹²³ *Atlantic Coast Line*, 398 U.S. at 286.

¹²⁴ *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atlantic Coast Line*, 398 U.S. at 287).

¹²⁵ See *Atlantic Coast Line*, 398 U.S. at 295 (stating that because "the state and federal courts had concurrent jurisdiction in this case . . . neither court was free" to enjoin the other); *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 518-19 (1955) (maintaining that the appellate process adequately protects federal rights if state courts go wrong, and thus, federal court intervention into state court proceedings is not necessary); see also *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-86 (1996) (requiring a federal court to give preclusive effect to a state court's settlement of claims that were within the exclusive jurisdiction of the federal court).

ings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear.¹²⁶ Additionally, once a state court has issued a final judgment, federalism principles have been applied to bind federal courts to the state decision, even where that decision is wrong as a matter of federal law.¹²⁷

The Court seems to be increasing its emphasis on federalism and states' rights. In the last several Terms, for example, the Court has struck down federal legislation outlawing guns in schools as exceeding Congress's authority under the Commerce Clause,¹²⁸ struck down the federal Religious Freedom Restoration Act¹²⁹ as exceeding federal regulatory powers under the Fourteenth Amendment,¹³⁰ and voided the federal Brady Bill¹³¹ because it required local law enforcement officers to conduct background checks on handgun purchasers.¹³² In fact, the Court recently showed such willingness

¹²⁶ *Chick Kam Choo*, 486 U.S. at 149 (quoting *Atlantic Coast Line*, 398 U.S. at 294).

¹²⁷ See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982). In *Kremer*, the Court rejected the plaintiff's argument that granting preclusive effect to the state court judgment would actually harm federalism interests by discouraging future litigants from pursuing appellate remedies within the state system. The Court stated:

On the contrary, stripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality not only would violate basic tenets of comity and federalism . . . but also would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.

Id. (citations omitted).

¹²⁸ See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (finding that the Gun-Free School Zones Act of 1990 did not regulate commercial or economic activity, and therefore exceeded Congress's power to regulate commerce).

¹²⁹ 42 U.S.C. § 2000bb-1 (1994).

¹³⁰ See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

¹³¹ Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 (1994).

¹³² See *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997) (concluding that federal imposition on local law enforcement would violate the Constitution's system of "dual sovereignty" between federal and state government); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 55-76 (1996) (striking down the Indian Gaming Regulatory Act as inconsistent with the sovereign immunity requirements of the Eleventh Amendment); *Missouri v. Jenkins*, 515 U.S. 70, 83-102 (1995) (explaining that federal judges should strive to return power over education to state and local authorities when fashioning desegregation decrees); *New York v. United States*, 505 U.S. 144, 188 (1992) (finding that the Tenth Amendment precludes Congress from requiring states to take title to radioactive waste because such a requirement would force states to act as agents of the federal government); cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845-50 (1995) (Thomas, J., dissenting) (discussing the view that the Tenth Amendment precludes the federal government from depriving the people of each state of the power to prescribe eligibility requirements for congressional candidates for their state).

to strike down federal legislation that commentators have begun to draw comparisons to the *Lochner* era.¹³³

No matter where one stands on the relative importance of federalism concerns,¹³⁴ it seems clear that federal courts ought to be just as concerned with federalism and comity when they consider enjoining state courts' consideration of arbitration matters, as the federal court are in other contexts.¹³⁵ Yet, the federal courts that have been asked to issue arbitral antisuit injunctions have typically failed to adequately consider how federalism and comity ought to influence their decisions. Many of the federal courts which have granted such injunctions have paid scant attention to the disruptive effect of such a remedy.¹³⁶ Even those federal courts that have cited federal-

¹³³ See *Lochner v. New York*, 198 U.S. 45 (1905); see also Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2214 (1996) (contending that the Court's recent emphasis on states' rights reflects the same kind of hostility toward regulation that underlie the pre-1937 economic due process cases, and critiquing the Court's recent federalism decisions as an unjustifiable interference with the political market). See generally Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) (discussing ways to protect new post-*Lopez* federalism); Marcia Coyle, *Was this Term Historic?*, NAT'L L.J., Aug. 11, 1997, at B5 (discussing the federalism theme that runs through many of the Court's decisions during the 1996-97 term); Richard C. Reuben, *Justices Take the 11th: Obscure Amendment Becomes Federalism Fodder for Supreme Court*, 83 A.B.A. J., Feb. 1997, at 44, 44 (discussing "new federalism"); David G. Savage, *Supreme Spree: Court Decides on Everything from Federalism to the Internet*, 83 A.B.A. J., Aug. 1997, at 40, 40 (concluding that "[t]he states were consistent winners at the expense of Congress and the president"). For an article that questions whether the Court is really transforming the relationship between the states and the federal government in a significant way, see Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 646-61 (1996).

¹³⁴ I could not, within the scope of this Article, completely spell out my own views, even assuming such views were fully developed. I do note, however, that I am not convinced that federal courts are inherently more protective of individual rights than are state courts.

¹³⁵ In fact, an argument can be made that federalism concerns more strongly favor federal courts' non-interference with state courts than they favor striking down intrusive federal legislation. As Professor Hovenkamp has argued, our political system is, at least arguably, capable of protecting states' interests in the legislative context. See Hovenkamp, *supra* note 133, at 2221-22. States and their citizens are not clearly oppressed minorities that lack the political clout to protect their own interests. While the correction might not be immediate, citizens who find federal legislation too intrusive can, as Hovenkamp says, "elect less imperial members of Congress." *Id.* at 2247. By contrast, where a federal court oversteps its bounds and interferes with a state court, the political process cannot step in to make a correction. Relief can be obtained only through appeal within the federal system, and the odds of getting to the Supreme Court are always extremely low.

¹³⁶ See, e.g., *Pervel Indus. Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 869-70 (S.D.N.Y. 1987) (failing to mention federalism concerns), *aff'd*, 871 F.2d 7 (2d Cir. 1989); *Novik & Co. v. Jerry Mann, Inc.*, 497 F. Supp. 447, 448-49 (S.D.N.Y. 1980) (enjoining a state action without considering the implications for federalism); *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 668-70 (S.D.N.Y. 1966) (enjoining a state suit filed five years previously without taking note of federalism concerns).

ism and comity concerns in denying such injunctions have generally paid insufficient attention to how the specific factual context of the case may affect such concerns, and instead, have simply announced that the injunction would interfere with state processes.¹³⁷

A proper explication of federalism and comity concerns should recognize that the significance of the federal court intrusion will vary substantially, depending on facts regarding the status of the federal and state actions. One relevant fact is the relative priority of the two actions. Federalism concerns are stronger where the state action was filed first and weaker where the federal court action was filed first.¹³⁸ Second, the federal court should consider the extent of progress that has been made in the state court action. Although any federal court antisuit injunction will interfere to some degree with state court autonomy, federalism and comity concerns are heightened in those cases in which state courts have already expended substantial resources on the case.¹³⁹ At the extreme, a federal court acts most disrespectfully toward a state court when it enjoins an action in which the state court has already reached a final judgment, and in which this judgment has been affirmed by the highest state court.¹⁴⁰ A third consideration is the status of the federal action. Where a federal court enjoins a state action in support of a federal court action in which substantial progress has been made, it demonstrates far more respect for the state forum than where it

¹³⁷ See *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1180 (11th Cir. 1981) (acknowledging that "[w]here a federal court is asked to interfere with pending state court proceedings it must proceed with caution, taking into account general considerations of federalism"), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1274 (7th Cir. 1976) (upholding the district court's refusal to enjoin state court proceedings because the power to do so is discretionary, and no abuse of discretion was found); *Swofford v. Shearson Lehman/Am. Express, Inc.*, 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (stating that none of the exceptions to the AIA were applicable, and thus, the state court action would not be enjoined); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 781-84 (E.D. Pa. 1984) (concluding that "principles of comity and federalism require that [the court] refrain from interfering in the pending state court case at this time").

¹³⁸ Applying a related analysis, one commentator proposed that the abstention doctrine be modified to focus substantially on a "first filed rule," such that "a federal district court should abstain from exercising jurisdiction if, and only if, the federal plaintiff has an adequate opportunity to litigate her claims in a duplicative suit already pending in state court." Rehnquist, *supra* note 114, at 1110.

¹³⁹ That is, a federal court exhibits greater disrespect for a state court by disregarding the state court's substantial efforts in a case than by merely preventing a state from continuing to act in a suit which has barely commenced.

¹⁴⁰ There is some tension between this concern and the idea, discussed in Subpart II.A, that a federal court should not enjoin a state court action in order to support federal policy based on the mere speculation that the state court may not adequately enforce the policy. See *also supra* note 100 and accompanying text.

stays a state court action in favor of a federal suit that has barely commenced.¹⁴¹

At the easy extremes, these factors will all weigh on the same side. On the one hand, federalism interests are strongest where the case was first filed in state court, where the state action has already progressed to final judgment, and where it has been affirmed on appeal. On the other hand, federalism interests are weakest where the suit was first filed in federal court, the federal court has already progressed to final judgment, and the state action has only just been filed. In between, of course, is an entire spectrum of possible scenarios: state court actions in which substantial discovery has been exchanged but no orders have been issued; state actions in which a non-final order has been issued; federal actions which were filed first, but in which no discovery has been exchanged and no motions filed. Faced with such “in-between” cases, courts should not simply assume that federalism interests are either weak or strong, but rather should analyze the strength of the interest in light of the particular facts, including the dates of filing of the actions, the extent of discovery completed in both suits, and the nature of any rulings made by the two courts.

C. Do Judicial Efficiency Concerns Support or Oppose Arbitral Antisuit Injunctions?

Antisuit injunctions are generally said to be justified, at least in part, by efficiency concerns. As one commentator put it, “It is not difficult to recognize . . . that one court can resolve a particular controversy more efficiently than two courts belonging to separate systems.”¹⁴² That is, it is wasteful of both litigant and court resources for two courts to simultaneously conduct proceedings directed toward resolution of the same dispute. While this concern with efficiency does not, by itself, permit federal courts

¹⁴¹ Many of these same facts are also relevant in assessing efficiency concerns, as will be discussed *infra* in Subpart II.C.

¹⁴² Redish, *Reassessing*, *supra* note 34, at 1778-79; see also Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 753-60 (1977) [hereinafter Redish, *The Anti-Injunction Statute*] (advocating the broadening of exceptions to the AIA in order to allow federal courts to enjoin state actions under the “in aid of jurisdiction” exception); Edward F. Sherman, *supra* note 77, at 931-34 (urging that the issuance of federal court injunctions should take into account how far individual actions have progressed and the degree of duplication between suits in order to secure more efficient results); Paul W. Werner, Comment, *Antisuit Injunctions Under the Complex Litigation Proposal: Harmonizing the Sirens’ Song of Efficiency and Fairness with the Hymn of Judicial Federalism and Comity*, 1995 BYU L. REV. 1041, 1047 (recognizing that “repeated litigation of identical issues of law requires the potentially unnecessary, and therefore wasted, expenditure of limited judicial, individual, and societal resources,” while arguing that the recent ALI Complex Litigation Proposal neglects comity and federalism concerns by overemphasizing efficiency).

to enjoin ongoing state actions,¹⁴³ courts have noted the relevancy of efficiency in connection with various doctrines that do govern the grant of such injunctions.¹⁴⁴

A few courts have properly taken efficiency concerns into account in determining whether or not to issue an arbitral antisuit injunction.¹⁴⁵ Such courts have recognized that the strength of the efficiency concern will vary depending on the status of both the federal and state actions. The efficiency

¹⁴³ See Wood, *supra* note 34, at 314-15 (observing that efficiency concerns, alone, do not form an exception to the strictures of the AIA, and asking whether the old rule tolerating duplicative federal and state in personam actions should be discarded); see also *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) (concluding that federal and state courts had concurrent jurisdiction and that "neither court was free to prevent either party from simultaneously pursuing claims in both courts"). Note, also, that efficiency concerns never justify state courts' actions to enjoin in personam proceedings in federal courts. See *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (stating that "state courts are completely without power to restrain federal-court proceedings in *in personam* actions"); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 296 (5th ed. 1994) ("Since the states cannot limit the jurisdiction of the federal courts, they cannot enjoin proceedings in federal courts, except to protect the jurisdiction of the state court over property in its custody or under its control.").

¹⁴⁴ For example, the "relitigation exception" to the AIA allows federal courts to enjoin parties from spending time and money to attempt to litigate in state court an issue that the federal court had already resolved. See, e.g., Allan D. Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635, 660 (1975) (discussing how "a federal court has the right to prevent its judgment from being circumvented or undercut through relitigation of the claim"). See *infra* text accompanying notes 334-69 for a further discussion of this exception. Also, the Full Faith and Credit statute, 28 U.S.C. § 1738 (1994), prohibits federal courts from relitigating state courts' final decisions, in part to conserve judicial resources. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 (1982) (stating that since the plaintiff already received a final judgment in state court, 28 U.S.C. § 1738 would "appear to preclude [him] from relitigating the same question in federal court"); see also *infra* text accompanying notes 164-99 (discussing the Full Faith and Credit statute).

¹⁴⁵ Compare *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1308-09 (M.D. Ala. 1997) (denying an antisuit injunction where the allowance of a federal suit would be inefficient, because not all parties could be joined in federal suit), *aff'd in part, vacated in part on other grounds and remanded*, 149 F.3d 1292 (11th Cir. 1998), and *Ultracashmere House, Ltd. v. Meyer*, 88 F.R.D. 359, 360 (M.D. Ala. 1980) (denying an antisuit injunction where a federal action was filed one working day prior to the state trial, and observing that federal arbitration laws were not intended to be an instrument to protract litigation or make it more expensive), *aff'd*, 664 F.2d 1176, 1180 (11th Cir. 1981) (noting that federal interference with state proceedings at a late date would waste the resources already expended by the state), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998), with *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 494-95 (N.D. Ga. 1988) (granting an antisuit injunction against a state suit that had proceeded only to the initial stages of discovery, in part due to concerns of judicial economy), *rev'd in part*, 149 F.3d 1292 (11th Cir. 1998), and *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 373 (S.D.N.Y. 1983) (enjoining a state action filed more than five years after federal court had ordered the dispute to arbitration, and citing the federal court's "considerable familiarity . . . with the complex issues involved in the case throughout its history"), *aff'd*, 742 F.2d 1438 (2d Cir. 1983).

concern is greatest where the federal action has progressed quite far and the state court action has only recently been filed or has otherwise progressed very little. In such a situation, it does make sense from the efficiency standpoint, for the federal court to prevent commencement of additional litigation that will waste the resources of the parties and the state court.¹⁴⁶ By contrast, where the state court action has progressed quite far and the federal action has not, the efficiency rationale may dictate against the federal anti-suit injunction.¹⁴⁷ Efficiency concerns may also exist where, due to a lack of complete diversity among the disputants, a federal court's order compelling arbitration and enjoining state court litigation could not apply to all the state court disputants and thus would result in piecemeal litigation.¹⁴⁸

Nonetheless, advocates of federal antisuit injunctions might argue that these injunctions save resources, in the arbitration context, even in those cases where the state court action has progressed much farther than the federal action; because the federal court is more likely than the state court to send the dispute to arbitration, and because arbitration is substantially quicker and cheaper than litigation, federal courts generally ought to be permitted to prevent state courts from making decisions on arbitrability.¹⁴⁹

¹⁴⁶ For a general discussion on this point, see *A.L. Williams*, 697 F. Supp. at 488, and *Hunt*, 557 F. Supp. at 368, which are discussed *supra* at notes 72 and 76. Of course, those who are particularly concerned with protecting state court autonomy might still question if it ought to be the state court's decision as to whether to stay its own proceeding in the interest of efficiency, rather than the federal court's decision to impose such an economizing measure.

¹⁴⁷ For a general discussion on this point, see *TranSouth*, 975 F. Supp. at 1308-09, and *Ultracashmere*, 88 F.R.D. at 360, which are discussed *supra* notes 66 and 145. Where, in the extreme, a state court has already ruled on the merits of the case before the federal court orders the dispute to arbitration, arbitrators cannot be reversed for failing to apply preclusion principles and follow the state court ruling. Although the arbitrators might choose to apply issue or claim preclusion, their failure to do so can only be reversed to the extent that the arbitrators express "manifest disregard" for the law. Some circuits will not reverse even for such manifest disregard. See, e.g., *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir. 1992) (pointing out that "this circuit never has employed a 'manifest disregard of the law' standard in reviewing arbitration awards"). The Seventh Circuit has essentially stated that failure to properly apply preclusion principles cannot rise to the level of manifest disregard. But see *C.P. Miller v. Runyon*, 77 F.3d 189, 193-94 (7th Cir. 1996) (observing that courts may consider the existence of claim or issue preclusion to determine whether a dispute is arbitrable). See generally *MACNEIL ET AL*, *supra* note 96, at § 39.5 (addressing preclusion issues in arbitration proceedings).

¹⁴⁸ Compare *TranSouth*, 975 F. Supp. at 1308-09 (abstaining on the ground that an order compelling arbitration would lead to piecemeal litigation), with *TranSouth*, 149 F.3d at 1294-95 (reversing the district court's abstention, in part, because no piecemeal litigation would ensue with regard to the arbitrability of the dispute and because "any piecemeal litigation that might result from a decision on arbitrability would be the result of the parties' voluntary actions and the strong federal policy favoring arbitration").

¹⁴⁹ See *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1273 (7th Cir. 1976) (summarizing one party's argument that denying an injunction would frustrate the con-

There are, however, several flaws in this argument. First, although it is often posited that binding arbitration is quicker and cheaper than litigation, this has yet to be established by empirical evidence.¹⁵⁰ Anecdotal evidence reveals that binding arbitration can, at times, be more fraught with delay than litigation, and also can be more costly, at least for one of the parties.¹⁵¹ Second, given the limited nature of federal court jurisdiction, it may often be the case that some of the parties in a state court dispute are not participants in the federal court action. In such cases, the federal court would not have the power to order all parties to arbitration, and the dispute might therefore have to be resolved in a piecemeal and inefficient fashion.¹⁵²

Third, except where a state court has already found a dispute nonarbitrable, a federal court engages in speculation by presuming that the state court would reach such a conclusion. Yet, it is not clear that Congress or the Supreme Court would, or should, sanction such speculation. As discussed earlier, our dual court system depends in large degree on the assumption that state courts can be trusted to apply federal law.¹⁵³ Fourth, even if state courts are less likely to find a dispute to be arbitrable, federal enforcement of arbitration may not accurately reflect the parties' choice. Does such an "efficiency" policy, which denies parties access to litigation for which they had contracted, really support an efficiency rationale?¹⁵⁴ In short, it is far from clear that both parties will benefit, in terms of time or cost, where a federal court enjoins a state court from allowing litigation of a

gressional purpose of resolving disputes speedily through arbitration in order to avoid the expense and delay of litigation).

¹⁵⁰ Few empirical studies have been done. Those studies that have been done regarding *non-binding* arbitration, admittedly a very different technique, have shown that non-binding arbitration does not necessarily save either time or money. See Sternlight, *supra* note 54, at 678-79; see also James S. Kakalik et al., *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 18 (1997) (reporting the results of a study that showed that surveyed programs implemented by the Civil Justice Reform Act, including various nonbinding alternative dispute resolution measures, had little impact on the speed or cost of resolution).

¹⁵¹ In *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 912-13 (Cal. 1997), the California Supreme Court affirmed the trial court's finding that the HMO had typically used its power to veto selection of arbitrators to delay arbitration, such that, on average, it took 863 days to reach a hearing. See also Sternlight, *supra* note 54, at 682-83 (arguing, *inter alia*, that binding arbitration can often be very costly for the "little guy" by requiring him to arbitrate in a distant location, as well as pay certain arbitral fees that would not have been required had the case remained in litigation).

¹⁵² See *TranSouth*, 975 F. Supp. at 1308 (refusing to enjoin state action where pursuit of federal court action would have led to piecemeal dispute resolution due to lack of diversity jurisdiction).

¹⁵³ See *supra* text accompanying notes 121-25; *infra* notes 248-63 (discussing the relationship between the state and federal court systems as effected by the AIA).

¹⁵⁴ See generally Sternlight, *supra* note 54, at 677-97 (arguing that arbitration is not necessarily better for society than is litigation).

dispute that the federal court believes to be arbitrable. Thus, the efficiency rationale strongly supports issuance of a federal antisuit injunction in the arbitration context *only where* the federal action has progressed much further than the state suit.

D. Does Deterrence of Vexatious Litigation Support or Oppose Issuance of Arbitral Antisuit Injunctions?

In deciding whether to issue an arbitral antisuit injunction, federal courts should consider whether either party has engaged in bad faith or harassing litigation. Courts have at least implicitly employed such an analysis in various contexts. For example, the Supreme Court has held that a federal court is not barred from enjoining a state court criminal prosecution where that prosecution was brought in bad faith in order to deter the defendants from exercising their rights, rather than in a genuine attempt to secure a conviction.¹⁵⁵ Similarly, in determining the scope of the *Colorado River* abstention,¹⁵⁶ several federal appellate courts have found that vexatious behavior, engaged in by either party, is relevant to a federal court's determination regarding the propriety of abstention.¹⁵⁷ In addition, the "relitigation exception" to the AIA¹⁵⁸ seems geared toward preventing parties from using repeated, harassing relitigation to secure an advantage over an opponent.¹⁵⁹

¹⁵⁵ See *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965) (finding that a substantial loss of freedoms and expression shows the type of irreparable injury necessary "to justify a disruption of state court proceedings"); see also *Younger v. Harris*, 401 U.S. 37, 48-49 (1971) (denying an injunction after finding no sufficient showing of bad faith and harassment); *Cameron v. Johnson*, 390 U.S. 611, 619-20 (1968) (declining to interfere with the state court's determination of a constitutional issue because the court found no bad faith on the part of the state officials). See *infra* text accompanying notes 419-22 for discussion of this exception to the AIA.

¹⁵⁶ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (focusing on whether exceptional considerations of wise judicial administration and efficiency dictate abstention by the federal court); *infra* text accompanying notes 407, 424-27 (discussing the applicability of the *Colorado River* abstention to arbitral antisuit injunctions).

¹⁵⁷ See *infra* notes 392-93 and accompanying text (discussing appellate decisions that consider the possibly vexatious nature of federal or state litigation to determine whether abstention is appropriate).

¹⁵⁸ See *infra* text accompanying notes 334-56 (exploring the nature of the "relitigation" exception to the AIA).

¹⁵⁹ In fact, but for the possibility of such vexatious tactics, it would seem that claim and issue preclusion would render unnecessary the antisuit injunction designed to prevent relitigation. See Redish, *The Anti-Injunction Statute*, *supra* note 142, at 725 n.39 (suggesting that one possible rationale for the relitigation exception might be to save the party who had already prevailed in federal court the burden of using preclusion doctrines to defeat subsequent state actions). Interpreting another exception to the AIA, Justices Blackmun and Rehnquist, concurring in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (plurality opinion), opined that a federal court considering a claim brought under the Clayton Act would be justified in

Several courts that have been requested to issue arbitral antisuit injunctions have concerned themselves with whether either party has engaged in bad faith or harassing tactics. For example, in *Ultracashmere House, Ltd. v. Meyer*,¹⁶⁰ the district court refused to enjoin a previously filed state court action where it concluded that the federal court plaintiff had engaged in delaying tactics by failing to seek the injunction until the state action was all but resolved.¹⁶¹ By contrast, although they did not make a finding of harassment or bad faith, two federal courts were apparently influenced by an inference of bad faith in concluding that a stay was warranted where a party that had lost in federal court sought to relitigate the same issues in state court.¹⁶²

Some may contend that courts should not decide whether to grant an antisuit injunction based on the presence of vexatious behavior. Professor

enjoining a state court proceeding if it could be shown that the state proceedings "are themselves part of a 'pattern of baseless, repetitive claims' that are being used as an anticompetitive device" *Id.* at 644 (citations omitted).

At least one circuit has also considered the vexatious character of the litigation to decide whether to issue an antisuit injunction directed to the court of another country. In *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), the D.C. Circuit granted the injunction requested by the federal court plaintiff on the ground that the action brought by the federal court defendant, in the British courts, was "solely designed to rob the [federal] court of its jurisdiction." *Id.* at 931.

¹⁶⁰ 88 F.R.D. 359 (M.D. Ala. 1980), *aff'd*, 664 F.2d 1176 (11th Cir. 1981).

¹⁶¹ The district court stated:

Plaintiff seeks a stay of the state court action one working day prior to the commencement of the final stage of those proceedings. The state court has already resolved all issues in that proceeding except the amount of damages allowable to plaintiff, the issues of liability having been litigated and decided adversely to [plaintiff]. The state court has determined that the arbitration clause contained in the contract between the parties is unenforceable.

Ultracashmere, 88 F.R.D. at 359-60. Thus, emphasizing that the plaintiff had waited over nine months to assert the federal court claim, and that the plaintiff had failed to seek removal of the state claim, the court stated that "[a]rbitration laws are passed to expedite and facilitate the settlement of disputes and avoid the delay caused by litigation. It was never intended that these laws should be used as a means of furthering and extending delays." *Id.* at 360 (internal quotation marks omitted).

¹⁶² See *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F. Supp. 822 (E.D. Pa. 1997) (enjoining a state court proceeding where, after the federal court ordered the dispute to proceed to arbitration, the state court plaintiff still sought substantive relief through a temporary restraining order and failed to proceed to arbitration), *aff'd as modified and remanded sub. nom. Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 370 (S.D.N.Y. 1983) (enjoining a state court action where "[t]he parties to this action have been engaged in litigation for eight years," where a "final judgment after a trial was entered as to some claims in November 1978," and where "the end of the controversy is nowhere in sight"), *aff'd*, 742 F.2d 1438 (2d Cir. 1983); see also *Distajo Second Circuit I*, 66 F.3d 438, 441 (2d Cir. 1995), *on remand*, 944 F. Supp. 1007 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997) ("*Distajo Second Circuit II*"), *cert. denied*, 118 S. Ct. 365 (1997) (enjoining various state proceedings after expressing a concern that "[t]his case is about forum-shopping, by one and all").

Linda Mullenix has stated her opposition quite clearly: "Ultimately any vexatious litigation standard is inherently meaningless. In the broadest sense, all litigation is vexatious. Why should a federal plaintiff's suit be deemed vexatious because it was filed after a state plaintiff's lawsuit? In litigation terms, one party's good lawyering is the opposing party's vexation."¹⁶³

I am quite sympathetic to Professor Mullenix's position. I agree that it is not necessarily vexatious for a state court defendant to file a subsequent federal suit. More generally, I concur that mere forum shopping is not vexatious. Nonetheless, I do believe that in certain extreme situations a party's actions may be found to be inconsistent with the legitimate policies supporting a certain degree of forum shopping, and that such actions may appropriately be labeled vexatious or harassing.

To distinguish between those actions that are harassing or taken in bad faith, and those that merely reflect legitimate forum selection or other strategies, courts should look for signs of illegitimate delay, false forum shopping, or repetitive litigation. For example, a party sued in state court may legitimately seek a federal forum, either by removal to federal court or by filing a separate action in federal court. Such actions reflect the party's acceptable preference for a federal court forum. However, if the state court defendant's true goal is to secure the federal forum, then it should take steps to move the action to federal court as quickly as possible. Where instead, the state court defendant waits until the state court action has proceeded quite far before seeking the federal forum, it begins to appear that the state court defendant was actually seeking either "two bites at the apple" or delay, rather than a mere forum change. Similarly, where a party itself chooses the state forum and then later, perhaps in response to a counterclaim, files a federal court action seeking to stay the state action, it appears that the party acted vexatiously. After all, if the party truly preferred to have the federal forum make the arbitration determination, why did it file in state court in the first place? Finally, where a party essentially keeps refileing the same case, even after having received an adverse ruling, it may be attempting to use the litigation system to bother or harass its opponent, rather than to secure a victory on the merits.

¹⁶³ Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 148 (1986). Some might also prefer to use a standard that does not explicitly require identification of vexatious conduct to accomplish essentially the same end. Doctrines of waiver, estoppel, or laches might possibly be used in this way. See *infra* note 436 (citing cases where courts have applied the waiver doctrine to parties seeking arbitration in a federal court).

There may be, however, legitimate explanations for any of the actions described above. At times, parties may engage in activities that at first appear vexatious or harassing, but are not. Moreover, given the difficulty in distinguishing legitimate from vexatious litigation, I believe that litigation should be labeled as vexatious only under rare circumstances. Thus, although courts should be alert to the possibility of harassing tactics, and should take them into account when deciding whether or not to grant an arbitral antisuit injunction, courts will have to consider *all* of the facts and arguments of the parties in making such determinations.

III. DOCTRINES RESTRICTING A FEDERAL COURT FROM OVERRIDING A PRIOR STATE COURT RULING

A. *The Federal Full Faith and Credit Statute*

1. Background on the Full Faith and Credit Statute

Federal courts are statutorily required to give state judicial proceedings full faith and credit.¹⁶⁴ Now set out in 28 U.S.C. §1738,¹⁶⁵ the gist of this provision was enacted in 1790.¹⁶⁶ The Supreme Court has interpreted this statute to require federal courts to apply to state court judgments the same claim preclusion¹⁶⁷ and issue pre-

¹⁶⁴ This statutory requirement should not be confused with the Constitution's Full Faith and Credit provision, Article IV, which requires states to honor other states' public acts, records, and judicial proceedings. *See* U.S. CONST. art. IV.

¹⁶⁵ 28 U.S.C. § 1738 (1994). This section provides in relevant part:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

¹⁶⁶ The Act of May 26, 1790, ch. XI, 1 Stat. 122, 122 required that federal courts afford a state judgment "such faith and credit" that it would have "by law or usage in the courts of the state" in which it was issued. Professor Wright speculates that the concept was adopted by statute, rather than as part of the Constitution, because "it was not clear when the Constitution was drawn that there would be lower federal courts." WRIGHT, *supra* note 143, at 731. He suggests that once the lower federal courts were created by the Judiciary Act of 1789, Congress realized the necessity of requiring such deference to state court judgments. *See id.*

¹⁶⁷ The Court actually uses the term "res judicata," rather than the more modern "claim preclusion," now set out in the Restatement. *See* RESTATEMENT (SECOND) OF JUDGMENTS

clusion¹⁶⁸ treatment those judgments would be afforded by the courts within the state.¹⁶⁹ In *Parsons Steel, Inc. v. First Alabama Bank*,¹⁷⁰ the Court further held that where a state court has already determined the res judicata effect of a particular federal decision, a federal court must defer to the state court's res judicata interpretation to the extent that another state court within the jurisdiction would defer to that ruling.¹⁷¹ Even where the state court judgment consists of a settlement of claims that are within the exclusive jurisdiction of the federal court, the federal court is precluded from rehearing the claims.¹⁷² The Court has explained that the deference required by the statute is particularly important to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system,"¹⁷³ as well as to serve the typical preclusion goals by "reliev[ing] par-

§§ 17-19 (1982). The Court explains that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982); cf. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (discussing the use of plain English terms, claim and issue preclusion, in lieu of res judicata and collateral estoppel).

¹⁶⁸ The Court uses the term "collateral estoppel" in place of "issue preclusion" and explains that "[u]nder collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Kremer*, 456 U.S. at 467 n.6.

¹⁶⁹ See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369 (1996) ("Absent a partial repeal of the Full Faith and Credit Act . . . a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered."); *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 519 (1986) (same); *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (same); *Kremer*, 456 U.S. at 466-67 & n.6 (same); see also *Migra*, 465 U.S. at 84 (holding that the Full Faith and Credit statute even barred a plaintiff from raising in federal court claims she could have raised but did not raise in the earlier state court action, to the extent such claims would be barred by the state's own res judicata doctrines).

¹⁷⁰ 474 U.S. 518 (1986).

¹⁷¹ See *id.* at 524. In *Parsons Steel*, similar claims were filed in both federal and state court. The federal action went to trial first and a j.n.o.v. was granted in favor of the bank. When the state court refused to treat the matter as res judicata, however, the federal court issued an injunction to protect the validity of its own prior judgment, and the Eleventh Circuit affirmed. See *id.* at 520-22. The Supreme Court reversed the grant of injunctive relief, holding that the federal district court should have relied on state law to determine the preclusive effect of the state court's decision concerning res judicata. See *id.* at 525. The Supreme Court allowed the seemingly inefficient simultaneous litigation in state and federal court as "one of the costs of our dual court system." *Id.*

¹⁷² See *Matsushita*, 516 U.S. at 379-87 (finding that the policies underlying the grant of exclusive jurisdiction to federal courts to hear securities claims are not undermined by requiring federal courts to defer to a state court's settlement of said claims).

¹⁷³ *Kremer*, 456 U.S. at 467 n.6 (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)); see also *Marrese*, 470 U.S. at 385 ("[T]he concerns of comity reflected in § 1738 generally allow States to determine the preclusive scope of their own courts' judgments."). See generally Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 85 (1982) (finding that the decisions in *Kremer* and

ties of the cost and vexation of multiple lawsuits, conserv[ing] judicial resources, and, by preventing inconsistent decisions, encourag[ing] reliance on adjudication."¹⁷⁴ Thus, where the full faith and credit statute applies, and where the state rules require preclusion, federal courts must defer unless the state court action failed to "satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause."¹⁷⁵

2. Application of the Full Faith and Credit Statute to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

Although the Supreme Court has never issued a holding on the question of whether federal courts owe full faith and credit to state courts' arbitration decisions, the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹⁷⁶ seemed to assume that a state court's decision on arbitrability would be treated as res judicata by the federal court. The Court stated: "[A] stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata."¹⁷⁷ In support of this

Allen illustrate that enforcing preclusion doctrines supports "the principle of comity as well as traditional res judicata goals of judicial economy, finality, and repose"); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 327 (1978) (explaining that state policies may seek to limit the preclusive effect of a state's own judgments).

¹⁷⁴ *Kremer*, 456 U.S. at 467 n.6 (quoting *Allen*, 449 U.S. at 94); see also *Marrese*, 470 U.S. at 385 (stating that the Full Faith and Credit statute "may promote the goals of repose and conservation of judicial resources by preventing the relitigation of certain issues in a subsequent federal proceeding"). See generally, Daan Braveman & Richard Goldsmith, *Rules of Preclusion and Challenges to Official Action: An Essay on Finality, Fairness, and Federalism*, 39 SYRACUSE L. REV. 599, 599-600 (1988) (noting that preclusion supports policies of efficiency but concerns for efficiency should not be permitted to overwhelm concerns for fairness); Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968) (observing that preclusion saves time and costs, avoids inconsistent judgments, and protects litigants from harassment).

¹⁷⁵ *Kremer*, 456 U.S. at 480-81 (holding that a party must be afforded a "full and fair opportunity" to litigate" (quoting *Allen*, 449 U.S. at 95)). *Kremer* found that state court procedures were constitutionally sufficient where, although they were primarily administrative, the claimant had a chance to informally present his claim to the administrative agency, the agency was charged with investigating his complaint, the claimant had an opportunity to rebut respondent's case, a public hearing was required in certain circumstances, and judicial review was ultimately available to assure that the agency's decision was not arbitrary or capricious. *Id.* at 483-84. See generally William V. Luneburg, *The Opportunity to be Heard and the Doctrines of Preclusion: Federal Limits on State Law*, 31 VILL. L. REV. 81, 122 (1986) (discussing due process principles that should be applied in preclusion cases, and applying principles set out in *Hansberry v. Lee*, 311 U.S. 32 (1940) and *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971)).

¹⁷⁶ 460 U.S. 1 (1983).

¹⁷⁷ *Id.* at 10. The dissent similarly stated:

If the state court had found that there was no agreement to arbitrate within the meaning of the United States Arbitration Act, the District Court would have been

proposition the Court cited two circuit court decisions holding that district courts were bound by prior state court rulings denying arbitration of a particular dispute.¹⁷⁸

Notwithstanding the above dicta, some might attempt to argue that claims brought under the FAA are somehow exempt from the statutory full faith and credit requirement. However, any such argument seems doomed given two Supreme Court decisions holding that even state decisions in civil rights cases are entitled to preclusive effect in federal court.¹⁷⁹ Given these decisions, and in light of the language and legislative history of the FAA, it seems clear that the Court would not find FAA cases exempt from the requirements of 28 U.S.C. § 1738. Like the federal civil rights statutes, the FAA contains no *explicit* language exempting FAA decisions from the requirements of the Full Faith and Credit statute.¹⁸⁰ Further, the FAA contains no *implicit* exemption from the statute. Whereas the Court found that the Civil Rights Act of 1871 was passed in part because state courts were

bound by that finding. But res judicata or collateral estoppel would apply if the state court reached a decision before the District Court in the absence of a stay.

Id. at 30 (Rehnquist, J., dissenting).

¹⁷⁸ See *id.* at 10 (citing *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1183-84 (11th Cir. 1981), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998)) (relying on res judicata to affirm the district court's refusal to enjoin a state court that had already rejected the manufacturer's claim that the dispute was subject to arbitration and resolved the dispute in favor of the retailer); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 397-98 (5th Cir. Unit B Feb. 1981) (reversing and remanding the district court's grant of a motion to compel arbitration to allow the district court to consider the preclusive effect of a prior state court ruling denying arbitration and ordering commencement of a trial).

¹⁷⁹ In *Allen*, the Court held that the plaintiff's federal court damages action, pursuant to 42 U.S.C. § 1983, was precluded by a prior state court ruling denying plaintiff's motion to suppress. See 449 U.S. at 100-05. While recognizing that "one strong motive" behind Congress's passage of the Civil Rights Act of 1871 was "grave congressional concern that the state courts had been deficient in protecting federal rights," *id.* at 98-99, the Court nonetheless concluded that neither the language nor the legislative history of 42 U.S.C. § 1983 demonstrated an intent to limit the coverage of the preclusive scope of 28 U.S.C. § 1738. Rejecting a principle of "general distrust of the capacity of the state courts to render correct decisions on constitutional issues," *id.* at 105, and also refusing to conclude that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court," *id.* at 103, the Court instead concluded:

There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. at 104; see also *Kremer*, 456 U.S. at 478 (holding that Title VII of the Civil Rights Act of 1964 created no exception to the statutory full faith and credit requirement in that "[s]tate authorities are charged with enforcing laws, and state courts are presumed competent to interpret those laws").

¹⁸⁰ See *Allen*, 449 U.S. at 98 (noting that 42 U.S.C. § 1983 says nothing, explicitly, about the preclusive effect of state judgments).

seen as insufficiently protective of civil rights,¹⁸¹ the FAA's legislative history provides no reason to doubt the legitimacy of arbitration decisions made by state courts. Rather, as discussed earlier, the jurisdictional structure of the FAA illustrates that Congress had confidence in the capacity of state courts to interpret arbitration agreements.¹⁸² This confidence justifies federal courts' grant of full faith and credit to state arbitration decisions.¹⁸³ In this situation, the FAA should not be entirely exempted from the full faith and credit requirements of 28 U.S.C. § 1738.

Assuming then that 28 U.S.C. § 1738 applies to actions brought under the FAA, a state court determination of nonarbitrability is entitled to preclusive effect in federal court so long as it would be entitled to preclusive effect in the state itself, and so long as the state proceeding did not violate the due process clause.¹⁸⁴ In particular, a federal court may not deny preclusive effect to a state court's judgment as to arbitration merely because the state court's decision was legally erroneous or failed to follow federal arbitration policies.¹⁸⁵

Several federal courts have applied such an analysis to rule upon requested arbitral antisuit injunctions after examining whether a state court ruling was sufficiently final and "on the merits" to foreclose subsequent federal court action. The results have been mixed. The Second Circuit, in

¹⁸¹ See *supra* note 179 (discussing the Court's interpretation of the legislative history of the Civil Rights Act of 1871 in *Allen*).

¹⁸² See *supra* text accompanying notes 102-08 (explaining that the legislative history of the FAA shows that Congress did not intend to preclude state court decisions).

¹⁸³ Commentator Barbara Atwood has argued that statutes which grant concurrent jurisdiction to federal and state courts *cannot*, by definition, create exceptions to the Full Faith and Credit statute. See Atwood, *supra* note 173, at 63. Further, the Supreme Court, in *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 385 (1985), and *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-86 (1996), has even stated that the mere fact that a statute provides federal courts with exclusive jurisdiction does not mean that such courts are excused from deferring to state court rulings. Surely if deference is not necessarily excused in the case of exclusive jurisdiction, and perhaps never excused in the case of concurrent jurisdiction, then it is not excused where the federal statute at issue does not create federal jurisdiction at all.

¹⁸⁴ See *supra* text accompanying notes 164-75 (explaining federal deference to state court judgments under the Full Faith and Credit statute).

¹⁸⁵ As the Court stated with respect to 42 U.S.C. § 1983, there is "no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous." *Allen*, 449 U.S. at 101; see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 142-43 (3d Cir. 1998) (holding that a state court's approval of a class action certification and settlement was entitled to full faith and credit even though a federal court had refused to certify a virtually identical class or to approve settlement).

Doctor's Associates, Inc. v. Distajo,¹⁸⁶ a case involving the Subway sandwich shop and various franchisees, considered antisuit injunctions issued by the federal district court against suits pending at various stages in state courts in Alabama, Illinois, and North Carolina.¹⁸⁷ In each of these cases, the state court had either ruled that arbitration was not appropriate or refused to order the case to arbitration prior to the district court's issuance of its antisuit injunction.¹⁸⁸ The Second Circuit concluded that the district court erred in failing to afford preclusive effect to the Alabama Circuit Court's entry of judgment against the franchisor.¹⁸⁹ However, the Second Circuit affirmed the district court's refusal to afford full faith and credit to the Illinois and North Carolina decisions, even though the Illinois state court had concluded the arbitration clause was void and unenforceable on several grounds and designated its decision a "final and appealable order."¹⁹⁰ Quite a few other federal courts have, with little or no analysis, found that the statutory full faith and credit provision did not block them from overriding or even enjoining a prior state court denial of a motion to compel arbitration.¹⁹¹

¹⁸⁶ *Distajo Second Circuit I*, 66 F.3d 438 (2d Cir. 1995), *on remand*, 944 F. Supp. 1007 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997) ("*Distajo Second Circuit II*"), *cert. denied*, 118 S. Ct. 365 (1997).

¹⁸⁷ 66 F.3d at 441. Subway sandwich shop franchisor Doctor's Associates, Inc. ("DAI") initially instituted litigation against several of its franchisees in various state courts by directing its wholly owned real estate subsidiary to bring eviction proceedings against them. When the franchisees responded by filing suit against DAI in state court, DAI sought the protection of the arbitration clauses in the franchise agreement by filing actions in federal court. *See id.*

¹⁸⁸ Prior to the federal court's issuance of its injunction, the Alabama state court had already ruled that the arbitration clause was void and unenforceable, and denoted its ruling a "final judgment." *See* 66 F.3d at 447. The Illinois court had issued partial summary judgment in favor of the franchisee, declaring the arbitration clause void and unenforceable. *See id.* at 449. The North Carolina court had denied DAI's motions to stay or dismiss the complaint pending arbitration. *See id.* at 450.

¹⁸⁹ The Alabama trial court ruled that the arbitration clause was "void and unenforceable," basing its ruling on "any of the following independent reasons": (1) lack of mutuality; (2) fraudulent inducement; (3) waiver by DAI of the right to invoke the arbitration clause; and (4) invalidity of the clause under Alabama law." *Id.* at 447. Rejecting DAI's counterclaim, the Alabama court then found "no just reason for delay" and ordered immediate entry of judgment. *Id.* The Second Circuit, having found that the Alabama judgment was "final," rejected arguments that it nonetheless could be ignored by the federal court. *See id.* at 447-49. The court found no change in the law totally undercutting the state court rationale, found no denial of a full and fair opportunity to litigate, and rejected an assertion that the Alabama ruling was merely advisory. *See id.*

¹⁹⁰ *Id.* at 449-50.

¹⁹¹ In *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540 (10th Cir. 1996), the state court denied a brokerage firm's interlocutory motion to compel arbitration based on the brokerage's insufficient factual showing that the dispute was covered by the arbitration clause. *See id.* at 1542-43. This determination was also affirmed by the state court of appeals, and the federal district court therefore found that the Full Faith and Credit Clause precluded it from

Two other federal circuits have, however, applied the Full Faith and Credit statute and relevant state law to preclude federal courts from issuing arbitral antisuit injunctions in cases where the state court had already ruled arbitration to be inappropriate. The Third Circuit, in *Towers, Perrin, Forster & Crosby, Inc. v. Brown*,¹⁹² found that the district court erred in granting a petition to compel arbitration and in staying a California state court action where, prior to the district court's ruling, the state court had denied the company's petition to arbitrate, and where this denial had already been refused review by the state supreme court.¹⁹³ Similarly, in *Ultracashmere House, Ltd. v. Meyer*,¹⁹⁴ the Eleventh Circuit found that where Ultracashmere's violation of various discovery orders led the state court not only to

compelling arbitration or from staying the state court proceedings. *See id.* The Tenth Circuit, however, reversed this decision, holding that because the state court decisions were based on an absence of evidence in the record rather than a decision "on the merits," they should not be given preclusive effect under the relevant state law. *See id.* at 1543-44; *see also* *Ferrari N. Am., Inc. v. Crown Auto Dealerships*, No. 94 Civ. 8541 (KMW) 1995 WL 614558, at *2-3 (S.D.N.Y. Oct. 19, 1995) (holding that a Florida appellate court's decision upholding a hearing officer's denial of a motion to stay or dismiss a state action was not entitled to preclusive effect on the issue of enforceability of an arbitration clause, because the ruling was based solely on the hearing officer's lack of statutory authority to interpret or enforce the clause), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1051-52 (D. Colo. 1991) (concluding that a state court's denial of a motion to dismiss or enforce an arbitration clause was not a final judgment entitled to preclusive effect in federal court); *Roodveldt v. Merrill Lynch*, 585 F. Supp. 770, 783-84 (E.D. Pa. 1984) (ruling that where a state court, presented with a motion to compel arbitration, instead issued an injunction preventing an employee from soliciting company clients, and where the employee subsequently filed a motion to compel arbitration in federal court, the state court's grant of a preliminary injunction was not a final order entitled to preclusive effect).

In a number of other cases, federal courts have granted motions to compel arbitration or even stayed state court actions, notwithstanding the existence of a prior state court order, without expressly addressing the full faith and credit issue. *See, e.g.,* *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1263-64 (7th Cir. 1976) (affirming the district court order compelling arbitration even though the state court had previously dismissed the complaint and ordered the case to proceed to arbitration, and even though the state court's determination was on appeal to the state supreme court); *Burger Chef Sys., Inc. v. Baldwin Inc.*, 365 F. Supp. 1229, 1233-34 (S.D.N.Y. 1973) (granting a motion to compel and to stay state court action although the state court had already issued an ex parte restraining order enjoining arbitration); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (granting a motion to compel arbitration and to stay state court action although the state court had previously ruled that the arbitration clause was unenforceable).

¹⁹² 732 F.2d 345 (3d Cir. 1984).

¹⁹³ *See id.* at 346-47, 350. The appeals court interpreted California law to preclude further action by any court. *See id.* at 350. The Third Circuit rejected Towers Perrin's argument that the state court lacked subject matter jurisdiction, stating that "[t]he failure of the state court to give effect to the federal right is an error of law, not an act beyond the jurisdiction of the court." *Id.* at 348. The Third Circuit also rejected the argument that the federal and state actions were not sufficiently similar to bring res judicata principles into play. *See id.*

¹⁹⁴ 664 F.2d 1176 (11th Cir. 1981), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997).

invalidate the arbitration clause but also to grant summary judgment on liability to Meyer, those orders were entitled to preclusive effect in Alabama state court and thus must be afforded full faith and credit by the federal court.¹⁹⁵

Without delving deep into the details of each state's preclusion doctrines, it is not possible to critique each of these decisions. It is clear, however, that the extent to which the full faith and credit statute precludes arbitral antisuit injunctions should turn on three factors: 1) the federal court's interpretation of that statute,¹⁹⁶ 2) what constitutes "fundamental fairness,"¹⁹⁷ and 3) the state's own preclusion policies. At times, these determinations will be straightforward, such as where a state court judgment on the merits has been affirmed by the state's supreme court. Where they are not, the federal courts should consider the policies discussed earlier in this Article, as well as the specific circumstances of the case. For example, in determining whether a particular state decision is sufficiently "final" or "on the merits" to be entitled to have preclusive effect, the federal court should take into account principles of federalism, efficiency, and deterrence of vexatious conduct. The Ninth Circuit employed just such an analysis in a decision holding that a state court's *grant* of an order compelling arbitration was, given state law, entitled to preclusionary effect as a final order.¹⁹⁸ Somewhat curiously, these concerns have not been voiced as loudly in cases in which federal courts have been called upon to reverse state court *denials* of motions to compel arbitration.¹⁹⁹

¹⁹⁵ See 664 F.2d at 1183-84 (summarizing and applying existing res judicata case law); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398-99 (5th Cir. Unit B 1981) (reversing and remanding the district court's grant of a petition to compel arbitration in part because the district court failed to consider the preclusionary impact of the state court's refusal to compel arbitration).

¹⁹⁶ As noted earlier, the scope of the Full Faith and Credit statute must be interpreted in light of the FAA and its own underlying policies. See *supra* text accompanying notes 164-75.

¹⁹⁷ See *supra* text accompanying note 175 (discussing the constraint placed upon federal court deference by the Fourteenth Amendment's Due Process Clause).

¹⁹⁸ See *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 714 (9th Cir. 1992). See *infra* text accompanying notes 447-51 (discussing *Southeast Resource* in more detail).

¹⁹⁹ See *infra* text accompanying notes 447-55 (observing that federal courts have more frequently deferred to state court decisions ordering arbitration to proceed than to those refusing to compel arbitration).

B. *The Rooker-Feldman Doctrine*

1. Background on the *Rooker-Feldman* doctrine

The *Rooker-Feldman* doctrine provides that federal courts lack jurisdiction to review or sit as an appellate court over state court decisions. Not coincidentally, the doctrine originated in *Rooker v. Fidelity Trust Co.*,²⁰⁰ in which the Supreme Court reviewed a decision by a federal district court refusing to annul a judgment reached by the Indiana circuit court and affirmed by the Indiana Supreme Court.²⁰¹ The Supreme Court affirmed the district court's dismissal of the suit, concluding that the suit was "plainly not within the District Court's jurisdiction as defined by Congress."²⁰² Without laying out any particular policy justifications for the decision, the Court simply explained that Congress authorized only the Supreme Court, and not district courts, to hear challenges to state court decisions.²⁰³ Fifty-nine years later, in *District of Columbia Court of Appeals v. Feldman*,²⁰⁴ the Supreme Court reviewed a case in which the federal court plaintiffs challenged the local D.C. Court of Appeals' failure to grant their requests for waivers of a bar admission rule.²⁰⁵ The Supreme Court concluded that to the extent that plaintiffs' actions constituted a request that the district court review final determinations of the District of Columbia Court of Appeals in judicial proceedings, the district court was correct in its conclusion that it lacked subject matter jurisdiction.²⁰⁶ However, while concluding that the D.C. Court of Appeals' denial of the individuals' waiver petitions was judicial in nature, and therefore not reviewable in district court,²⁰⁷ the Court found that plaintiffs were nonetheless still jurisdictionally entitled to mount a general

²⁰⁰ 263 U.S. 413 (1923).

²⁰¹ See *id.* at 414. The federal court plaintiff challenged the Indiana judgment regarding a corporation's duties and obligations as void in that it arguably violated the Contract, Equal Protection, and Due Process Clauses of the U.S. Constitution. See *id.* at 414-15.

²⁰² *Id.* at 415.

²⁰³ See *id.* at 416. The Court further rejected the federal court plaintiff's attempt to characterize the federal court action as a challenge to the state court's jurisdiction, concluding instead that "the bill at best is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction." *Id.*

²⁰⁴ 460 U.S. 462 (1983).

²⁰⁵ Although the District of Columbia is not a state, the Supreme Court found that final judgments issued by the District of Columbia Court of Appeals are treated like decisions of the highest court of a state. See *id.* at 463-64.

²⁰⁶ Referring to 28 U.S.C. § 1257, the portion of the Judiciary Act granting the Supreme Court power to review state court decisions under certain circumstances, the Court found that "[r]eview of such determinations can be obtained only in this Court." See *Feldman*, 460 U.S. at 476.

²⁰⁷ See *id.* at 479, 482-83.

challenge to the constitutionality of the bar admission rule.²⁰⁸ Such a challenge, brought against the D.C. court in its non-judicial capacity, was not “inextricably intertwined” with a review of a state court judicial decision and thus was not barred by 28 U.S.C. § 1257.²⁰⁹ While the Supreme Court did not explicitly outline the policy arguments it believed supported its conclusions in *Feldman*, it did on several occasions cite *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,²¹⁰ a case that spelled out in some detail the federalism and comity concerns underlying the Court’s reversal under the AIA of a federal court’s injunction against a state court.²¹¹ The Supreme Court has not issued any other significant decisions applying the *Rooker-Feldman* doctrine.²¹² However, five justices in *Pennzoil Co. v. Texaco Inc.*,²¹³ did conclude in dicta that a request that a federal court enjoin a state court enforcement action was sufficiently distinct from the state court’s ruling on the merits such that *Rooker-Feldman* would not apply.²¹⁴

²⁰⁸ See *id.* at 484-86. The Supreme Court observed, however, that the doctrine of res judicata might foreclose plaintiffs’ action, and explicitly refrained from ruling on this issue. See *id.* at 487-88.

²⁰⁹ See *id.* at 485-87.

²¹⁰ 398 U.S. 281 (1970).

²¹¹ See *Feldman*, 460 U.S. at 476, 482 n.16 (“Lower federal courts possess no power whatever to sit in direct review of state court decisions.” (quoting *Atlantic Coast Line*, 398 U.S. at 296)). See *infra* text accompanying notes 288-92 for further discussion of *Atlantic Coast*.

²¹² In *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994), the Court reached the seemingly obvious conclusion that the doctrine did not bar a federal court action by a party that did not participate in a prior state court suit.

²¹³ 481 U.S. 1 (1987).

²¹⁴ *Texaco*, having been found liable for twelve billion dollars in a state court tortious breach of contract action, filed a federal court suit arguing that the Texas judgment lien and appeal bond provisions were unconstitutional in that they required *Texaco* to post a twelve billion dollar bond in order to secure review of the jury award issued against it. The district court ruled that *Rooker-Feldman* was inapplicable in that the federal court was not “attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action.” *Texaco Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 254 (S.D.N.Y. 1986), *aff’d*, 784 F.2d 1133 (2d Cir. 1986), *rev’d*, 481 U.S. 1 (1987). Rather, it stated that, “Our only intention is to assure *Texaco* its constitutional right to raise claims that we view as having a good chance of success.” *Id.* The Second Circuit affirmed on somewhat different grounds, concluding that while the *Rooker-Feldman* doctrine did in fact bar the district court from evaluating the merits of the state court judgment, the district court was entitled to review the due process and equal protection claims because they were not presented to the state court and were not “inextricably intertwined” with the state court action. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1144 (2d Cir. 1986) (quoting *Feldman*, 460 U.S. at 482-83 n.16, *rev’d*, 481 U.S. 1 (1987)). The Supreme Court plurality opinion chose not to address the *Rooker-Feldman* issue, instead reversing the injunction on the ground that the federal court was mandated to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). See *infra* text accompanying notes 408-22 (discussing *Younger*’s requirement that federal courts consider state interests before enjoining state court

Although the doctrine has been criticized by some as an unnecessary redundancy in that it substantially overlaps with the Full Faith and Credit Clause and *res judicata* doctrine,²¹⁵ *Rooker-Feldman* arguably has a broader scope than do those doctrines. In particular, numerous courts have found that *Rooker-Feldman* may prevent a federal court from hearing a case in which an order has already been issued by the state court, even though that order is not a final order entitled to preclusive effect under the Full Faith and Credit Clause.²¹⁶ Moreover, because the doctrine deprives courts of subject matter jurisdiction, challenges based on *Rooker-Feldman* can be raised at any time and even on appeal, although a party may initially have failed to raise the challenge.²¹⁷

civil and criminal proceedings). However, in dicta, five of the Justices concluded that *Rooker-Feldman* was inapplicable because the plaintiffs' request for injunctive relief was sufficiently distinct from the merits of the state court action that it was not akin to an attempted appeal. See *Pennzoil*, 481 U.S. at 18 (Scalia & O'Connor, JJ., concurring); *id.* at 18, 21 (Brennan & Marshall, JJ., concurring); *id.* at 27-28 (Blackmun, J., concurring); *id.* at 29, 31 n.3 (Stevens & Marshall, JJ., concurring). Only Justice Marshall found that the *Rooker-Feldman* doctrine barred federal court jurisdiction in the case. See *id.* at 23, 24-25 (Marshall, J., concurring) (finding that the constitutional challenge is inextricably intertwined with the state court judgment because federal relief is "predicated upon a conviction that the state court was wrong").

²¹⁵ See, e.g., Gary Thompson, Note, *The Rooker-Feldman Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859 (1990) (advocating abolition of the doctrine and explaining why it is unnecessary and harmful); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4469 (1981) ("This jurisdictional transmutation of *res judicata* doctrine seems entirely unnecessary."); see also *Narey v. Dean*, 32 F.3d 1521, 1526-28 (11th Cir. 1994) (finding it unnecessary to apply the *Rooker-Feldman* doctrine in a case that fails on the merits). But see *GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993) (holding that the *Rooker-Feldman* doctrine has nothing to do with the Full Faith and Credit statute, resting instead on the principle that federal courts have only original jurisdiction).

²¹⁶ See, e.g., *Distajo Second Circuit II*, 107 F.3d 126, 137-38 (2d Cir. 1997) (holding that the *Rooker-Feldman* doctrine bars federal courts from reviewing interlocutory as well as final state court decisions), *cert. denied*, 118 S. Ct. 365 (1997); *Campbell v. Greisberger*, 80 F.3d 703, 707 (2d Cir. 1996) ("It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing final decisions of state courts, they are free to review interlocutory orders."); *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir. 1995) ("*Rooker-Feldman* is broader than claim and issue preclusion because it does not depend on a final judgment on the merits."); *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't*, 973 F.2d 169, 177-79 (3d Cir. 1992) (observing that where a state court issued a preliminary injunction, and where the subject of a preliminary injunction subsequently brought suit in federal court to enjoin an opposing party from enforcing a rule supporting an injunction, a federal court could properly rely on *Rooker-Feldman* as well as *Younger* abstention to dismiss the case, in that the interlocutory nature of the injunction "does not preclude the application of the *Rooker-Feldman* doctrine").

²¹⁷ *Distajo Second Circuit II*, 107 F.3d at 137 ("A challenge to a federal court's subject matter jurisdiction under the *Rooker-Feldman* doctrine 'may be raised at any time by either party or sua sponte by the court.'" (quoting *Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996))); see also *In re General Motors Corp. Pick-Up*

2. Application of the *Rooker-Feldman* Doctrine to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

Very few courts have ruled on whether the *Rooker-Feldman* doctrine precludes a federal court from compelling arbitration or enjoining a state court from considering the arbitrability of a particular dispute.²¹⁸ Moreover, *Rooker-Feldman* jurisprudence is, in general, rather undefined.²¹⁹ Thus, courts will need to resolve at least three important ambiguities in applying the doctrine to the arbitration context: first, if the ruling was not made by the state's highest court, whether it blocks federal action; second, whether the state court's ruling was sufficiently "final" to bar federal action; and third, whether, given its content, the requested federal action is appropriately considered to be an "appeal" of the state ruling and thus prohibited by the doctrine. Courts will find it easier to resolve these ambiguities if they consider the four policies discussed in this Article,²²⁰ in light of the specific factual context of the case.

Although it could be argued that *Rooker-Feldman* only bars federal court action as to decisions that have been ruled upon by a state's highest court,²²¹ courts and commentators have generally applied *Rooker-Feldman*

Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 143 (3d Cir. 1998) (applying the *Rooker-Feldman* doctrine to block a federal court challenge to state approval of a settlement even though the state did not approve the settlement until after the district court refused to enjoin the state action). By contrast, at least in federal court, the defenses of res judicata and collateral estoppel are affirmative defenses that must be stated in the answer or else lost. See FED. R. CIV. P. 8(c). It should be noted, however, that many pre-*Feldman* cases cited *Rooker* as a principle of res judicata, and not of federal jurisdiction. See, e.g., *Ellentuck v. Klein*, 570 F.2d 414, 425 (2d Cir. 1978) (citing *Rooker* to support the court's refusal to nullify a determination of the New York Court of Appeals); *Hanley v. Four Corners Vacation Props., Inc.*, 480 F.2d 536, 538 (10th Cir. 1973) (citing *Rooker* to support the determination that a when final judgment on the issue of due process has been entered, it is res judicata).

²¹⁸ This author located only one case that considered whether the *Rooker-Feldman* doctrine precluded a federal court from enjoining a state court order to send a dispute to arbitration. See *Distajo Second Circuit II*, 107 F.3d at 138 (determining that the *Rooker-Feldman* doctrine was inapplicable because the federal action, having been filed prior to the state court ruling, could not properly be characterized as an "appeal" from the state court ruling). A second case, *Integrated Pet Foods, Inc. v. Commonwealth*, No. CIV. A. 95-7847, 1996 WL 153216 (E.D. Pa. Apr. 1, 1996), involved the reverse situation: a party's attempt to secure a federal court order enjoining a state court's decision sending a matter to arbitration. *Integrated Pet Foods* stated, in dicta, that the *Rooker-Feldman* doctrine would appear to preclude the federal court from reconsidering the state court's decision that certain defenses were not available to the party. See *id.* at *1.

²¹⁹ See generally Thompson, *supra* note 215, at 860-61 (discussing various ambiguities in the interpretation of the doctrine).

²²⁰ See *supra* text accompanying notes 77-163 for a discussion of the four policies.

²²¹ Both the *Rooker* and *Feldman* cases themselves involved decisions that reached the end of the state appellate process. Moreover, 28 U.S.C. § 1257, the jurisdictional foundation

to decisions by lower state courts as well.²²² Analyzing the issue in terms of federalism and comity concerns, the Second Circuit explained that “[a]llowing lower federal courts to review the judgments of state lower courts is as intrusive and as likely to breed antagonism between state and federal systems as allowing federal court review of the judgments of the states’ highest courts.”²²³ This analysis seems correct, in terms of serving the interests of not only federalism and comity but also efficiency. Thus, where a state court has made a final ruling on the merits in a case that the losing party now argues should have been arbitrated, *Rooker-Feldman* would seem to bar a federal court from reconsidering the issue.

As to “finality,” all would agree that unless the state court has at least made a ruling of some sort, *Rooker-Feldman* does not apply. Thus, where a state court action was filed but no ruling on arbitrability was made, the doctrine certainly does not restrict the federal court from making its own ruling on arbitrability or even from enjoining the state court proceeding. Beyond that, the road is foggy. For example, it is not entirely clear whether the *Rooker-Feldman* doctrine applies only to final judgments, or also to interlocutory rulings. Calling the question “interesting,” the Seventh Circuit hinted that it may find the doctrine applicable only to final determinations.²²⁴ If this were so, a state court ruling that the dispute was not arbitra-

of these cases, refers only to the Supreme Court’s right to review decisions by the “highest court of a State in which a decision could be had.” 28 U.S.C. § 1257 (1994).

²²² See, e.g., Thompson, *supra* note 215, at 894 (noting that although the Supreme Court has never taken the step of giving *Rooker-Feldman* recognition to lower state court decisions, other federal courts and commentators consistently have); Michael Finch & Jerome Kasriel, *Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes*, 48 OHIO ST. L.J. 927, 976 (1987) (“The absence of state appellate finality does not alter the practical reality that lower federal court review will constitute the functional equivalent of an appeal Thus, *Rooker-Feldman* is relevant at the time that the state trial court’s judgment is final, regardless of whether section 1257 review is . . . timely.”); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) (holding that *Rooker-Feldman* barred a federal court from hearing a challenge to a class action settlement approved by a Louisiana trial court); *Branson v. Nott*, 62 F.3d 287, 291-92 (9th Cir. 1995) (stating that *Rooker-Feldman* barred federal courts from hearing claims that were affirmed by state appellate courts, but not the state supreme court); *United States v. Shepherd*, 23 F.3d 923, 925 (5th Cir. 1994) (concluding that *Rooker-Feldman* prohibited federal courts from reviewing state trial court decisions on liens). But see *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1510-11 n.13 (11th Cir. 1991) (stating that *Rooker-Feldman* would have been applicable once the state decision had been reviewed and affirmed by the state supreme court).

²²³ *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1142-43 (2d Cir. 1986), *rev’d on other grounds*, 481 U.S. 1 (1987).

²²⁴ See *Owens-Corning Fiberglass Corp. v. Moran*, 959 F.2d 634, 635 (7th Cir. 1992) (holding that a plaintiff may not circumvent a state court decision by bringing a 42 U.S.C. § 1983 action against the state court judge in federal court); see also *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995) (stating, in dicta, that *Rooker* applies only where final judgment

ble would not bring *Rooker-Feldman* into play until the state court decided the case on the merits. Several other circuits have found, however, that the doctrine bars reconsideration of interlocutory as well as final rulings.²²⁵ As the Second Circuit put it: "It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing final decisions of state courts, they are free to review interlocutory orders."²²⁶ Applying the federalism principles upon which the doctrine seems to be based, this reading would seem to be correct, at least as applied to arbitration decisions. Federal courts should no more be allowed to sit as appellate reviewers over interlocutory state court orders than over final state court orders. Efficiency principles also oppose federal court review of interim state court orders. Federal policy sometimes points the other way, perhaps dictating that federal courts should be allowed to make their own determinations, notwithstanding a mere interlocutory state court ruling. In determining the finality of the state court's order in the arbitration context, the federal court should look, specifically, at the context of the order. Where, for example, a state court has only issued an emergency temporary restraining order, precluding arbitration, it is less appropriate to prohibit a federal court to act than when the state court has determined, after a full evidentiary hearing, that arbitration is not required.

Even where a sufficiently high-level state court has issued a sufficiently final judgment, *Rooker-Feldman* bars only those federal court actions that can be characterized as an "appeal" of the state court action. Several factors are relevant to the federal court's determination of whether it is, effectively, being asked to hear an "appeal" from a state court ruling.²²⁷ First, as dis-

has been issued but that it "is not a requirement that a plaintiff exhaust all conceivable state remedies" (quoting *Wood v. Orange County*, 715 F.2d 1543, 1548 (11th Cir. 1983)).

²²⁵ See *Richardson v. District of Columbia Ct. of Appeals*, 83 F.3d 1513, 1515-16 (D.C. Cir. 1996) (rejecting a request to review an interlocutory decision by the D.C. Court of Appeals to suspend an attorney); *Campbell v. Greisberger*, 80 F.3d 703, 707 (2d Cir. 1996) (refusing to distinguish between an interlocutory decision and a final judgment for the purposes of determining subject matter jurisdiction using the *Rooker-Feldman* doctrine); *Port Authority Police Benevolent Ass'n v. Port Authority of N.Y. & N.J. Police Dep't*, 973 F.2d 169, 177-79 (3d Cir. 1992) (holding that the interlocutory nature of a state court order does not preclude the use of the *Rooker-Feldman* doctrine and upholding the dismissal of an appeal against a preliminary injunction issued by a state court); *Keene Corp. v. Cass*, 908 F.2d 293, 296-97, 297 n.2 (8th Cir. 1990) (noting agreement with other circuits that the *Rooker-Feldman* doctrine applies to state court decisions that are not final).

²²⁶ *Campbell*, 80 F.3d at 707 (emphasis added); see also *Gentner v. Shulman*, 55 F.3d 87, 89 (2d Cir. 1995) (concluding that *Rooker-Feldman* applies whether an order is "final or interlocutory in nature").

²²⁷ As the authors of an authoritative treatise observe, parties would only rarely characterize their federal court action as an "appeal" from a state court decision. See 18 WRIGHT ET AL., *supra* note 215, § 4469. Thus, the difficult task is to determine which purportedly independent federal suits are in fact appeals from a state court decision.

cussed earlier, the doctrine bars only those actions which are "inextricably linked" to the state court decision.²²⁸ However, where a federal court is being asked in a motion to compel arbitration to reverse a state court's decision that a case pending in the state court is nonarbitrable, it seems clear that the federal court action is "inextricably intertwined" with the state court decision. This is not a situation, such as that described by five Justices in *Pennzoil*, where the federal court is being asked to rule on an issue that was not litigated in the state court.²²⁹ Second, the Second Circuit has found that the *Rooker-Feldman* doctrine is inapplicable where the federal court action was filed prior to the state court's ruling that the dispute was nonarbitrable, reasoning that where the federal action was filed first, "[w]e cannot say that DAI is attempting to appeal from any of the state court decisions."²³⁰

²²⁸ See *supra* text accompanying notes 209-10. This concept is not always easy to apply. Compare *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996) (stating that *Rooker-Feldman* barred a federal court from hearing a legal malpractice claim based on alleged malpractice in state court), *Gentner*, 55 F.3d at 89 (holding that *Rooker-Feldman* defeated federal jurisdiction where a state court disqualified three attorneys from representing the defendants in a pending criminal prosecution, and while the state action was still pending, the attorneys and clients brought suit in the federal court to enjoin a state court order, because "[i]n essence, they sought an appeal in federal court from the state court decisions"), and *Chrissy F. ex rel. Medley v. Mississippi Dep't of Pub. Welfare*, 995 F.2d 595 (5th Cir. 1993) (finding that the district court lacked jurisdiction to order a state referee to hold a new trial where the grounds for relief could have been raised by appeal in the state courts), with *Charchenko v. City of Stillwater*, 47 F.3d 981 (8th Cir. 1995) (holding that *Rooker-Feldman* did not bar a federal court from hearing a complaint dismissed by a state court for lack of jurisdiction), *Marks v. Stinson*, 19 F.3d 873, 885-86 n.11 (3d Cir. 1994) (concluding that *Rooker-Feldman* did not bar a federal suit alleging absentee voter fraud in a state election where the issues presented to the federal court were not determined by a state court and were not intertwined with those issues), and *Rhoades v. Penfold*, 694 F.2d 1043, 1046-47 (5th Cir. 1983) (permitting federal action under § 1983 to enjoin enforcement of a state judgment allegedly tainted by the denial of the right to appointed counsel where a claim did not involve review of the substantive issues decided in a state court).

²²⁹ See *supra* notes 213-14 and accompanying text.

²³⁰ *Distajo Second Circuit II*, 107 F.3d 126, 138 (2d Cir. 1997) (citing *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1143 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987)), *cert. denied*, 118 S. Ct. 365 (1997); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Doe*, 868 F. Supp. 532, 538 (S.D.N.Y. 1994) (holding that where a state court has not issued a judgment and the federal action is brought before any state court order was issued, "state courts are simply without power to enjoin the commencement of a federal court action"). The Second Circuit so held while recognizing that several of the state courts had issued final judgments prior to its ruling. As to one of the state court decisions, the Second Circuit also emphasized that the federal district court issued a temporary restraining order which enjoined the state court action *prior* to when the state court made its damages determination, but that the state court plaintiff failed to apprise the state court of the existence of the temporary restraining order. See *Distajo Second Circuit II*, 107 F.3d at 137-38.

The Second Circuit's reasoning here seems questionable from a policy standpoint, at least when applied as a strict rule.²³¹ Such a rule would encourage a party anticipating a possible adverse state ruling on arbitration to file a federal court action immediately following the filing of the state suit. Then, depending on how the state court action seemed to be going, the party could either pursue the federal court action, without fear of *Rooker-Feldman* preclusion, or else voluntarily dismiss the federal court action. A variant of the Second Circuit's ruling would, however, be desirable. The federal court should determine whether the federal court action is effectively an appeal of the state court ruling, after taking into account both the timing of the filing of the two actions and the timing of the ruling in the state case. Where the federal action is filed prior to the filing of the state court action, the federal court should be free to enjoin the state court action.²³² That is, the priority of filing should be a relevant, but not conclusive, factor in the federal court's analysis.

In sum, the *Rooker-Feldman* doctrine precludes a federal court from hearing what is in effect an "appeal" from a state court determination that a dispute is nonarbitrable. The extent to which a particular federal court action in a motion to compel arbitration should be considered to be an impermissible "appeal" ought to turn on the maturity of the state court action and the relative priority of the federal and state court actions.²³³ Consideration

²³¹ The Third Circuit implicitly rejected the Second Circuit's reasoning, holding that the *Rooker-Feldman* doctrine blocked a federal court from enjoining a state court where the state court did not enter final judgment until after the district court refused to issue the injunction. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998).

²³² A third unresolved *Rooker-Feldman* question is whether the doctrine bars a federal court from considering issues not actually raised in the court below. If the issue was not raised below, can the federal court's consideration of the issue properly be considered an "appeal" and thus be barred by the *Rooker-Feldman* doctrine? The question has generated interesting analysis by commentators and courts. Compare Thompson, *supra* note 215, at 876-77 (arguing that *Rooker-Feldman* only covers those issues actually raised in the state court), and *Texaco*, 784 F.2d at 1144-45 (same), with *Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992) (holding that *Rooker-Feldman* bars issues that were not, but could have been, raised previously in state court). It seems unlikely, however, that this issue would arise with any frequency in the context of an arbitral antisuit injunction because one party or the other almost surely would have raised the issue of arbitrability in state court prior to one party seeking an order to compel arbitration and enjoin the state court proceeding.

²³³ An argument could be made that the applicability of *Rooker-Feldman* should also turn on whether either party engaged in vexatious conduct. The Fifth Circuit considered such an argument in *Musslewhite v. State Bar*, 32 F.3d 942, 947-48 (5th Cir. 1994) and, withdrawing its own prior ruling in *Musslewhite v. State Bar*, 25 F.3d 1300 (5th Cir. 1994), concluded that such conduct was irrelevant. The court explained that even if the federal court plaintiff could establish that the state court action seeking to discipline him for various alleged ethical infractions was spurred by improper motives, *Rooker-Feldman* still barred the federal suit. The

of these factors will allow courts to take into account the federalism and efficiency concerns upon which the doctrine is founded.

IV. DOCTRINES DEFINING A FEDERAL COURT'S ABILITY TO ENJOIN ONGOING STATE COURT ACTIONS

Even if a federal court is not entirely barred from considering a motion to compel arbitration, it may be precluded from enjoining an ongoing state court action. This Part will discuss the doctrines that are relevant to this question.

A. *The All Writs Act Provides Authority for Arbitral Antisuit Injunctions*

Federal courts' authority to issue injunctions is founded in the All Writs Act.²³⁴ This statute, passed in 1948 as a consolidation of prior statutes,²³⁵ states that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."²³⁶ Courts have long held that, subject to the constraints set out by the other doctrines that will be discussed in the following Subparts, this statute authorizes federal courts to issue various writs, including particularly antisuit injunctions directed to other federal or state courts.²³⁷ Once the federal court directs

court contrasted other Fifth Circuit decisions which had concluded that the federal preemption doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), would not apply where it could be shown that the state court action was undertaken for improper purposes. See *Musslewhite*, 32 F.3d at 947-48 (citing *Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982) and *Shaw v. Garrison*, 467 F.2d 113, 119-21 (5th Cir. 1972)). Although the Fifth Circuit stated that different policy justifications underlie *Younger* than underlie *Rooker-Feldman*, and concluded that the bad faith exception was appropriate only under *Younger*, it did not spell out its reasoning. See *Musslewhite*, 32 F.3d at 948.

²³⁴ Ch. 646, § 1651(a), 62 Stat. 944, 944 (1948) (codified at 28 U.S.C. § 1651(a) (1994)).

²³⁵ See 28 U.S.C. § 1651 (noting that the 1948 statute was intended to consolidate former sections 342, 376, and 377 of Title 28 of the United States Code).

²³⁶ 28 U.S.C. § 1651(a).

²³⁷ See *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202-03 (7th Cir. 1996) (noting that the All Writs Act permits a federal court to issue such commands as an injunction in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction" (quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 173 (1977)); *In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994) (affirming the district court's issuance of an order under the All Writs Act staying all litigation and proceedings against the trust that was party to settlement, and also staying all payments by the trust to its beneficiaries); *Wesch v. Folsom*, 6 F.3d 1465, 1470-71 (11th Cir. 1993) (recognizing that a federal court injunction of state court proceedings is appropriate in aid of jurisdiction); *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (stating that it "seems clear that the issuance of a preliminary injunction pursuant to the All Writs Act is appropriate in certain instances to preserve the court's [Antitrust Procedures and Penalties Act] jurisdiction") see also 28 U.S.C. § 1651. See generally *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964) ("While Congress has seen

such an antisuit injunction to the state court, the Supremacy Clause requires the state court to abide by the order.²³⁸

B. Equitable Constraints May Preclude Arbitral Antisuit Injunctions

1. Background on Equitable Constraints

Traditional equitable constraints prohibit federal courts from issuing injunctions, including arbitral antisuit injunctions, absent a showing of prospective "irreparable injury and lack of an adequate remedy at law."²³⁹ As the D.C. Court of Appeals explained in *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,²⁴⁰ equitable principles support the issuance of an anti-suit injunction only where such an injunction "is required to prevent an irreparable miscarriage of justice."²⁴¹

fit to authorize [federal] courts . . . to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions . . ." (citing 28 U.S.C. §§ 1651, 2283) (additional citations omitted)).

²³⁸ See U.S. CONST. art. VI. It should be noted that the Supreme Court has recently stated in dicta that the Constitution's Full Faith and Credit Clause does not require one state to abide by another state's antisuit injunction. See *Baker v. General Motors Corp.*, 118 S. Ct. 657, 665 (1998) (stating that enforcement measures, unlike determinations on the merits, are not controlling in a second state jurisdiction).

²³⁹ Sherman, *supra* note 77, at 927; see also William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 331 (1978) (explaining that courts are generally restrained by principles of equity and comity, and considerations of federalism, in issuing antisuit injunctions); Wood, *supra* note 34, at 292-93 (outlining the equitable principles which generally preclude antisuit injunctions). See generally *Younger v. Harris*, 401 U.S. 37, 43 (1971) (noting that courts of equity should not act "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief"); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (proposing a standard governing interlocutory injunctions which balances interim injury against interlocutory judicial error); Comment, *Anti-suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965) (discussing the circumstances in which a federal court could enjoin proceedings before a state court).

²⁴⁰ 731 F.2d 909 (D.C. Cir. 1984).

²⁴¹ *Id.* at 927. While observing that antisuit injunctions are permissible only in extreme circumstances, either to protect the jurisdiction of the issuing court or to prevent evasion of the forum's important policies, *Sabena* nonetheless upheld a district court's issuance of an injunction that restrained defendants from taking part in a British action. See *id.* at 930-31. It found that the British action, in contrast to a typical permissible parallel proceeding, was initiated solely for the purpose of depriving the American courts of jurisdiction, see *id.* at 930, and further found that the injunction was necessary to prevent the litigants from evading U.S. antitrust law. See *id.* at 931-32. For a brief but informative discussion of the use of antisuit injunctions in the international context, see GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS*, 475-90 (3d ed. 1996).

Typically, courts have applied this equitable test to conclude that anti-suit injunctions are not proper merely to halt a parallel in personam claim.²⁴² Rather, as discussed earlier, the principle of comity is typically interpreted to allow in personam proceedings in two jurisdictions to proceed concurrently until one of the jurisdictions issues a judgment.²⁴³ Thus, the possible problem of inconsistent judgments is resolved most often through the use of preclusion doctrines, rather than by allowing one jurisdiction to close down another's operations.

2. Application of Equitable Constraints to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

The vast majority of courts that have granted arbitral antisuit injunctions have not even considered whether equity permits interference.²⁴⁴ Once the question is raised, however, it is not at all clear that many such injunctions meet the equitable test.²⁴⁵ To obtain an arbitral antisuit injunc-

²⁴² See *Laker Airways*, 731 F.2d at 927 ("Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum.").

²⁴³ See *supra* text accompanying notes 121-27; see also *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting that between state and federal courts, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court"); *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (explaining that both state and federal courts may proceed with litigation until judgment is obtained in one of them, which may be set up as *res judicata* in the other). Courts more frequently enjoin proceedings in other jurisdictions where jurisdiction is in *rem* rather than in *personam*. See *infra* text accompanying notes 282-86. Courts have also generally found that it is more permissible to enjoin a proceeding in the same forum in which the injunction is sought, than to enjoin a proceeding in a different forum. See *Colorado River*, 424 U.S. at 817; *Laker Airways*, 731 F.2d at 927 n.49.

²⁴⁴ See, e.g., *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (compelling an arbitration sought by an insurer in a dispute over the enforceability of insured's policy); *Ferrari N. Am., Inc. v. Crown Auto Dealerships*, No. 94 Civ. 8541 (KMW), 1995 WL 614558, at *5 (S.D.N.Y. Oct. 19, 1995) (requiring respondent to submit to arbitration before the American Arbitration Association in New York City, and staying a proceeding before the Florida Department of Highway Safety and Motor Vehicles), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *Pervel Indus., Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 870 (S.D.N.Y. 1987) (granting a motion to compel an arbitration pursuant to a clause in a sales contract, and staying pending state court proceeding), *aff'd*, 871 F.2d 7 (2d Cir. 1989). But see *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 473-74 (D. Mont. 1993) (explaining that Snap-On established a likelihood of success on the merits of its claim that the dispute was arbitrable, and that it would suffer irreparable harm if it lost the benefits of arbitration, whereas Vetter's claimed inability to pay for arbitration did not rise to the level of irreparable harm).

²⁴⁵ The district court refused to find such a showing in *TranSouth Financial Corp. v. Bell*, 975 F. Supp. 1305, 1311 (M.D. Ala. 1997) (finding that no irreparable harm was established, particularly where the party seeking arbitration retained the right to appeal an adverse state decision through the state appellate process, as well as to the Supreme Court), *aff'd in*

tion, moving parties should have to establish that equitable factors weigh in their favor and that absent such injunction they will suffer irreparable injury.

In determining whether or not a party seeking an arbitral antisuit injunction can establish irreparable injury or equitable entitlement to the injunction, the federal court should consider more than the federal policy regarding arbitration; principles of federalism and comity, efficiency concerns, and unjustifiable harassing trial tactics should also figure in the analysis.

Although a party might contend that being forced to litigate an arguably arbitrable dispute constitutes irreparable harm, there are several problems with this argument. First, such a party cannot blithely point to potential substantive differences between the rulings of the arbitrators and a court because the Supreme Court has clearly stated it will not assume the existence of any such differences.²⁴⁶ Second, unless the state court has already ruled, it is mere speculation, and also disrespectful to the state court, to assume that it would find the dispute not to be arbitrable. Third, in terms of efficiency, even assuming one could accurately predict the actions of the state court, or even if the state court had already ruled, it is not clear that allowing a case to be decided through litigation rather than through arbitration constitutes irreparable harm. Particularly where substantial progress has already been made in the state suit, litigation might well prove cheaper than arbitration. Moreover, even to the extent it could be shown that the litigation process would be more time consuming and expensive, it would seem that monetary compensation could be awarded to make up for such a loss and that such harm is, therefore, not irreparable. Finally, where a party is attempting to establish that equitable factors favor granting of the injunction, the court should consider whether either party engaged in vexatious or harassing conduct.²⁴⁷ A party might in some instances be able to establish

part, vacated in part on other grounds and remanded, 149 F.3d 1292 (11th Cir. 1998); *see also* Swofford v. Shearson Lehman/Am. Express, Inc., 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (concluding that the plaintiff had not made the necessary showing to obtain a preliminary injunction given that the plaintiff had the opportunity for both a trial on the merits and an appeal in the state court system); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 784 (E.D. Pa. 1984) (considering the "balance of the equities" and the lack of a showing of irreparable injury, before concluding that a federal court stay of a state court ruling is not necessary, given the state court's careful and thoughtful proceedings and given the federal court's order compelling arbitration).

²⁴⁶ *See supra* note 112 (discussing the Supreme Court's statement, in cases including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), that enforcement of substantive rights is the same in arbitration as in litigation).

²⁴⁷ Courts should employ the same equitable analysis they would undoubtedly employ if asked to interfere with a state court decision ordering a case to proceed to arbitration. Only if, for example, due to arbitrator bias and expense, a party could show she would be irreparably harmed by participation in the arbitration might an injunction be permitted. *Cf. Aviall, Inc. v.*

irreparable harm due to the loss of the private forum or expertise that would have been afforded by arbitration, but claims of such harm must be carefully scrutinized.

In sum, traditional equitable principles are likely to preclude a federal court from issuing an arbitral antisuit injunction except in very unusual circumstances that might lead to irreparable harm. Such circumstances might include a situation where the federal action is filed prior to the state suit and has already progressed substantially, or where a party opposing arbitration is engaging in inappropriate vexatious conduct.

C. *The Anti-Injunction Act*

The AIA, initially passed in 1793,²⁴⁸ currently provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by AIA of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."²⁴⁹ This current version of the Act was passed in 1948 in part to counter a highly controversial Supreme Court decision, *Toucey v. New York Life Insurance Co.*,²⁵⁰ which interpreted the Act restrictively to prevent federal courts from enjoining state court proceedings seeking to relitigate issues previously resolved in federal court.²⁵¹

Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997) (refusing to remove an arbitrator for bias prior to rendering an award).

²⁴⁸ The original version of the Act stated "nor shall a writ of injunction be granted [by a federal court] to stay proceedings in any court of a state . . ." Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 335 (1793); see JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 914 (Carolina Academic Press 1987) (1833) (stating that federal courts have no authority to issue injunctions in state courts or otherwise interfere with their jurisdiction). The Act was amended in 1874 to provide that "The writ of injunction shall not be granted by any 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." Ch. 12, § 720, 18 Stat. 137 (1874) (codified at 28 U.S.C. § 379 (repealed)).

²⁴⁹ 28 U.S.C. § 2283 (1994). The Act applies to injunctions that indirectly as well as directly seek to limit the scope of state courts' authority. See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) ("It is settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.").

²⁵⁰ 314 U.S. 118 (1941).

²⁵¹ Justice Reed and two others had dissented vigorously in *Toucey*, complaining that the Court's ruling would allow state courts to ignore federal courts' rulings, even after a tremendous investment of time and energy. See 314 U.S. at 144. See generally 17 WRIGHT ET AL., *supra* note 215, § 4221 (discussing the history of the AIA). The 1948 amendment explicitly included a "relitigation exception" to the Act's general proscription against antisuit injunctions. The Reviser's Historical and Revision Notes to § 2283 state in part: "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin

In interpreting the AIA, the Supreme Court has explained that while “[t]he precise origins of the legislation are shrouded in obscurity, . . . the consistent understanding has been that its basic purpose is to prevent ‘needless friction between state and federal courts.’”²⁵² Thus, the AIA reflects the federalist premise that state courts can generally be trusted to ap-

relitigation of cases and controversies fully adjudicated by such courts.” 28 U.S.C. § 2283 (1994). See *infra* text accompanying notes 336-69 for further discussion of this provision.

²⁵² *Mitchum v. Foster*, 407 U.S. 225, 232-33 (1972) (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)).

The Act . . . is a necessary concomitant of the Framers’ decision to authorize, and Congress’ decision to implement, a dual system of federal and state courts. It represents Congress’ considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls “the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.”

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion)).

[Such a] dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and “to prevent needless friction between state and federal courts” . . . it was necessary to work out lines of demarcation between the two systems. . . . The 1793 anti-injunction Act was at least in part a response to these pressures.”

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs, 398 U.S. 281, 286 (1970) (quoting *Oklahoma Packing Co.*, 309 U.S. at 9).

Commentators have expressed less certainty or agreement than the Supreme Court as to the origin of the Act. Compare MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 310 (2d ed. 1990) (positing that the Act was part of a compromise, designed to ensure the independence of state courts from the newly-created lower federal courts), and Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347 (1930) (citing a report made by Attorney General Edmund Randolph to the House of Representatives in 1790 stating as to the Judiciary Act: “This clause will debar the district court from interfering with the judgments at law in the State courts . . .”), with Currie, *supra* note 34, at 322 (noting that “dense clouds of ambiguity envelop[] this most obscure of all jurisdictional statutes,” and arguing for revision of the statute), Telford Taylor & Everett I. Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1170 (1933) (observing that “[t]he historical explanation for the inclusion of the anti-injunction provision in the Act of 1793 is a matter of some uncertainty”), Mayton, *supra* note 239, at 332 (explaining that the AIA did not preclude federal courts from enjoining state court actions but rather only barred single Supreme Court justices, sitting as circuit judges, from issuing such injunctions), and Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 614 (1971) (arguing that Congress intended to foreclose federal courts from using injunctions against state courts, but that it specifically approved the use of other writs including the writ of certiorari to stay state proceedings).

ply federal statutory law and constitutional provisions.²⁵³ Concurrent jurisdiction has typically been the rule. Indeed, the prohibition against federal court injunctions has a constitutional aspect, “[d]ue in no small part to the fundamental constitutional independence of the States [and their courts].”²⁵⁴

The powerful AIA is limited in two ways. First, it does not preclude federal courts from enjoining parties from *filing* actions in state court, but only from interfering with *pending* state court actions.²⁵⁵ Second, the cur-

²⁵³ The Supreme Court has stated that the AIA “is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.” *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 518 (1955).

²⁵⁴ *Chick Kam Choo*, 486 U.S. at 146.

²⁵⁵ See *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (“This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted.”); see also *Mitchum*, 407 U.S. at 226, 229-31 (1972) (repeatedly referring to 28 U.S.C. § 2283 as a bar against enjoining a “pending” state action); cf. *Kerr v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civ. A. No. 87-3223, 1987 WL 14515, at *1 (E.D. Pa. July 24, 1987) (purporting to rely on the protection of judgment exception to the AIA to enjoin commencement of state action where the federal court had previously held the dispute to be arbitrable). See generally Warren, *supra* note 252, at 366-78 (discussing the history of judicial comity and the federal courts’ reluctance to issue injunctions against state court proceedings); Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 728-29 (1961) (discussing situations where federal courts have issued injunctions apparently interfering with state judicial proceedings).

This distinction has raised a question on which appellate courts are divided—whether or not the AIA’s prohibition applies in situations where, at the time the federal court is requested to enjoin the filing of a state suit, the state suit has not been filed, but where a state suit is then filed prior to the issuance of a federal injunction prohibiting such a suit. To date, the First, Seventh, and Eighth Circuits have ruled that the Act does not apply (thereby permitting the injunction) so long as no state suit has been filed at the time of the request. See *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127-28 (8th Cir. 1982) (stating that a litigant should not have the power to render a future federal ruling nugatory “by taking the very act the federal court was being urged to enjoin”); *Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973) (same); see also *Hyde Park Partners v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988) (stating, in dictum, that the Act “does not . . . bar injunctive relief that would run against a state court . . . when the federal court’s injunctive power is invoked . . . by the plaintiff before the state court action is commenced”). The Sixth Circuit has rejected such a rule, reasoning that the ban of the Act is absolute, and that the rule adopted by the Seventh Circuit and others does not, in any event, prevent the unseemly race to the courthouse:

As long as the commencement of state proceedings in any way affects or triggers the operation of the anti-injunction statute, a race is assured, unseemly or not. What attorney worth his salt, learning that federal proceedings were about to start, would fail to race to the state courthouse beforehand if it suited his client’s interests to do so? *Barancik* does not eliminate the race; it merely moves the finish line.

Roth v. Bank of the Commonwealth, 583 F.2d 527, 532-33 (6th Cir. 1978). The Second Circuit has also questioned the rule:

We have considerable doubt whether the *Barancik* rule should be adopted in this circuit [I]t is axiomatic that one is not disabled from acting merely because an adverse litigant has *applied* for an order to bar such action However anomalous it may seem that a party can moot an issue by acting more rapidly than the court, it is

rent Act sets out three exceptions, apparently designed to be exclusive, pursuant to which federal courts are permitted to enjoin pending state court actions.²⁵⁶ Absent an exception, a federal injunction is not justified either by state court error or delay,²⁵⁷ nor even where the state court acts entirely without jurisdiction, such as where the dispute involves an area preempted

far more anomalous and dangerous than a mere application for injunctive relief be deemed equivalent to a court's order issuing an injunction.

Standard Microsystems Corp. v. Texas Instruments Inc., 916 F.2d 58, 62 (2d Cir. 1990). This important issue remains open, as the Supreme Court dismissed the writ of certiorari in a case which likely would have decided the question. *See Roth*, 583 F.2d at 539, *cert. granted*, 440 U.S. 944 (1979), *cert. dismissed*, 442 U.S. 925 (1979).

²⁵⁶ As the Supreme Court stated, "[b]y that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Richman Bros.*, 348 U.S. at 514; *see also Mitchum*, 407 U.S. at 228-29 (stating that the AIA "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions"); *Atlantic Coast Line*, 398 U.S. at 286-88 (stating that the Act is not a mere principle of comity, but rather absolutely prohibits federal injunctions against state court proceedings unless they fall within one of the three specifically defined exceptions and that such exceptions should not be enlarged by statutory construction). One commentator has observed that the three stated exceptions are not, however, exclusive, and has identified five additional situations in which federal courts may enjoin state court proceedings. *See Wood*, *supra* note 34, at 308. Wood specifies that injunctions may be permitted in cases involving the United States as a plaintiff, U.S. agencies, private attorneys general, different parties, or situations in which no state judicial proceeding is said to be involved. *See id.* at 308-12. However, as cases involving motions to compel arbitration do not typically involve these situations, this Article will not focus on these purported additional exceptions.

²⁵⁷ In *Richman Bros.*, the Court announced:

The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress.

348 U.S. at 518. Thus, federal and state actions may typically proceed simultaneously until either forum arrives at a judgment. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962) (allowing concurrent jurisdiction in state and federal court for disputes over violations of collective bargaining contracts); *Clafin v. Houseman*, 93 U.S. 130, 142-43 (1876) (allowing concurrent jurisdiction in state and federal court for the assignee in a bankruptcy action). *See generally* Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976) (discussing the power and obligation of state courts to hear cases involving federal causes of action). Where a state court has erred, the appropriate recourse is to appeal within the state system and ultimately to the United States Supreme Court. *See Atlantic Coast Line*, 398 U.S. at 296 (holding that "lower federal courts possess no power whatever to sit in direct review of state court decisions" and that appeal should be made to the state appellate court and "in certain emergenc[ies]" to the United States Supreme Court).

by the federal courts.²⁵⁸ The Supreme Court has also stated that these exceptions "are narrow and are 'not [to] be enlarged by loose statutory construction.'"²⁵⁹ Moreover, given the general prohibition of 28 U.S.C. § 2283 and the "fundamental principle of a dual system of courts,"²⁶⁰ "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."²⁶¹

Finally, courts have made clear that even where an injunction falls within one of the exceptions to the AIA, a federal court is by no means required to enjoin a state court proceeding. Rather, the federal court is still bound by "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."²⁶² One of the factors that most readily leads federal courts to enjoin state court actions, assuming one of the exceptions applies, is where a party is attempting to engage in bad faith or harassing activities.²⁶³

In light of these general principles, the following Sections will describe the three exceptions and their applicability to federal arbitral antisuit injunctions.

²⁵⁸ *Chick Kam Choo*, 486 U.S. at 149-50 (explaining that the federal court did not have inherent power to ignore 28 U.S.C. § 2283 and enjoin a state court proceeding merely because it invaded an area preempted by federal law, but, rather, the proper course was to seek resolution of that issue by the state court); see also *Atlantic Coast Line*, 398 U.S. at 294 ("[A] federal court does not have inherent power to ignore the limitations of 28 U.S.C. § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear.").

²⁵⁹ *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atlantic Coast Line*, 398 U.S. at 287).

²⁶⁰ *Atlantic Coast Line*, 398 U.S. at 297.

²⁶¹ *Id.*; see also *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion) (reaffirming the Court's opinion in *Atlantic Coast Line*).

²⁶² *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); see also *Chick Kam Choo*, 486 U.S. at 151 ("Of course, the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue.").

²⁶³ See, e.g., *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1499 (5th Cir. 1993) (affirming the issuance of an antisuit injunction where the plaintiff continued to bring frivolous cases); *Sassower v. Thompson, Hine & Flory*, No. 92-3553, 1993 WL 57466, at *1-2 (6th Cir. Mar. 4, 1993) (affirming an injunction barring the plaintiff, who had already filed 28 appeals and original actions based on the same facts, from filing further actions without permission); *Sassower v. Whiteford, Taylor & Preston*, Nos. 90-1142, 90-1146, & 90-8122, 1991 WL 136589, at *1 (4th Cir. July 1, 1991) (affirming the issuance of an injunction barring the plaintiff from filing any further actions without first obtaining leave of the court); *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) (stating that although preclusion doctrines are normally adequate to protect defendants against repetitious litigation, courts have the power under 28 U.S.C. § 1651(a) to enjoin a litigant who is abusing the court system by harassing its opponent).

1. Express Authorization Exception

a. *Background on the Express Authorization Exception*

The Supreme Court has held that a federal statute “expressly authorize[s]”²⁶⁴ a federal court to enjoin a state court action either where such authorization is clearly contained in the words of the statute *or* where the legislative history of the statute reveals that the “Act . . . created 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.”²⁶⁵ Applying this analysis in *Mitchum v. Foster*,²⁶⁶ the Court found that the AIA did not bar a federal court from enjoining a state court in connection with an action brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983.²⁶⁷ The Court explained that while the Civil Rights Act contained no explicit language authorizing federal anti-suit injunctions, the circumstances surrounding passage of that Act led to the conclusion that the statute expressly authorized an exception to the AIA prohibition.²⁶⁸ Observing that “[p]roponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights,”²⁶⁹ the Supreme Court concluded that “Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights . . . and it believed that these failings extended to the state courts.”²⁷⁰

²⁶⁴ 28 U.S.C. § 2283.

²⁶⁵ *Mitchum*, 407 U.S. at 237 (stating that no prescribed formula is required, an authorization need not expressly refer to 28 U.S.C. § 2283). This broadening of the exception has led some commentators to note that “the words ‘expressly authorized’ actually mean ‘implicitly authorized.’” Wood, *supra* note 34, at 297; see Redish, *The Anti-Injunction Statute*, *supra* note 142, at 726 (explaining that “express” authorization does not have to be express).

²⁶⁶ 407 U.S. 225 (1972).

²⁶⁷ The bookstore owner alleged that the closing violated his rights under the First and Fourteenth Amendments. 407 U.S. at 227. Commentators, while expressing sympathy with the decision’s bottom line, have often argued that the Court’s reasoning is confused. See, e.g., Redish, *The Anti-Injunction Statute*, *supra* note 142, at 733 (stating that *Mitchum* “may be as pleasing in result as it is questionable in its legal reasoning”).

²⁶⁸ The *Mitchum* Court also, however, seemingly adopted the reasoning of six pre-1948 Supreme Court decisions that relied on particular statutory language to conclude that an exception to the Act existed with respect to removal jurisdiction, legislation limiting the liability of ship owners, statutory interpleader, legislation regarding farm mortgages, habeas corpus, and the Emergency Price Control Act of 1942. See *Mitchum*, 407 U.S. at 234-35 & nn.12-17.

²⁶⁹ *Mitchum*, 407 U.S. at 240.

²⁷⁰ *Id.* at 242.

Nonetheless, the Court has also found that "express authorization" does not exist merely because a federal question is involved, because it is assumed that federal rights will not be adequately protected in state courts, or even where the federal courts have preempted the entire field under consideration. The Court has found, for example, that neither the Taft-Hartley Act,²⁷¹ governing labor relations, nor the Clayton Antitrust Act²⁷² expressly authorizes exceptions to the AIA, even though federal courts have exclusive jurisdiction over claims brought under both statutes.²⁷³

²⁷¹ 29 U.S.C. §§ 141-97 (1994). In *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511 (1955), the Court found that Taft-Hartley did not expressly authorize federal courts to enjoin state court proceedings, even though the statute preempts state court regulation in the labor field. *See id.* at 514, 517-18. While "assuming" that the state court lacked jurisdiction to hear the manufacturer's request for an injunction to preclude union picketing, the Court nonetheless found that the federal court was barred from enjoining the state court proceedings, observing that it is wrong to assume that "federal rights will not be adequately protected in the state courts." *See id.* at 518. The Supreme Court was also influenced by the fact that the federal court itself lacked jurisdiction to hear the dispute until it was first heard by the National Labor Relations Board. *See id.* at 516.

²⁷² In *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), a plurality of the Court reversed the district court's grant of an antisuit injunction, concluding that the Clayton Antitrust Act did not expressly authorize federal courts to enjoin state court actions, even though that statute provided for exclusive federal jurisdiction. *See id.* at 632. The Court reasoned that even though the statute was designed to protect an important policy, allowing federal courts to issue injunctions wherever necessary to protect an important federal policy would "completely eviscerate[]" 28 U.S.C. § 2283. *See id.* at 636.

Given the clear prohibition of § 2283, the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying § 2283; by the statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself.

Id. at 639. The *Vendo* plurality opinion was signed by only three Justices. However, the concurring Chief Justice agreed that the Clayton Act generally did not authorize federal antisuit injunctions, stating instead:

I would hold that no injunction may issue against currently pending state-court proceedings unless those proceedings are themselves part of a "pattern of baseless, repetitive claims" that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings.

Id. at 644 (Burger, C.J., concurring). The four dissenters would have held that the injunction was in fact expressly authorized by the Clayton Act. *See id.* at 647-54 (Stevens, Brennan, White, & Marshall, JJ., dissenting).

²⁷³ *Richman Bros.*, 348 U.S. at 514, 517-18; *see also Vendo*, 433 U.S. at 632 ("The private action for damages conferred by the Clayton Act is a 'uniquely federal right or remedy,' in that actions based upon it may be brought only in the federal courts.").

b. Application of the Express Authorization Exception to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

To date, all courts considering the question have held that a federal court is not justified in enjoining a state court action in the arbitration context based on the "expressly authorized" exception.²⁷⁴ This conclusion seems correct. Turning first to the express language of the FAA, it is immediately evident that the statute does not specifically authorize federal courts to enjoin ongoing state proceedings. Rather, as many courts have noted, sections 3 and 4 of the statute merely allow courts to stay litigation pending before them and to compel arbitration.²⁷⁵

Nor does the legislative history or policy underlying the FAA reveal the FAA to be "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."²⁷⁶ In contrast to the history of the Civil Rights Act of 1871, relied upon by the Supreme Court in *Mitchum* to justify an exception to the AIA,²⁷⁷ the history of the FAA contains no evidence that the FAA was intended to allow federal courts to control actions taken in state court. Rather, as discussed earlier, this history shows that the FAA was passed to supplement an ongoing effort to mod-

²⁷⁴ See, e.g., *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1309-10 (M.D. Ala. 1997) (concluding that the expressly authorized exception does not apply), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998); *Swofford v. Shearson Lehman/Am. Express, Inc.*, 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (holding that none of the three exceptions to the AIA apply); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973) (holding that federal arbitration statutes do not explicitly grant United States District Courts the authority to stay state court proceedings); *In re Arbitration of Controversies Between Necchi Sewing Machine Sales Corp. & Carl*, 260 F. Supp. 665, 669 (S.D.N.Y. 1966) ("[A] stay in this case is most certainly not 'expressly authorized by Act of Congress.'"). Many other courts have found that either the second or third exception to the AIA is met, while conspicuously failing to mention the first exception. See *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (holding that no abstention was warranted and granting a stay in a state court contract dispute); see also *Ferrari N. Am., Inc. v. Crown Auto Dealerships, No. 94 Civ. 8541 (KMW)*, 1995 WL 614558, at *5 (S.D.N.Y. Oct. 19, 1995) ("[T]he Anti-Injunction Act . . . allows a federal court to stay state proceedings 'where necessary in aid of its jurisdiction, or to protect and effectuate its judgments.'"), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *Pervel Indus., Inc. v. TM Wallcovering Inc.*, 675 F. Supp. 867, 870 (S.D.N.Y. 1987) (applying the "necessary in aid of jurisdiction" exception), *aff'd*, 871 F.2d 7 (2d Cir. 1989).

²⁷⁵ See *supra* note 102 and accompanying text (noting that the FAA does not expressly authorize federal courts to enjoin ongoing state proceedings).

²⁷⁶ *Mitchum v. Foster*, 407 U.S. 225, 237 (1972).

²⁷⁷ See *supra* text accompanying notes 264-70 (detailing the policy reasons justifying the exception).

ernize state arbitration laws.²⁷⁸ Moreover, the enforcement mechanisms set up in the Act, including particularly the fact that the Act does not give rise to federal question jurisdiction, sharply undercut any argument that the purposes of the FAA would be frustrated if it could not be enforced in federal court. Instead, as the Court stated in *Moses H. Cone*, "enforcement of the Act is left in large part to the state courts."²⁷⁹ In sum, given the federal policy underlying the FAA and given the federalism principles supporting the AIA, neither the fact that the FAA imposes important federal policy nor the fact that it preempts state law appears sufficient to justify an injunction under the "expressly authorized" exception.

2. The "In Aid of Jurisdiction" Exception

a. Background on the "In Aid of Jurisdiction" Exception

The "in aid of jurisdiction" exception to the AIA is not susceptible to entirely clear explication. Although the exception appears, by its wording, to be the one most subject to expansionary interpretation by the courts, one commentator has observed that it "has often been construed with the greatest nineteenth century rigor the courts can muster."²⁸⁰ Another commentator has called the exception "the most enigmatic of the three exceptions to the Anti-Injunction Statute."²⁸¹

At minimum, the exception allows federal courts to issue injunctions both to protect their own removal jurisdiction and to prevent state courts from interfering with in rem actions that were first filed in federal court.²⁸²

²⁷⁸ See *supra* note 102, 103-06 and accompanying text (noting that steps were taken to modernize state arbitration laws as the FAA was passed to revise the federal court's approach to arbitration).

²⁷⁹ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The Court did go on to state that the Act represented federal policy and should be "vindicated by the federal courts where otherwise appropriate." *Id.* As discussed earlier, however, this decision does not justify the issuance of federal antisuit injunctions to support arbitration. See *supra* text accompanying notes 91-96 (describing two reasons why *Moses H. Cone* does not show that the FAA justifies federal courts' actions of injunction against state courts).

²⁸⁰ Wood, *supra* note 34, at 301.

²⁸¹ REDISH, *supra* note 252, at 324.

²⁸² The language of the 1948 Reviser's Note might seem to allow the exception to be used only to support removal jurisdiction. It states as to this exception only: "The phrase . . . 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." 28 U.S.C. § 2283 (1948) (Reviser's Note). However, as discussed in the text, the Court has explicitly applied the exception to in rem actions. As Professor Martin Redish has observed, interpreting the exception to cover only removal cases would seemingly render the clause superfluous and would also fly in the face of that portion of the Reviser's Note which states that "the revised section restores the basic law as generally understood and interpreted prior to the

As to in rem actions that are first filed in federal court, the concept is that because the “res” cannot be guarded simultaneously by two jurisdictions, the federal court is entitled to enjoin the state action to ensure its own continued jurisdiction. While this crucial distinction between actions brought “in rem” and those brought “in personam” was originally explicated at length in *Kline v. Burke Construction Co.*,²⁸³ prior to the 1948 amendment of the statute, that decision was cited favorably in two recent Supreme Court decisions.²⁸⁴

Although the Supreme Court has not explicitly said that the “in aid of jurisdiction” exception may *only* be used for removal or in rem cases, it has in several decisions sharply limited the scope of the exception, distinguishing specifically between actions brought in rem and those brought in personam.²⁸⁵ The Court has explained that typically, where the actions are in personam and where the federal and state courts have concurrent jurisdiction, neither court should be allowed to interfere with the other, but rather

Toucey decision.” 28 U.S.C. § 2283 (1948) (Reviser’s Note) (emphasis added); see Redish, *The Anti-Injunction Statute*, *supra* note 142, at 744-45. The “res” exception was well established at the time of *Toucey*. See *id.*

²⁸³ 260 U.S. 226 (1922).

²⁸⁴ See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (plurality opinion) (noting that the Court has never viewed parallel in personam actions as interfering with the jurisdiction of either court); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 295-96 (1970) (“[T]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.”).

²⁸⁵ One decision, *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), does seem to support a somewhat broader interpretation of the exception. In that case, the Court affirmed the district court’s grant of a preliminary injunction enjoining the company from enforcing an anti-picketing injunction it had obtained in state court. See *id.* at 505. The facts of the case were that the employer had first sought an injunction against the union in state court and then filed an unfair labor practice claim with the NLRB. See *id.* at 502. The NLRB concluded, in part, that the union had acted unlawfully and went on to seek a federal court injunction to restrain the conduct of the union. See *id.* at 502. The Supreme Court affirmed the district court’s grant of the injunction, reasoning that in order to make the Board’s power under federal labor law effective:

[T]he Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. . . . [For the district court] [t]o exercise its jurisdiction freely and fully it must first remove the state decree.

Id. at 505-06. However, although *Capital Service* seems to support a broader interpretation of the statute, it has been sharply undercut by the later decisions discussed in the text. In addition, the Court itself, just one year after issuing *Capital Service*, seemingly limited the strength of the decision’s holding by construing the decision as having been made under the “expressly authorized” exception rather than the “in aid of jurisdiction” exception to the Act. See *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955) (describing *Capital Services* as based on the “express authorization” exception); see also Redish, *The Anti-Injunction Statute*, *supra* note 142, at 753 (noting the questionable implications of *Capital Service* in light of its characterization by the Court in *Richman Bros.*).

parties should use appellate mechanisms and the doctrines of claim preclusion and issue preclusion to protect against incorrect or inefficient results.²⁸⁶ For example, in 1970, *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*²⁸⁷ vacated the district court's grant of an antisuit injunction against a state court's anti-picketing order, even though the union claimed that the injunction was necessary to support both the district court's prior refusal to bar the picketing and the Supreme Court's determination in a related case that picketing was a protected activity under federal law.²⁸⁸ The Court explained that antisuit injunctions are not justified merely because state proceedings "interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear."²⁸⁹ Rather, it must be shown that the injunctive relief is "necessary to

²⁸⁶ The Court in *Kline v. Burke Constr. Co.*, while defending the use of antisuit injunctions in the in rem context, stated:

But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending.

260 U.S. at 230. Similarly, in *Mandeville v. Canterbury*, the Court, reversing an injunction issued against a state court by a federal court, stated that:

[W]here the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other.

318 U.S. 47, 49 (1943) (per curiam).

²⁸⁷ 398 U.S. 281 (1970).

²⁸⁸ *Atlantic Coast Line* involved picketing at the Moncrief switching yard near Jacksonville, Florida. As soon as the picketing began, the company, Atlantic Coast Lines ("ACL"), sought an anti-picketing injunction in federal court. After the federal court denied this injunction, in 1967, ACL sought and obtained an anti-picketing injunction in state court. See *id.* at 283. Two years later, the Supreme Court, in a factually related decision, determined that unions had a federally protected right to picket under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-88, and that state courts could not permissibly enjoin such picketing. See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 393 (1969) ("[P]icketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription."). Armed with this Supreme Court precedent, the union asked the federal court to dissolve the state court injunction prohibiting the Moncrief Yard picketing, and the district court granted its request. See *Atlantic Coast Line*, 398 U.S. at 284. The Court of Appeals summarily affirmed the grant of the injunction. See *id.*

²⁸⁹ *Atlantic Coast Line*, 398 U.S. at 294. Similarly, in *Richman Bros.*, decided just one year after *Capital Service*, the Court found the "in aid of jurisdiction" exception inapplicable, where the federal court itself had no jurisdiction prior to action by the NLRB. See *Richman Bros.*, 348 U.S. at 519 ("[N]onexistent jurisdiction therefore cannot be aided."). *Richman*

Rather, it must be shown that the injunctive relief is “necessary to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.”²⁹⁰ The Court concluded: “In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.”²⁹¹ It found that even though a prior Supreme Court decision had made clear that the state court’s decision was improper, the union’s appropriate remedy was to seek review within the state system or ultimately to the Supreme Court.²⁹²

Notwithstanding such narrowing Supreme Court decisions, several lower courts have recently used the “in aid of jurisdiction” exception more broadly, particularly to assist in the management of complex litigation and class actions. Some courts have, for example, relied on the exception to justify the injunction of state proceedings to protect tentative settlements in antitrust or mass tort class actions,²⁹³ or to protect the limited funds avail-

rather than the “in aid of jurisdiction exception.” See *id.* at 517 (noting that *Capital Services* recognized express authority).

See *supra* note 257 for further discussion of *Richman Bros.*’s reversal of the district court’s antisuit injunction. See also 17 WRIGHT ET AL., *supra* note 215, § 4225, at 534-35 (noting that courts interpreting the “necessary in aid of its jurisdiction” exception to the AIA have concluded that it “does not allow a federal court to enjoin state proceedings merely because they involve issues presented in a federal in personam action” (citations omitted)).

²⁹⁰ *Atlantic Coast Line*, 398 U.S. at 294.

²⁹¹ *Id.* at 295.

The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court.

Vendo Co. v. Lektro-Vend. Corp., 433 U.S. 623, 642 (1977) (plurality opinion).

²⁹² See *Atlantic Coast Line*, 398 U.S. at 296 (“[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.”).

“[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear.” Rather, when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149-50 (1988) (citations omitted).

²⁹³ See, e.g., *Carlough v. Amchem Prods. Inc.*, 10 F.3d 189, 201-04 (3d Cir. 1993) (holding that a federal court could enjoin class members from filing a state court action when the federal court had provisionally approved the settlement of a complex asbestos class action and when the parties were attempting to use the state suit as a “preemptive strike” against the federal settlement and to have the state court declare what the federal court should do); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334 (5th Cir. Unit A Oct. 1981) (holding that because a state court action would be a challenge to the federal court’s jurisdic-

able to creditors in a bankruptcy action.²⁹⁴ Also, in one well known busing case, in which the district court's jurisdiction was continuing, the federal court enjoined certain parties from bringing a state court action.²⁹⁵ In several cases, federal courts have even issued antisuit injunctions based on potential settlements of particularly complex matters,²⁹⁶ or based merely on the federal court's continuing responsibility over a class action.²⁹⁷ Federal courts have also sometimes felt free to enjoin state court proceedings in insurance cases, wherein the insurer brings a declaratory action in federal court seeking a decision that the policy is invalid, while the insured files an action under the policy in state court.²⁹⁸

Liab. Litig., Civ. A. No. CV94-P-11558-S, 1994 WL 114580, at *7 (N.D. Ala. Apr. 1, 1994) (enjoining related state and federal actions where the court had approved a preliminary settlement agreement); *Ahern v. Fibreboard Corp.*, Civ. A. No. 6:93cv526, 1993 WL 767801, at *1 (E.D. Tex. Sept. 28, 1993) (issuing an antisuit injunction to support a proposed settlement in a mandatory class action).

²⁹⁴ See *In re Joint E. & S. Dist. Asbestos Litig. (In re Eagle-Picher Indus., Inc.)*, 134 F.R.D. 32, 36-38 (E. & S.D.N.Y. 1990) (stating that where a defendant would likely go bankrupt if the court allowed parallel proceedings, and where the court is at the "critical juncture" of reviewing the stipulation of settlement of a proposed class action, the federal court is empowered to enjoin a state proceeding that may interfere with that purpose).

²⁹⁵ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (stating that it is proper to enjoin a state court when a state court proceeding would endanger the federal court's desegregation orders); see also *Wesch v. Folsom*, 6 F.3d 1465, 1470-71 (11th Cir. 1993) (concluding that the "aid of jurisdiction" exception justified the federal court, which had issued a congressional redistricting order, in enjoining a state court suit that sought congressional redistricting); *Garcia v. Bauza-Salas*, 862 F.2d 905, 909 (1st Cir. 1988) (stating that the "aid of jurisdiction" exception applies "in cases where a state court proceeding would interfere with ongoing federal oversight of a case").

²⁹⁶ See *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (enjoining a state court action that "threatened to frustrate" a federal proceeding of "substantial scope" which had already required expenditure of substantial time and was nearing a possible settlement); *In re Asbestos Sch. Litig.*, 1991 U.S. Dist. LEXIS 5142, at *6-9 (E.D. Pa. Apr. 16, 1991) (holding that where an ongoing class action suit had been in litigation for nine years and where progress was finally being made in federal court, the potential for resolution justified enjoining state court proceedings under the "in aid of jurisdiction" exception to the AIA).

²⁹⁷ See *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) (stating that a federal court has the power to enjoin a state court action in order to support the federal court's continuing jurisdiction over a class action and reasoning that extremely complex litigation is the equivalent of a "res"); see also *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 255-56 (S.D.N.Y. 1989) (enjoining landlords from proceeding against tenants in state housing court to collect rent where the district court was in the process of deciding a challenge brought by low-income tenants to city policies and procedures in federal court). But see *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1298-99 (5th Cir. 1992) (refusing to interpret the "in aid of jurisdiction" exception so broadly as to allow injunctions with respect to all federal court class actions); *In re Ford Motor Co. Bronco II Prods. Litig.*, MDL-991, 1995 WL 489480, at *3 (E.D. La. Aug. 15, 1995) (same).

²⁹⁸ See generally *Redish, The Anti-Injunction Statute*, *supra* note 142, at 748-50 (noting that in these circumstances, "federal courts have generally felt free to enjoin the state proceeding"). There are many examples of insurance cases in which the federal court has enjoined the state action. See *Hesselberg v. Aetna Life Ins. Co.*, 102 F.2d 23, 27 (8th Cir. 1939)

Nonetheless, such broad interpretations have been disputed even in complex cases,²⁹⁹ and they are not the norm. Not only the Supreme Court, but also many appellate courts have reiterated that the mere fact that federal issues are presented in a state case, even combined with the fact that those federal issues are preemptive, does not justify a federal court in enjoining the state court's consideration of those issues.³⁰⁰ Rather, as one commentator observed, these expansions are "the exception . . . and not the rule."³⁰¹

(finding that the federal court had jurisdiction to stay the state proceeding); *Jamerson v. Alliance Ins. Co.*, 87 F.2d 253, 256 (7th Cir. 1937) (same). *Cf. Royal Ins. Co.*, 960 F.2d at 1293-301 (affirming the district court's reliance on the "relitigation" exception to enjoin a state court from considering coverage claims which a federal court had already ruled were not covered by the policy, but reversing the district court's use of the "in aid of jurisdiction" exception to prohibit litigation in state court of related tort, waiver, and estoppel claims that arose after the issuance of a declaratory judgment).

²⁹⁹ See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 144-45 (3d Cir. 1998) (refusing to issue an injunction as necessary in aid of jurisdiction even though the federal court had previously rejected class certification and a settlement now being approved in state court); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1181-83 (8th Cir. 1982) (reversing a grant of mandatory class certification on the ground that it constituted an injunction that violated the AIA); *In re Glenn W. Turner Enters. Litig.*, 521 F.2d 775, 780 (3d Cir. 1975) (holding that the district court could not enjoin a state attorney general from executing a state judgment even if executing the state judgment would render the defendants unable to pay any future federal judgment); *United States v. Ford Motor Co.*, 522 F.2d 962, 965-66 (6th Cir. 1975) (stating that when a state court proceeding is "not interfering with a res in the possession of" a federal court, a federal court would violate the AIA by interfering with the state action); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 903 F. Supp. 16, 18 (W.D.N.C. 1995) (finding that the AIA prohibits federal courts from enjoining class members from continuing to pursue in personam state actions although the AIA would allow a federal court to bar the commencement of new state actions); *cf. Standard Microsystems Corp. v. Texas Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990) (vacating the district court's injunction of a state court action as a violation of the AIA, even though the suit involved the same claims as the federal court action, and distinguishing *Baldwin* because here the federal court was not on the verge of settling a complex matter).

³⁰⁰ See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) (noting that federal issues arising in state proceedings should be resolved in state courts); *1975 Salaried Retirement Plan v. Nobers*, 968 F.2d 401, 411 (3d Cir. 1992) (observing that although ERISA preempted state law claims, benefit plans were not entitled to enjoin state suit since none of three exceptions applied); *National R.R. Passenger Corp. v. Florida*, 929 F.2d 1532, 1535 (11th Cir. 1991) ("The law is clear that a claim of federal preemption does not constitute an exception to this absolute prohibition [on injunctions] . . . regardless of both the merits of the federal preemption claim and the validity of the federal or state courts' asserted jurisdiction over the controversy."); *Total Plan Servs., Inc. v. Texas Retailers Ass'n.*, 925 F.2d 142, 144-46 (5th Cir. 1991) (affirming the district court's refusal to enjoin a state court from considering claims, even assuming that such claims arise under ERISA which is within the exclusive jurisdiction of federal court); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131-32 (5th Cir. 1990) (reversing the district court's injunction prohibiting federal court defendants from pursuing foreclosure proceedings in state court during the pendency of a federal lender liability action based on RICO).

³⁰¹ Wood, *supra* note 34, at 303; see also Sherman, *supra* note 77, at 938-39 (noting a modest expansion of antisuit injunctions in the past decade to prevent class action members from litigating their suits individually).

Even assuming, as is by no means clear, that the Supreme Court will accept some lower courts' issuance of injunctions to aid jurisdiction in the context of complex class actions, the rationale supporting such an exception would not seem to apply in the context of a typical arbitration case. The Subsection which follows will address the question of whether the party requesting a federal court injunction in an arbitration case can meet the *Atlantic Coast Line* test of showing that the injunctive relief is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."³⁰²

b. Application of the "In Aid of Jurisdiction" Exception to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

Several federal courts have either held or stated that federal courts which have determined that it is appropriate to issue an order compelling arbitration under the FAA may also rely on the "in aid of jurisdiction" exception to the FAA to enjoin ongoing state proceedings.³⁰³ However, only

³⁰² *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970).

³⁰³ See *TranSouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1296-97 (11th Cir. 1998) (raising the possibility that an exception might apply once the district court had issued an order compelling arbitration, but remanding for consideration of these issues); *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F. Supp. 822, 829-31 (E.D. Pa. 1997) (granting a preliminary injunction barring the defendants from continuing to seek relief in a state court action in which the court had earlier refused to stay the action pending arbitration, concluding that such an order was justified "in aid of jurisdiction" because the federal court had previously granted a motion to compel arbitration), *aff'd as modified and remanded sub nom. Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (granting a motion to compel arbitration and also issuing an injunction against the state court proceeding on the grounds of either aiding jurisdiction or protecting or effectuating judgments); *Ferrari N. Am., Inc. v. Crown Auto Dealerships*, No. 94 Civ. 8541 (KMW), 1995 WL 614558, at *5 (S.D.N.Y. Oct. 19, 1995) (issuing an order both compelling arbitration and also staying proceedings initiated before the Florida Department of Highway Safety and Motor Vehicles and concluding that a stay was justified either in aid of jurisdiction or to protect and effectuate the court's judgment), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *McMahon v. Shearson/Am. Express Inc.*, 709 F. Supp. 369, 374-75 (S.D.N.Y. 1989) (granting a permanent injunction precluding the plaintiffs from pursuing, and the state court from granting, relief in the state court where the federal courts had previously ruled the dispute was arbitrable and where the current ruling resolved the issue of the venue of arbitration, concluding that an injunction was necessary in aid of jurisdiction); *Pervel Indus., Inc. v. TM Wallcovering, Inc.*, 675 F. Supp. 867, 869 (S.D.N.Y. 1987) (granting a motion to compel arbitration and staying a pending state court action in order to preserve the federal court's jurisdiction), *aff'd*, 871 F.2d 7 (2d Cir. 1989).

two of the courts offer any substantial reasoning in support of this position.³⁰⁴

In *Specialty Bakeries, Inc. v. RobHal, Inc.*,³⁰⁵ where the federal court had, in a previous decision, ordered that the contractual dispute between two sets of bagel companies proceed to arbitration, the court declared that it was justified in enjoining one of the parties from seeking broad injunctive relief in a state court action that had been filed prior to the federal action. The court explained:

In our Order dated March 26, 1997, we "ORDERED that this court will retain jurisdiction until further order of court, pending completion of the arbitration proceeding." As such, we retained jurisdiction "to supervise implementation of [our] order." To allow HalRob to proceed to a preliminary injunction hearing in the state court seeking relief far beyond what the parties contemplated in that forum would eviscerate the arbitration process and make it a "hollow formality," with needless expense to all concerned.³⁰⁶

The federal court further cited the federal policy favoring arbitration and opposing prolonged litigation.³⁰⁷ It stated that although it was sensitive to federalism and comity concerns, the injunction was necessary "to preserve the integrity of this arbitration process. Otherwise, HalRob can obtain full and complete injunctive relief and money damages in the state court, as it requests in its complaint there. Little or nothing would be left for the arbitrator."³⁰⁸

In *TranSouth Financial Corp.*,³⁰⁹ the Eleventh Circuit considered an appeal from a district court decision abstaining from granting a motion to compel arbitration and held that it was barred under the AIA from granting an arbitral antisuit injunction.³¹⁰ After reversing the abstention decision,³¹¹ the appellate court offered some dicta regarding whether the district court might grant a motion to enjoin the ongoing state court action if, on remand,

³⁰⁴ The rest of the decisions, all from the Southern District of New York, simply cite prior precedent which supposedly justifies the injunction as falling under an exception to the AIA. However, none of the prior precedent sets out a justification for relying on the "in aid of jurisdiction" exception. See *supra* note 303 (citing cases holding that injunctions were appropriate as exceptions to the AIA but, with the exception of *TranSouth* and *Specialty Bakeries*, failing to provide a clear rationale for the exceptions).

³⁰⁵ 961 F. Supp. 822 (E.D. Pa.), *aff'd as modified and remanded sub nom. Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997).

³⁰⁶ *Id.* at 830 (citations omitted) (alterations in original).

³⁰⁷ See *id.*

³⁰⁸ *Id.*

³⁰⁹ 149 F.3d 1292 (11th Cir. 1998).

³¹⁰ 975 F. Supp. 1305 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

³¹¹ See *TranSouth*, 149 F.3d at 1294-96.

it chose to issue an order compelling arbitration. Noting that the exception could, at least in some circumstances, be used to enjoin state courts' consideration of in personam as well as in rem cases,³¹² the Eleventh Circuit recognized that the question remained whether such an injunction would be "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."³¹³ It stated that "[i]f the district court orders arbitration, a stay of the state court proceedings might be appropriate at that point because continued state proceedings could jeopardize the federal court's ability to pass on the validity of the arbitration proceeding it has ordered."³¹⁴ The court reasoned that "when a federal district court grants a motion to compel arbitration it retains jurisdiction to confirm or vacate the resulting arbitration award under 9 U.S.C. §§ 9-10."³¹⁵ Ultimately, however, the court refused to reach out to decide this question.³¹⁶

Two other federal courts have interpreted the "in aid of jurisdiction" clause quite differently, though neither explicated the exception in any detail. In *TranSouth Financial Corp. v. Bell*,³¹⁷ the district court ruled that it was not authorized, by the "in aid of jurisdiction" exception, to enjoin a state court action. Citing the Supreme Court's decision in *Atlantic Coast Line*, the district court found that traditionally the exception applied to in rem proceedings and that "[b]eyond that, it is very difficult to distinguish situations in which this exception solely applies."³¹⁸ In *Swofford v. Shearson Lehman/American Express, Inc.*,³¹⁹ the district court refused to stay the state court action pending the federal court's ruling on the petition to compel arbitration. It stated simply:

The Court does not believe that any of the exceptions to the Act are applicable here Plaintiff has the opportunity for a trial on the merits of the action against him in the state court. There is no reason to believe that justice will not be served thereby. If the Plaintiff is correct in his assertions made here, then

³¹² See *id.* at 1296-97 (citing *Peterson v. BMI Refractories*, 124 F.3d 1386, 1395 (11th Cir. 1997) (holding that "aid of jurisdiction" exception could be used to stay state court action where the suit had been removed to federal court).

³¹³ *Id.* at 1297 (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970)).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See *id.*

³¹⁷ 975 F. Supp. 1305 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

³¹⁸ *Id.* at 1311.

³¹⁹ 604 F. Supp. 1128 (E.D. Ark. 1985).

he has recourse in the appellate courts of Arkansas if he loses in state court and chooses to file an appeal.³²⁰

Only the Eleventh Circuit's *TranSouth* decision squarely addresses the question of whether an arbitral antisuit injunction meets the *Atlantic Coast Line* test of being "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case,"³²¹ or whether, instead, the federal and state cases should be allowed to coexist as two in personam actions. In examining this question, it should be pointed out that certain factors some might think pertinent are not in fact relevant to the analysis. Given *Atlantic Coast Line* and *Chick Kam Choo*, it is clear that neither the fact that relief is sought under a federal law, nor the fact that the FAA preempts inconsistent state laws, nor the fact that there is a strong federal policy favoring arbitration, justify a federal court in enjoining a previously filed state court action.³²² Rather, the Court has repeatedly enunciated that state courts can and must be trusted to make their own determinations.³²³ This seems especially salient given the policy underlying the FAA, and given that the Court has explicitly held that the FAA applies in state as well as in federal court.³²⁴ Nor, in the typical arbitration case, has the federal court made the extreme commitment of resources that some courts have found justify an injunction, such as where the court has all but signed off on a final settlement. Thus, a strong argument can be made that the ongoing state court action does not interfere with the federal court's arbitration ruling any more than the typical state suit interferes with any other ongoing federal action; therefore, the two lawsuits should be permitted to coexist.³²⁵

³²⁰ *Id.* at 1129.

³²¹ *Atlantic Coast Line*, 398 U.S. at 295.

³²² See *supra* notes 96-113 and accompanying text (arguing that "it is by no means clear that federal arbitration policy favors federal courts' issuance of arbitral antisuit injunctions"). But see Wood, *supra* note 34, at 316 (arguing that "[i]f the state law is hostile to arbitration, and the state court rejects a request for a stay pending arbitration, the case for a federal injunction is strong").

³²³ See *supra* text accompanying notes 248-63, 282-302 (arguing that concurrent jurisdiction is the norm, and that even federal preemption does not justify antisuit injunctions).

³²⁴ See *supra* text accompanying notes 93-96 ("Since 1983 the Supreme Court has on multiple occasions made it clear that the FAA requires state courts as well as federal courts to enforce parties' arbitration agreements."). Even where a state court has actually ruled that arbitration is not required, it is wrong to assume that the state court *incorrectly* interpreted either the FAA or the parties' agreement to arbitrate. This is the flaw in Diane Wood's argument. See Wood, *supra* note 34, at 316 (arguing that "[i]f the state law is hostile to arbitration, and the state court rejects a request for a stay pending arbitration, the case for a federal injunction is strong").

³²⁵ In *Specialty Bakeries v. RobHal, Inc.*, for example, the federal determination that the dispute was arbitrable was placed in no more jeopardy than any other federal ruling in a con-

The Eleventh Circuit's contrary reasoning in *TranSouth* has some initial appeal, but ultimately is not compelling. Whereas the Eleventh Circuit suggests that courts that grant motions to compel arbitration necessarily retain jurisdiction to consider a future motion to confirm or vacate the arbitral award, this is not always the case. Rather, in some disputes no motion to confirm or vacate is ever filed.³²⁶ In other disputes, a motion to confirm or vacate may be filed in a court other than that which granted the motion to compel arbitration.³²⁷ Some courts have even held that no motion to confirm may be filed in *any* court unless the parties in their arbitration agreement included "magic words" allowing for court confirmation of the arbitral award in a particular jurisdiction.³²⁸ Thus, it is not true that a federal court which grants a motion to compel will inevitably be faced with a motion to confirm or vacate the arbitral award. Moreover, it is hard to see why it

current jurisdiction situation. See 961 F. Supp. 822 (E.D. Pa.), *aff'd as modified and remanded sub nom.* Specialty Bakeries v. HalRob, 129 F.3d 726 (3d Cir. 1997). The state court could decide whether or not it was compelled to or desired to follow the federal court ruling. *But see supra* text accompanying notes 305-08 (discussing the court's view in *Specialty Bakeries* that to allow the state action to proceed would "eviscerate the arbitration process").

It might be argued that arbitration decisions are unique in that pro-arbitration orders are, by their nature, preliminary rulings, and that federal courts must be authorized to issue injunctions to protect their jurisdiction over these matters. As discussed *supra*, in a typical concurrent jurisdiction situation, the two courts effectively participate in a race to judgment, such that once one court has issued a final judgment, the judgment will presumably be entitled to preclusive effect in the other jurisdiction. In the arbitration context, however, a federal court's determination that a dispute must be resolved through arbitration will not necessarily be held to be a final judgment and, therefore, entitled to preclusive effect by the state court. As will be discussed, *infra* at text accompanying notes 367-70, a number of courts have held that an order compelling arbitration is final only when the motion to compel arbitration was independent and not embedded in an action on the merits. The federal court's ruling may become final only after the arbitrators have ruled and their ruling has been confirmed by the federal court. Thus, the federal court may itself be incapable of issuing a speedy decision that will terminate the state court proceeding. However, it is not clear that the model of competing concurrent courts turns on each court's right to issue a final decision. Moreover, it is not clear that this situation is really unique. In many cases a court is not in the position to issue a final judgment until a great deal of discovery has been done, motions have been presented, and, perhaps, trial has occurred.

³²⁶ See MACNEIL ET. AL., *supra* note 96, § 38.1.1 (observing that confirmation is used where awards are "not complied with voluntarily").

³²⁷ See *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 183-84 (5th Cir. 1974) (holding that although Florida federal district court had issued a motion to compel arbitration and technically retained jurisdiction, the motion to confirm arbitration should be heard in the Northern District of Ohio, where the arbitration had been held).

³²⁸ See, e.g., *Oklahoma City Assocs. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 795 (10th Cir. 1991) (refusing to confirm an arbitral award where the arbitration agreement did not call for court confirmation); *Varley v. Tarrytown Assocs.*, 477 F.2d 208, 210 (2d Cir. 1973) (same). See generally MACNEIL ET. AL., *supra* note 96, § 38.2 (discussing and critiquing some courts' insistence on the presence of an "entry of judgment" clause in order to allow confirmation of arbitral award).

would be necessary to enjoin state court proceedings to protect the federal court's future jurisdiction to grant a motion to confirm the arbitration. Until an arbitral award is issued, the federal court would seem to have no need for jurisdiction to confirm or vacate that award. While perhaps an antisuit injunction might be in order if, following issuance of an arbitral award, a state court sought to block confirmation in federal court, granting an antisuit injunction prior to such action seems quite premature.

Thus, I conclude that it will take a truly exceptional case to justify a federal court involved in an arbitration determination in enjoining an ongoing state court action in order to protect its jurisdiction. In the vast majority of situations the federal court should simply issue the order to compel arbitration and then allow the parties to deal with any consequences of the state court action.³²⁹ A federal court might, however, be justified in enjoining an ongoing state action on efficiency grounds where, although the state court suit had already been filed,³³⁰ the parties devoted substantially more time and energy to a federal court action which was now nearing termination through issuance of an order to compel arbitration.³³¹ Such a case would fairly closely resemble cases in which, to protect a federal court's settlement or managerial efforts, various courts have held that an injunction is necessary to protect the federal court's jurisdiction.³³² I also believe that a federal

³²⁹ If one of the parties were to ignore the federal court's order to compel arbitration, the court could, of course, issue appropriate sanctions, such as for civil or criminal contempt. *See, e.g.,* *United States v. United Mine Workers*, 330 U.S. 258, 292-94 (1947) (explaining that a court may use both civil and criminal contempt to enforce its orders, and observing that a defendant may be punished for criminal contempt of a court order even after the underlying order is found to have exceeded the court's subject matter jurisdiction); *see also* *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 78-79 (1988) (confirming that a court may use criminal or civil contempt powers to enforce its orders, but observing that a civil contempt order may depend on the court's underlying jurisdiction).

³³⁰ If the state court suit had not already been filed, the federal court would not be barred by the AIA from enjoining the filing of such a suit. *See supra* text accompanying note 255 (interpreting the AIA as "not preclud[ing] federal courts from enjoining parties from *filing* actions in state court, but only from interfering with *pending* state court actions").

³³¹ *See, e.g.,* *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368 (S.D.N.Y. 1983) (involving a lawsuit commenced in 1975), *aff'd*, 742 F.2d 1438 (2d Cir. 1983). In *Hunt*, following an eight week trial in 1978, the district court dismissed some of the plaintiffs' claims on the merits and ruled that others were subject to arbitration. *See id.* at 370. The remainder of the case then went to arbitration, but in 1982 the plaintiffs commenced a state court action seeking to vacate the arbitral award. The federal district court ruled that it retained jurisdiction over the claim it sent to arbitration and further ruled that it was justified in enjoining the state court's consideration of the claim by either the second or third exception to the AIA. The district court emphasized the "considerable familiarity of this Court with the complex issues involved in the case throughout its history . . ." *Id.* at 373. Here, given the vast expenditure of time and resources in the federal court, and given the state court's total lack of familiarity with the case, the injunction does seem justified to protect the federal court's jurisdiction.

court may, in rare circumstances, find it necessary to enjoin a state proceeding to protect its own jurisdiction where a party is engaged in harassing and abusive litigation tactics that threaten the viability of the federal action.³³³ Similarly, where the party requesting the antisuit injunction has itself engaged in harassing conduct, I believe the federal court should not issue the injunction to preserve its jurisdiction.

3. "Protection or Effectuation of Judgment" Exception (Relitigation Exception)

a. *Background on the "Protection or Effectuation of Judgment" Exception*

The "protection or effectuation of judgment" exception, also known as the "relitigation exception," is in some ways the most logical of the exceptions.³³⁴ As Professor Redish has observed, it would seem to be based on a policy that "[I]itigants should not be allowed to relitigate in state court issues between them that have already been determined by a federal court, lest the parties prevailing in federal court be subjected to harassment, and the finality and legitimacy of the federal court's findings be undermined."³³⁵ Yet, as Redish also observes, the policy makes less sense as one gives it closer scrutiny.³³⁶ Why can't state courts be expected to use their own preclusion doctrines to prevent relitigation of issues that have already been decided?³³⁷ The explanation that jumps to mind is that we can't trust state courts, perhaps seeking to aggrandize their own jurisdiction, not to ignore federal precedent.³³⁸ Yet, the Supreme Court has repeatedly stated that we *can*, as a general matter, trust state courts to properly apply federal law.³³⁹

³³² See *supra* text accompanying notes 293-98 (discussing cases in which "several lower courts have recently used the 'in aid of jurisdiction' exception more broadly, particularly to assist in the management of complex litigation and class actions").

³³³ It is somewhat difficult even to imagine this scenario. If, however, one of the parties to the federal suit kept repeatedly filing actions in various state courts, and if that party kept asking these various state courts to issue temporary restraining orders against its federal opponent, I would be sympathetic to the federal court's grant of an antisuit injunction.

³³⁴ See *supra* notes 248-51 and accompanying text (discussing the 1948 revision of the AIA to add a relitigation exception).

³³⁵ Redish, *The Anti-Injunction Statute*, *supra* note 142, at 723.

³³⁶ See *id.* at 723-24 (arguing that the doctrine of res judicata should be sufficient to prevent the relitigation of cases in the state courts).

³³⁷ See *id.*

³³⁸ See *id.* at 724 ("One explanation . . . is that the relitigation exception reflects pervasive mistrust of the state courts' ability and willingness to comprehend federal judgments and to accord them proper respect.").

³³⁹ See *supra* text accompanying notes 248-53 ("Thus, the A[IA] reflects the federalist premise that state courts can generally be trusted to apply federal statutory law and Constitutional provisions."); see also Henry J. Bourguignon, *The Federal Key to the Judiciary Act of*

Without resolving this basic concern as to the policy underlying the relitigation exception, the Supreme Court has set out a framework for when the exception does and does not apply. In essence, the Court has interpreted the exception narrowly, thus far precluding relitigation only of those specific issues that have actually been presented to, and resolved by, the federal court.³⁴⁰ Thus, in *Chick Kam Choo*,³⁴¹ the Court found that where a federal court had granted summary judgment as to the plaintiff's federal law claims and dismissed the plaintiff's Texas law claim for forum non conveniens,³⁴²

1789, 46 S.C. L. REV. 647, 701-02 (1995) ("The grant to state courts of maximum concurrent jurisdiction with the federal courts and of exclusive jurisdiction over most cases arising under federal law, treaties and the Constitution reflected a trust, perhaps reluctant for some, of the state courts in dealing with important federal suits of their own citizens."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (concluding that state courts have been considered primary and in many cases ultimate guarantors of constitutional rights). But see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1218 (1988) (noting that "the Constitution does not presume the parity of state and lower federal courts" but rather trusts the lower federal courts to guarantee the "supremacy of federal law and federal rights"); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 46-47 n.237 (1990) (arguing that the Framers did not trust state courts to "faithfully enforce federal law"); Neuborne, *supra* note 117, at 1105 (arguing that it is an "illusion that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts"); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 69-70, 100 (1975) (arguing that lower federal courts are "the enforcers of Supreme Court decisions" and that "[s]tate judges who are either unfamiliar with or antagonistic to federal programs . . . may do much to disrupt and injure federal schemes of national scope").

³⁴⁰ See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) (vacating the district court's injunction prohibiting enforcement of a state court injunction barring picketing, even though the district court had previously ruled that the picketing could not be enjoined under federal law). The Court reasoned that because it was not clear in the federal court's initial ruling that federal law precluded an injunction based on state law, the federal court was not justified in enjoining the subsequent state court action to protect its own order. See *id.* at 287-93. The Court explained that the state court should be allowed to make the determination whether federal law preempted the state court injunction, even though the federal court "was certain" that the state court action "was improper" under the Supreme Court's intervening decision in *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). See *Atlantic Coast Line*, 398 U.S. at 296; see also *supra* text accompanying notes 285-92 (arguing that the Supreme Court "has in several decisions sharply limited the scope of the exception, distinguishing specifically between actions brought in rem and those brought in personam").

³⁴¹ *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

³⁴² The case involved a Singapore resident who was killed in an accident in Singapore while performing repair work on a ship owned by Esso Tankers Inc., a subsidiary of Exxon. See *id.* at 142. The federal claims had been brought under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761, and the "general maritime law of the United States." *Id.* These claims were rejected by the district court, respectively, on the grounds that plaintiff was not a "seaman," that he had not died on the "high seas," and that Singapore law rather than U.S. general maritime law applied. See *id.* at 142-43.

and where the plaintiff brought a subsequent claim based on the same incident in state court alleging claims under both Texas and Singapore law, the federal court was justified in enjoining only that portion of the state court case that was based on Texas law, because only that claim involved "an issue that previously was presented to and decided by the federal court."³⁴³ The Court explained that the relitigation exception "is founded in the well-recognized concepts of *res judicata* and collateral estoppel,"³⁴⁴ and that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court."³⁴⁵ While commentators have expressed some dismay at the Court's narrow interpretation of the relitigation exception, observing that principles of *res judicata* normally preclude claims that *could have been raised* as well as those that were actually raised in a prior proceeding,³⁴⁶ all but one appellate court that has ruled on the issue after *Chick Kam Choo* has concluded that only actually litigated claims may be protected.³⁴⁷

The Court has further limited the scope of the relitigation exception by ruling that even where a state court has explicitly determined that a prior federal court judgment is not entitled to *res judicata* effect in the state court,

³⁴³ *Id.* at 147. The district court had initially granted the defendant's motion to permanently enjoin the plaintiff and her attorneys "from prosecuting or commencing any causes of action or claims against [respondents] in the courts of the State of Texas or any other state . . . arising out of or related to the alleged wrongful death of Leong Chong." *Id.* at 144. The Fifth Circuit affirmed. *See id.* at 144-45.

³⁴⁴ *Id.* at 147.

³⁴⁵ *Id.* at 148. The Supreme Court also found that it would be up to the state court to determine whether, as the defendant argued, the state's forum non conveniens determination was preempted by federal maritime law. *See id.* at 149-50. It stated: "[W]hen a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." *Id.*

³⁴⁶ *See, e.g.,* 17 WRIGHT ET AL., *supra* note 215, § 4226 & nn.7-9 (Supp. 1997) ("[C]laim preclusion bars state litigation on a part of the claim that could have been, but was not, heard in the federal action . . ."); George A. Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 NEB. L. REV. 643, 659 (1993) (arguing that *Chick Kam Choo* should not be read to mean that a federal court may enjoin a state court from considering only those issues actually decided by the federal court and asserting that the Court's language to this effect is "unconsidered dicta," in that defendants did not argue for preclusion of claims that could have been but were not raised in the federal court).

³⁴⁷ *See In re SDDS, Inc.*, 97 F.3d 1030, 1037 (8th Cir. 1996) (holding that only issues which have actually been decided by a federal court permit enjoining a state court from relitigating the issue); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 524 (5th Cir. 1994) (same); *LCS Servs., Inc. v. Hamrick*, 925 F.2d 745, 749 (4th Cir. 1991) (same); *American Town Car v. Hall 83 Assocs.*, 912 F.2d 104, 112 (6th Cir. 1990) (same); *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 642 (2d Cir. 1989) (same). *But see Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 870-72 (9th Cir. 1992) ("We disagree with those Circuits which have concluded that the relitigation exception is limited to issues 'actually litigated' in a prior court proceeding.").

the federal court may not necessarily enjoin the state court action in order to protect its own decree.³⁴⁸ Rather, if the state court's ruling that the federal court action was non-preclusive would itself be entitled to res judicata or collateral estoppel effect in the state court, then the federal court is required to defer to that ruling.³⁴⁹ The Court reasoned that the possibility that "inefficient simultaneous litigation in state and federal courts on the same issue" would result from this decision "is one of the costs of our dual court system"³⁵⁰

Case law has not entirely resolved the question of how final a federal court ruling must be to support an injunction against a state court under the relitigation exception. At the extremes, it is clear that a final judgment is sufficient³⁵¹ and that an injunction protecting a judgment that a federal court may make in the future, but has not yet made, is insufficient.³⁵² Beyond this, as a leading treatise notes, "there is some uncertainty."³⁵³ While the Second Circuit did affirm issuance of an injunction based on a discovery or-

³⁴⁸ See *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524 (1986) (limiting the relitigation exception of the AIA to those situations in which the state court has not yet ruled on the merits of the res judicata issue). Plaintiffs had initially sued defendants in state court in February, 1979. A few months later, plaintiffs brought an action against some of the same defendants on related grounds in federal court. The federal action was tried first, and although plaintiffs won a favorable jury verdict, the district court granted a j.n.o.v. in favor of the defendant. When the defendant sought to have the pending state court action dismissed on res judicata grounds, the state court denied the motion. Plaintiffs went on to secure a verdict of \$4,000,001 in the state court action, and defendants then asked the federal district court to enjoin the plaintiffs from further prosecuting the state court action. The injunction granted by the district court was affirmed by the Fifth Circuit. See *id.* at 520-21.

³⁴⁹ The *Parsons* court stated:

We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

Id. at 524. See generally Wood, *supra* note 34, at 305-06 (critiquing *Parsons* on the ground that it discourages parties from exhausting state court remedies and instead encourages them to file actions in federal court as quickly as possible).

³⁵⁰ *Parsons Steel*, 474 U.S. at 525 (calling a federal court injunction against the enforcement of a state court judgment "highly intrusive").

³⁵¹ See, e.g., *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51 (1988) (holding that the district court was justified in enjoining the state court from considering claims which the federal court had already rejected in resolving a motion for summary judgment).

³⁵² See 17 CHARLES ALAN WRIGHT, ET AL., *supra* note 215, § 4226 n.16 (citing, *inter alia*, *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 929 n.59 (D.C. Cir. 1984) (stating that protecting possible future federal court judgments is an insufficient reason to enjoin state proceedings) and *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367, 374 (5th Cir. 1984) (same)).

³⁵³ 17 WRIGHT ET AL., *supra* note 215, § 4226.

der,³⁵⁴ other circuits have not adopted such a lax test.³⁵⁵ Some have suggested that the test for whether a federal court ruling is sufficiently final to support an order for injunctive relief ought to be whether the federal court's order would be subject to interlocutory appeal, if not appeal as a final judgment.³⁵⁶

b. Application of the Protection or Effectuation of Judgment Exception to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

Although quite a few federal district courts have based their issuance of antisuit injunctions on the "relitigation" exception to the AIA, none of these courts has provided a substantial analysis justifying its reliance on the exception.³⁵⁷ Rather, such courts have typically made a simple statement such

³⁵⁴ See *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 248-49 (2d Cir. 1961) (enjoining a party from using information obtained in federal court discovery in a state court proceeding).

³⁵⁵ See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (holding that neither the denial of class certification nor the rejection of a provisional class settlement were sufficient to support an injunction under the relitigation exception to the AIA); *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 179 n.2 (5th Cir. 1996) (holding that the denial of class certification in a federal action was not a judgment that could form the basis for enjoining state court action); *Coastal Petroleum Co. v. U.S.S. Agri-Chems.*, 695 F.2d 1314, 1319 (11th Cir. 1983) (holding that a pretrial order determining that certain defenses would not be available at trial was not a final order sufficient to support an injunction under the relitigation exception).

³⁵⁶ See 17 WRIGHT ET AL., *supra* note 215, § 4226 (suggesting that interlocutory rulings that are appealable as of right or under the collateral order doctrine could be the basis for an injunction, but arguing that the statute should not be interpreted to include an order "merely because it might have been certified for discretionary interlocutory appeal" in that doing so "would make this exception wholly open-ended and would go far beyond the purposes it was intended to serve").

³⁵⁷ See, e.g., *In re Arbitration Between Nuclear Elec. Ins. Ltd. & Central Power & Light Co.*, 926 F. Supp. 428, 436 (S.D.N.Y. 1996) (holding that an order staying a pending Texas state court action is justified, "when issued subsequent to or in conjunction with an order compelling arbitration concerning the same subject matter as the state court proceeding," under one or both of the second two exceptions to the AIA); *Ferrari N. Am., Inc. v. Crown Auto Dealerships*, No. 94 Civ. 8541 (KMW), 1995 WL 614558, at *5 (S.D.N.Y. Oct. 19, 1995) (allowing an injunction under either the second or third exception because "[a]llowing the Florida proceeding to continue would be inconsistent with this court's order that the parties proceed to arbitration of their dispute in New York"), *aff'd*, 101 F.3d 686 (2d Cir. 1996); *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 472-73 (D. Mont. 1993) (granting a petition to compel arbitration and also staying any further state court proceedings as inconsistent with such federal order); *McGuire, Cornwell & Blakey v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991) (stating that as the court had decided in its opinion to order the parties to submit their claims to arbitration, any further proceedings in state court on the arbitrable claims and disputes would be inconsistent with that order); *Hunt v. Mobil Oil Corp.*, 557 F. Supp. 368, 372 (S.D.N.Y.) ("From what has already been set forth, it is abundantly clear that this case comes within the exception and that the Court is empowered to enjoin the Hunts' state court proceeding as necessary to effectuate the judgment entered in this action."), *aff'd*, 742 F.2d 1438 (2d Cir. 1983); *In re Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172

as that issued by a Montana district court in *Snap-On Tools Corp. v. Vetter*.³⁵⁸ “Because the petition to compel arbitration should be granted, any further proceedings in state court between [the parties] should be stayed as inconsistent with this order. This stay thus falls within the third exception contained in the Anti-Injunction Act”³⁵⁹

Two district courts employed somewhat more detailed analyses and concluded that they were not permitted to issue an antisuit injunction by the third exception to the AIA. In *TranSouth Financial Corp. v. Bell*,³⁶⁰ Judge Thompson stated:

An injunction staying the state-court suit by Bell could not be properly issued as a means to protect or effectuate a judgment of this court, as none has been entered. The court is not tempted to put the cart before the horse by first deciding the arbitrability question, and then strapping an injunction on that decision.³⁶¹

The court explained that the AIA permits federal courts to enjoin state actions only where the court “has issued an immediately appealable ruling containing directives with preclusive effects on state as well as federal courts”³⁶² Examining the policy implications of its ruling, the *TranSouth* court found no unfairness or other problems, because the party now seeking the injunction could have moved more quickly to file suit in federal court, and state courts can apply federal arbitration law as well as the federal

(S.D.N.Y. 1973) (stating that because the court held that the dispute should be referred to arbitration, a stay of state proceedings was authorized to protect and effectuate that determination); *In re Arbitration of Controversies Between Necchi Sewing Mach. Sales Corp. & Carl*, 260 F. Supp. 665, 669 (S.D.N.Y. 1966) (concluding that a stay was necessary to protect or enforce the judgment because, having ruled that the disputes should be sent to arbitration, any further proceedings in state court would be inconsistent with the decision and decree of the federal court); see also *Standard Microsystems Corp. v. Texas Instruments Inc.*, 916 F.2d 58, 60 (2d Cir. 1990) (stating in dictum that although a district court has conclusively ruled that a dispute is arbitrable, and where the effect of that ruling may be undermined by relitigation in state courts, an injunction may be permitted); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1274 (7th Cir. 1976) (stating that while the district court might have concluded that an injunction was necessary to protect or effectuate judgment, it had discretion not to do so and did not abuse its discretion in denying the injunction).

³⁵⁸ 838 F. Supp. 468 (D. Mont. 1993).

³⁵⁹ *Id.* at 473.

³⁶⁰ 975 F. Supp. 1305 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998). See *supra* notes 309-16 and accompanying text for a discussion of the Eleventh Circuit's conclusion that an injunction may be warranted under the “in aid of jurisdiction” exception.

³⁶¹ 975 F. Supp. at 1310.

³⁶² *Id.* The court explained, however, that had the state court suit been filed *after* the issuance of a federal court order compelling arbitration, then the federal court would have been justified in enjoining such a suit. See *id.* at 1310-11.

courts.³⁶³ In *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,³⁶⁴ the court employed a somewhat different analysis, concluding that even assuming the injunction might be permissible under the relitigation exception, the district court would exercise its discretion not to grant the injunction because "there is little danger that the Pennsylvania state court litigation will unduly affect an arbitration order entered by this court."³⁶⁵ Rather the federal court concluded that its own ruling would continue to require arbitration despite the course of action taken by the state courts.³⁶⁶

In determining whether the relitigation exception permits issuance of an antisuit injunction to support a federal court's grant of a motion to compel arbitration, courts should first consider whether the granting of the motion to compel is sufficiently final to be treated as a "judgment" under the AIA. Although most courts have failed even to address this question in interpreting the AIA, the answer is not clear. Interpreting two somewhat ambiguous provisions of the FAA,³⁶⁷ most appellate courts have dealt with this language by denying immediate appeals from orders granting motions to compel arbitration where the arbitration issue is "embedded" in a broader dispute on the merits, and allowing such appeals only where the motion to compel arbitration is an independent action.³⁶⁸ Thus, the relitigation excep-

³⁶³ See *id.* at 1311 ("Although the foreign corporations here may not have been able to anticipate being sued for fraud . . . before being served with papers in state court action, there is no unfairness in this fate.").

³⁶⁴ 585 F. Supp. 770 (E.D. Pa. 1984).

³⁶⁵ *Id.* at 783 (stating that the federal court's order would be unaffected by the state court's action).

³⁶⁶ The state court granted an injunction precluding Roodveldt, a former Merrill Lynch employee, from continuing to solicit Merrill Lynch accounts, clients, and customers. See *id.* at 774. The state court neither explicitly ordered arbitration nor denied Roodveldt's petition for a stay pending arbitration, but rather granted Merrill Lynch the requested injunctive relief, concluding that it was "the only means available . . . to maintain the status quo pending an opportunity to arbitrate the dispute upon the merits." *Id.* at 781; see also *Swofford v. Shearson Lehman/Am. Express, Inc.*, 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (concluding, without analysis, that none of the exceptions to the AIA applied).

³⁶⁷ The FAA allows appeal from "a final decision with respect to an arbitration that is subject to this title," 9 U.S.C. § 16(a)(3) (1994), but it also explicitly provides that a court's interlocutory grant of a motion either to stay litigation pending arbitration or to compel arbitration is not subject to appeal. See *id.* § 16(b). The issue is thus whether some orders compelling arbitration can properly be considered "final" and thus covered by 9 U.S.C. § 16(a)(3) and not 9 U.S.C. § 16(b). Interlocutory appeal would also be allowed where the district court and circuit court both exercise their discretion, as set out in 28 U.S.C. § 1292(b) (1994), to certify the matter as requiring interlocutory review.

³⁶⁸ See, e.g., *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998) (holding that the court lacked jurisdiction to hear an appeal from a grant of arbitration that was embedded in the larger case), *cert. denied*, 119 S. Ct. 341 (1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1243-44 (9th Cir. 1997) (same), *cert. denied*, 119 S. Ct. 275 (1998); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 772 (5th Cir. 1996) (dismissing an

tion would not seem to apply where an entire case on the merits was filed in federal court, but rather only in those cases where solely a motion to compel was filed and then granted by the federal court.

Second, as a matter of policy and fairness, as the district court concluded in *TranSouth*, there seems to be little reason to permit the issuance of such an injunction against state courts. The Supreme Court has required that state courts apply the FAA and has stated that it must generally be assumed that state courts properly apply federal law. Moreover, a party that is particularly concerned about the attitude of the state court toward arbitration need only make sure to file an action as quickly as possible in federal court, once a dispute arises, to ensure that the federal court will be authorized to enjoin a subsequently filed state court action.

Third, it is not at all clear that such an injunction is necessary as a matter of practicality. Once the federal court has issued an order compelling arbitration, parties would risk sanctions such as contempt of court by refusing to follow the order. Although some might protest that a subsequent state court order refusing to order arbitration or voiding the arbitration clause might put parties in a difficult situation, there is no reason to believe that such orders would be common.³⁶⁹ Even assuming (as I have argued) that state courts are currently less favorably inclined toward arbitration than federal courts, it is unlikely that many state courts would directly counter a prior federal court order compelling arbitration. In short, while it seems that federal district courts are justified in issuing antisuit injunctions to support the grant of a motion to compel arbitration in non-embedded proceedings, policy factors weigh against the federal courts' use of the injunction even in this situation.

appeal where the parties had sought relief on the underlying claims); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) ("[A]n order can only be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the district court."); *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994) (concluding that appellate courts lack jurisdiction to hear appeals from embedded proceedings); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993) ("If the suit is 'embedded,' . . . orders directing arbitration are not immediately appealable."); cf. *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 84-86 (2d Cir. 1961) (Friendly, J.) (concluding that the district court's decision to order a trial on arbitrability was not sufficiently final to be appealable, but also concluding that the First Circuit's ruling on arbitrability was sufficiently final to bind the district court). But see *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990) (concluding that even an embedded arbitration order is an appealable final judgment). See generally Carla Kemp, Note, *Appeals of Orders Compelling Arbitration in Embedded Proceedings Must Wait*, 1997 J. DISP. RESOL. 143.

³⁶⁹ This author has identified no decisions in which a state court insisted on resolving a dispute through litigation after the federal court issued an order compelling arbitration. Still, state courts should have the power to proceed concurrently in exceptional situations.

4. Conclusions About the Applicability of AIA

Looking at the AIA as a whole, once again, it appears that both the federalism principles underlying the AIA, and the federal policy underlying the FAA, generally oppose arbitral antisuit injunctions. Nonetheless, such injunctions may occasionally be permitted depending on the relative priority of the federal and state actions, the status of each of the two actions, and perhaps a showing of vexatious conduct by either party. In terms of priority, where the party seeks federal injunctive relief prior to the filing of the state court action, the AIA poses no bar whatsoever. Further, although the "expressly authorized" exception seems not to apply at all, under certain circumstances the federal court may be authorized in issuing an antisuit injunction either to protect its jurisdiction or to prevent relitigation of its resolution of the arbitration issue. The more the federal court has invested in the dispute relative to the state court, the more likely it is that an injunction would be warranted either to protect the federal court's jurisdiction or to prevent relitigation. Also, where the party against whom the injunction is sought appears to have engaged in harassing or vexatious conduct, and where the party seeking the injunction has not engaged in such conduct, either of the exceptions is more likely to apply.

D. Abstention Doctrines

The doctrines previously discussed in this Article determine whether federal courts have the authority to enjoin state court actions.³⁷⁰ The abstention doctrines discussed in this Subpart, by contrast, govern the question of whether a federal court that has the authority to enjoin a state court may, ought, or ought not exercise its discretion to do so. The Supreme Court has often observed that not only the AIA, but also "principles of equity, comity, and federalism," might preclude issuance of an antisuit injunction.³⁷¹

Abstention, described by one commentator as "a hydra-like beast,"³⁷² is based on a series of Supreme Court decisions rather than on any statute. Typically, both courts and commentators identify the various categories of abstention by the name of the court decision which originated each type of

³⁷⁰ See, e.g., *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970) (rejecting the contention that the AIA establishes a mere principle of comity rather than a binding rule regarding the power of the federal courts); cf. Wood, *supra* note 34, at 294 (stating that "[w]hether the Act is 'jurisdictional' or merely an expression of equitable restraint has remained unclear through the many years of its existence," but then basing the remainder of her article on the assumption that the AIA is jurisdictional).

³⁷¹ *Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (Burger, C.J., White & Blackmun, JJ., concurring).

³⁷² Rehnquist, *supra* note 114, at 1050.

abstention.³⁷³ The Court has expressed some ambiguity as to whether the various types of abstention should be viewed together, as part of a whole, or separately.³⁷⁴ Commentators have battled over the propriety of abstention given various circumstances, focusing particularly on whether and how abstention should take account of federal and state interests.³⁷⁵

Rather than attempt to devise a comprehensive abstention theory, a task which has challenged (and perhaps daunted) many commentators, this Article will focus on the two separate strands of abstention doctrine which appear most relevant to the question of whether a federal court should enjoin a state court action regarding a motion to compel arbitration. Specifically, it

³⁷³ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (requiring abstention, in limited circumstances, to prevent duplication of ongoing state court litigation); *Younger v. Harris*, 401 U.S. 37, 54 (1971) (requiring abstention as to ongoing state criminal prosecution not shown to be brought in bad faith); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959) (permitting abstention as to an unsettled and politically sensitive state law issue); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (requiring federal abstention where federal court action would disrupt a complex state regulatory scheme); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941) (requiring federal courts to abstain where they can avoid deciding a federal constitutional issue by deferring to a state court's determination on an unsettled issue of state law).

³⁷⁴ Compare *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987) ("The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."), with *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 359-60 (1989) ("While we acknowledge that '[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases,' the policy considerations supporting *Burford* and *Younger* are sufficiently distinct to justify independent analyses.") (citation omitted) (quoting *Pennzoil*, 481 U.S. at 11 n.9), and *Colorado River*, 424 U.S. at 813-15 (analyzing various types of abstention independently).

³⁷⁵ Professor Richard Fallon has categorized two major strands of such commentary as either nationalist (favoring federal courts) or federalist (favoring state courts). See Fallon, *supra* note 339, at 1151. Compare Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1037-38 (1982) ("federalist"), and Hart, *supra* note 339, at 1401 (same), with Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426-29 (1987) ("nationalist"), John Minor Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1072 (1984) (same), and Fiss, *supra* note 117, at 1103 (same). Another commentator has urged that abstention doctrine be drastically revised and largely eliminated to reflect the Constitution's fundamental forum neutrality. See Rehnquist, *supra* note 114, at 1052. Commentators have also battled over the empirical question of whether, in fact, there is "parity" between the determinations of federal and state courts. Compare Neuborne, *supra* note 117, at 105-06 (asserting that federal courts are more sympathetic to federal rights than are state courts), with Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214-15 (1983) (arguing that federal and state courts are equally likely to uphold federal claims). See generally Amar, *supra* note 117, at 646 (arguing that the Constitution mandates that state courts be considered competent to decide federal issues, but that Article III also mandates that federal courts "be the last word" in federal question and admiralty cases).

will first examine *Colorado River* abstention,³⁷⁶ which focuses on whether exceptional considerations of wise judicial administration and efficiency dictate abstention by the federal court. It will then turn to so-called *Younger* abstention, which looks to whether it is permissible for a federal court to enjoin a previously filed state action.

1. Colorado River/Moses H. Cone Abstention

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,³⁷⁷ the Supreme Court directly addressed the question of whether a federal district court may abstain from hearing a motion to compel arbitration based on the existence of a previously filed state court action. Applying the "considerations of wise judicial administration" standard set out in *Colorado River*,³⁷⁸ the Court found that the district court had erred in refusing to consider the motion to compel arbitration. The case arose out of a construction contract between Mercury Construction and Moses H. Cone Memorial Hospital that included an arbitration provision. When a dispute arose regarding payment of certain costs, the Hospital brought suit in state court.³⁷⁹ Mercury then filed an action seventeen days later in federal court seeking an order to compel arbitration under the FAA,³⁸⁰ but the district

³⁷⁶ The Court, in *Colorado River*, took great pains to state that the case was not laying out a new "abstention" doctrine, but rather a doctrine based on considerations of "[w]ise judicial administration." See 424 U.S. at 817. Nonetheless, the Court, in subsequent opinions, has referred to *Colorado River* as an abstention doctrine. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (describing *Colorado River* as "an example where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration'" (quoting *Colorado River*, 424 U.S. at 817)). This Article will follow the same course.

³⁷⁷ 460 U.S. 1 (1983).

³⁷⁸ *Colorado River*, 424 U.S. at 817 (1976). The *Colorado River* decision involved a water rights action brought by the United States in federal court under the McCarran Amendment, 43 U.S.C. § 666. See *id.* at 802-03. The Supreme Court upheld dismissal of the federal court action in light of a pending state court action involving the same issues. See *id.* at 820. In doing so, it cited federal policy opposing piecemeal litigation of water rights issues, the relative lack of progress in the federal court action, and the relative inconvenience of the federal forum. See *id.* at 818-19. While noting that a federal court may abdicate its duty to decide cases only in "exceptional circumstances," the Court found in that case that "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" justified the federal court's refusal to hear the case. *Id.* at 817.

³⁷⁹ See *Moses H. Cone*, 460 U.S. at 7. The Hospital argued, *inter alia*, that Mercury had relinquished any right to arbitration under the principles of waiver, laches, estoppel, and failure to make a timely demand. See *id.* at 7.

³⁸⁰ Mercury had to wait to file the federal action until the expiration of an *ex parte* injunction obtained by the Hospital in state court which prohibited Mercury from taking any steps to pursue arbitration. See *id.*

court granted the Hospital's motion to stay the federal court action pending resolution of the identical issues in state court.³⁸¹ Following an appeal to the Fourth Circuit, the Supreme Court affirmed the reversal of the stay, concluding that abstention was inappropriate on *Colorado River* grounds in that "[t]here was no assumption by either court of jurisdiction over any res or property,"³⁸² there was no "contention that the federal forum was any less convenient to the parties than the state forum,"³⁸³ there was no legitimate concern with "piecemeal litigation,"³⁸⁴ and "[t]he order in which the concurrent tribunals obtained and exercised jurisdiction cuts against, not for, the District Court's stay."³⁸⁵ The Court explained that although the state court action had been filed prior to the federal court action, the contractor filed the federal court action as soon as it could, following expiration of the state court injunction that had precluded it from taking steps to secure arbitration.³⁸⁶ Moreover, the Court observed that the federal court action had progressed further toward resolution of the arbitration issue than had the state court action at the time of the issuance of the stay.³⁸⁷ In concluding that the district court had erred in staying its resolution of the motion to compel arbitration, the Supreme Court further emphasized the federal policy favoring speedy resolution of arbitration issues and "the fact that federal law provides the rule of decision on the merits."³⁸⁸ Finally, the Court took note of the "probable inadequacy of the state court proceeding to protect Mercury's

³⁸¹ See *id.* The Fourth Circuit, in an en banc decision, reversed the district court's stay order and "remanded the case to the District Court with instructions for entering an order to arbitrate." *Id.* at 8.

³⁸² *Id.* at 19. *Colorado River* implied that a stay may sometimes be appropriate to allow a single jurisdiction to maintain its authority over a res. See 424 U.S. at 818.

³⁸³ *Moses H. Cone*, 460 U.S. at 19. The choice was between the North Carolina Superior Court of Guilford County and the District Court for the Middle District of North Carolina. See *id.* at 4, 7. The Hospital conceded that the federal court forum was not inconvenient. See *id.* at 19.

³⁸⁴ *Id.* The Court found that any inconvenience due to the fact that the Hospital might have to arbitrate claims against certain parties but not others was due to the Hospital's contracts, and not to the federal court action. It further observed that the actual litigation of the federal court action was "easily severable from the merits of the underlying disputes," *id.* at 21, and thus gave rise to no significant concern with piecemeal litigation.

³⁸⁵ *Id.* at 21.

³⁸⁶ See *id.* ("Mercury filed its § 4 petition the same day that the injunction was dissolved.").

³⁸⁷ See *id.* ("[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.").

³⁸⁸ *Id.* at 23. The "federal law" referred to by the Court was the FAA itself, which the Court explained gave rise to a body of federal substantive law governing arbitrability. See *id.* at 24.

rights,"³⁸⁹ explaining that it was not clear that state courts were obliged to grant motions to compel arbitration under section 4 of the FAA.³⁹⁰

In analyzing *Moses H. Cone*, it is extremely important to take note of several issues the Court did not reach. As to the central focus of this Article, the Court expressly refrained from ruling on the question of whether a federal court may stay a state court action pending arbitration.³⁹¹ Also, the Supreme Court reserved ruling in *Moses H. Cone* on the question of whether a party's engagement in "vexatious" or "reactive" litigation tactics should be relevant to a federal court's decision of whether or not to abstain from interfering with an action pending in state court.³⁹² It did, however, state: "The reasoning of the Courts of Appeals in this case and in *Calvert*—that the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River*—has considerable merit."³⁹³

³⁸⁹ *Id.* at 26.

³⁹⁰ *See id.* at 26. The Court observed that while state courts are required to grant stays of litigation under section 3 of the Act, it was not clear whether section 4 of the FAA, regarding motions to compel arbitration, applied to state courts. *See id.* The Court also noted, as an "historical matter," that the then current North Carolina precedent did not necessarily favor even the grant of a stay of litigation. *See id.* at 27 n.36.

³⁹¹ *See id.* at 25 n.32 ("We need not address whether a federal court might stay a state-court suit pending arbitration under 28 U.S.C. § 2283.").

³⁹² *See id.* at 17 n.20, 18 (stating "that even if the Hospital acted in complete good faith there were no exceptional circumstances warranting the District Court's stay").

³⁹³ *Id.* Specifically, the Court noted that the Fourth Circuit had reversed the district court's stay in part because it concluded that "the Hospital's state-court suit was a contrived, defensive reaction to Mercury's expected claim for relief and for arbitration." *Id.* (citing *Mercury Constr. Corp. v. Moses H. Cone Mem'l Hosp.*, 656 F.2d 933, 944 (4th Cir. 1981) (en banc), *aff'd*, 460 U.S. 1 (1983)). The Fourth Circuit also stated, by contrast, that "[i]t is manifest that [the federal court plaintiff's] action was not a 'contrived' federal claim asserted only in order to delay the resolution of the controversy nor was it a 'reactive' or 'tactical maneuver' for such purpose." *Id.* at 944. The earlier case mentioned by the Court, *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), had reversed and remanded a district court's issuance of a stay for reconsideration in light of *Colorado River*. *See id.* at 655, 657. On remand, both the district court and the court of appeals concluded that the stay should be continued as "a means to deter vexatious use of the federal courts." *Calvert Fire Ins. Co. v. American Mut. Reinsurance Co.*, 600 F.2d 1228, 1236 (7th Cir. 1979) (stating that the prevention of a vexatious federal suit is supported by strong policy and would justify federal deferral to a parallel state proceeding absent strong countervailing reasons for the federal court to decide a federal suit without further delay); *see also Calvert Fire Ins. Co. v. American Mut. Reinsurance Co.*, 459 F. Supp. 859, 866 (N.D. Ill. 1978) (staying a federal securities action that was virtually identical to a counterclaim filed by the same party in a state court action, where the only difference between the suits was a "questionable" Rule 10b-5 claim included only in the federal suit, and where the state court defendant had filed a separate federal action rather than attempting to remove the state court action, presumably in an attempt to delay the proceedings), *aff'd*, 600 F.2d at 1236. Specifically, the Seventh Circuit in *Calvert* affirmed the district court's conclusion that the filing of the federal suit was a "defensive maneuver" based on a contrived federal claim. *See Calvert*, 600 F.2d at 1234. The court observed:

Finally, although the Supreme Court concluded that the district court in *Moses H. Cone* erred in staying its resolution of the motion to compel arbitration,³⁹⁴ the Court did not foreclose the possibility that abstention might be appropriate given different facts. One district court distinguished *Moses H. Cone*,³⁹⁵ but was reversed on appeal.³⁹⁶

Moses H. Cone might be distinguished as follows. First, where a party seeking arbitration files its federal court action in a distant and inconvenient location, a federal court would have a stronger reason for abstaining on the

Judge Will's characterization of the suit as vexatious is essentially a factual finding which we should accept on appeal unless contrary to the weight of the evidence. Such is not the case here. There was ample evidence to support his finding that Calvert sought to delay a final decision on its liability under the participation agreement, and also that it sought to employ the federal suit as part of its delaying strategy. While delay is a legitimate trial tactic, it is not one which the federal courts are required to go along with.

Id. at 1234 n.14.

³⁹⁴ See *Moses H. Cone*, 460 U.S. at 27-28 (holding that the *Colorado River* test is applicable to stays as well as to dismissals of federal court actions).

³⁹⁵ In *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998), the court found that it must abstain from issuing an order to compel arbitration. In distinguishing *Moses H. Cone*, the district court emphasized the following: (1) that allowing the federal action to proceed would necessarily lead to piecemeal litigation in that not all the parties could be joined in federal court due to lack of diversity, *see id.* at 1308-09, and because pursuant to the AIA, the district court lacked authority to stay the state court action, *see id.* at 1308-09, 1313-14; (2) that due to subsequent developments in the law, it is now clear that state courts have the responsibility and authority to enforce the FAA, *see id.* at 1314; and (3) that the state court was a "slightly more convenient forum" than the federal court, *see id.* at 1308.

³⁹⁶ See *TranSouth*, 149 F.3d at 1294-96. In reversing the district court's abstention as an abuse of discretion, the Eleventh Circuit concluded: (1) any piecemeal litigation was the result of voluntary party actions and the federal pro-arbitration policy, *see id.* at 1295; (2) priority of jurisdiction and timing weighed against abstention, *see id.*; (3) the applicability of federal law favored the exercise of federal jurisdiction, *see id.*; and (4) that the availability of complete relief in the state forum only "slightly" favored abstention, *see id.* Several other courts have also applied the test set out in *Moses H. Cone* and concluded that they should not abstain from considering a motion to compel arbitration. See *First Franklin Fin. Corp. v. McCollum*, 144 F.3d 1362, 1363-65 (11th Cir. 1998) (reversing the district court's abstention from a motion to compel arbitration where the federal suit was filed just 18 days after the state suit); *Distajo Second Circuit II*, 107 F.3d 126, 138 (2d Cir. 1997) (holding that the district court did not abuse its discretion in refusing to abstain where it concluded that the state court had not engaged in "substantial proceedings" in the course of issuing a default judgment), *cert. denied*, 118 S. Ct. 365 (1997); *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102-03 (4th Cir. 1991) (holding that district court erred in refusing to consider a motion to compel where no exceptional circumstances existed that would support such abstention); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 492-93 (N.D. Ga. 1988) (holding that abstention is not appropriate where, among other factors, the state action was filed less than two months prior to the filing of the federal suit, and where the state action had not progressed beyond the filing of initial discovery requests); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 776-79 (E.D. Pa. 1984) (holding that no exceptional circumstances existed to justify abstention).

basis of inconvenience than it did in *Moses H. Cone*.³⁹⁷ Second, whereas Mercury filed its federal court action as soon as it could, just seventeen days after the filing of the state court action, some parties have waited much longer before filing a federal court action and seeking to enjoin the state court action. In the event of a longer delay, a federal court might conclude that policies of efficiency and good judicial management would call for deference to the state court, particularly if the state court had already made substantial progress in the case.³⁹⁸ Third, whereas the Supreme Court justified its decision, in part, on the ground that the state court might not have the authority to grant motions to compel pursuant to the FAA, this no longer appears to be good law. The Supreme Court's post-*Moses H. Cone* decisions in *Southland*³⁹⁹ and *Terminix*⁴⁰⁰ have made it clear that state courts must apply at least section 2 of the FAA (requiring enforcement of an arbitration clause) if the contract governs interstate commerce, interpreted in its broadest possible sense.⁴⁰¹ Further, although the Supreme Court has still not addressed the issue, it nonetheless seems clear that state courts must grant both motions to compel arbitration and stays of litigation when necessary to support an arbitration agreement.⁴⁰² Thus, it is no longer true, if it ever was, that state courts lack the power to grant their own motions to compel.⁴⁰³ Fourth, whereas the Supreme Court emphasized in *Moses H. Cone* that arbitrability is a question of federal law, subsequent Supreme Court decisions have clarified that arbitrability involves many issues of state law as well. Where the party challenging arbitration is raising a contractual

³⁹⁷ See *TranSouth*, 975 F. Supp. at 1308 (holding that "the state court may be a slightly more convenient forum" in deciding to abstain).

³⁹⁸ Cf. *First Franklin*, 144 F.3d at 1364-65 (emphasizing, in reversing district court abstention, that the federal suit was filed only about three weeks after the state action); *Distajo Second Circuit II*, 107 F.3d at 138 (affirming the district court's refusal to abstain where the state court had not engaged in "substantial proceedings" in entering [a] default judgment").

³⁹⁹ *Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1984) (finding that Congress intended section 2 of the FAA to apply in federal and state courts).

⁴⁰⁰ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-81 (1995) (holding that state courts must apply section 2 of the FAA rather than conflicting state anti-arbitration statutes, and construing broadly the FAA's requirement that the relevant contract involve commerce).

⁴⁰¹ See *supra* text accompanying note 95 (noting that the Supreme Court has stated that section 2 of the FAA must be enforced by federal and state courts).

⁴⁰² See *supra* notes 95-96 (describing sources which support a state court's ability to grant motions to compel arbitration and stays of litigation as part of their requirement to enforce section 2 of the FAA).

⁴⁰³ The *TranSouth* district court relied on these legal developments in concluding that abstention was appropriate. See *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1314-15 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998). The Eleventh Circuit, while vacating in part and remanding, accepted this conclusion. See *TranSouth*, 149 F.3d at 1295-96.

defense such as waiver, unconscionability, or fraud, the Court has now specified that state law shall guide the decision,⁴⁰⁴ and the Court has also explained that state law shall generally be used to determine whether the parties decided to arbitrate a particular dispute.⁴⁰⁵ Federal common law is relevant only to provide the background principle that ambiguities are generally to be interpreted to favor arbitration,⁴⁰⁶ and that parties may not be deemed to have submitted the question of arbitrability to the arbitrators absent a showing of clear and convincing evidence to that effect.⁴⁰⁷ Thus, to the extent that a party is challenging an arbitration clause or its scope on state law grounds, the abstention might well be justified.

As will be discussed below, a strong argument can also be made that a federal court, which might not be justified in abstaining from ruling on a motion to compel, might nonetheless be justified in abstaining from enjoining a state court from considering a motion to compel or from enjoining enforcement of a judgment already obtained in state court.

2. *Younger* and *Pennzoil* Abstention

In *Pennzoil Co. v. Texaco Inc.*,⁴⁰⁸ the Supreme Court greatly expanded its earlier decision in *Younger v. Harris*,⁴⁰⁹ ruling that principles of federalism require a federal court to abstain from enjoining a state court's civil as

⁴⁰⁴ See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

⁴⁰⁵ See *First Options v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

⁴⁰⁶ See *Mastrobuono v. Shearson Lehman/Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (noting that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983))).

⁴⁰⁷ See *First Options*, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear[r] and unmistakabl[e]' evidence that they did so." (citations omitted) (alteration in original)).

⁴⁰⁸ 481 U.S. 1, 10 (1987) (holding that the lower courts "should have abstained under the principles of federalism enunciated in *Younger v. Harris*" instead of enjoining a plaintiff from executing a judgment in its favor, pending appeal).

⁴⁰⁹ 401 U.S. 37, 41, 44 (1971) (reversing a district court's injunction which barred the state prosecutor from pursuing ongoing litigation under the California Criminal Syndicalism Act in state court, despite the fact that the federal plaintiff claimed its First Amendment rights were in jeopardy, and explaining that such injunction was inconsistent with "Our Federalism").

well as criminal proceedings if sufficient state interests are at stake.⁴¹⁰ Texaco, the federal court plaintiff, had been the defendant in an action brought in Texas state court by Pennzoil in which the jury awarded \$10.53 billion plus prejudgment interest against Texaco.⁴¹¹ Texaco sought to file a bond in state court to suspend execution on the judgment pending appeal. However, Texas law appeared to require Texaco to post a bond in at least the amount of the judgment, interest, and costs.⁴¹² Texaco's federal court action contended that the requirement of such a large bond violated the Constitution and various federal statutes.⁴¹³ Although Pennzoil argued that the requested injunction was improper as a matter of abstention doctrine, as well as pursuant to the AIA and the *Rooker-Feldman* doctrine, the federal district court granted the injunction and it was affirmed by the Second Circuit.⁴¹⁴

The Supreme Court reversed, stating that: "[t]he courts below should have abstained under the principles of federalism enunciated in *Younger v. Harris*."⁴¹⁵ Such principles, explained the Court, meant that, notwithstanding the important interests in protecting federal rights and interests, federal courts should not unduly interfere with state courts.⁴¹⁶ Rejecting a widely

⁴¹⁰ See *Pennzoil*, 481 U.S. at 11 (stating that *Younger* abstention should apply to pending state criminal and civil proceedings "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government" (quoting TEX. R. CIV. P. 364(b))).

⁴¹¹ See *id.* at 4 (describing the jury's award of \$7.53 billion in actual damages, \$3 billion in punitive damages, and prejudgment interest).

⁴¹² See *id.* at 5 (stating that with regard to a money judgment, Texas law requires that "the amount of the bond . . . shall be at least the amount of the judgment, interest, and costs" (quoting TEX. R. CIV. P. 364(b))).

⁴¹³ See *id.* at 6 (noting Texaco's claim that "the Texas proceedings violated rights secured to Texaco by the Constitution and various federal statutes"). The specific laws and statutes cited were the Full Faith and Credit Clause, the Commerce Clause, the Williams Act, and the Securities Exchange Act of 1934. See *id.* at 6 n.6.

⁴¹⁴ See *Texaco Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 260 (S.D.N.Y. 1986) (holding *Younger* abstention inapplicable because issuance of an injunction would not "interfere with a state official's pursuit of a fundamental state interest"); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1149 (2d Cir. 1986) (rejecting *Younger* abstention on the ground that "[t]he state interests at stake in this proceeding differ in both kind and degree from those present in the six cases in which the Supreme Court held that *Younger* applied," in that those six cases directly involved a state actor whereas this suit involved two private parties).

⁴¹⁵ 481 U.S. at 10.

⁴¹⁶ The Court stated that the basic doctrine of equitable restraint

is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways The concept 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. The Framers rejected both these courses. What the concept does represent is a sys-

held view that *Younger* applied only to criminal proceedings or situations in which the state itself was a party to the litigation, the Court stated:

This concern [with federalism] mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.⁴¹⁷

The Court then went on to conclude that the State of Texas did have an important interest in enforcing its judgment pursuant to the process selected by the state. It explained:

Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.⁴¹⁸

tem in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Pennzoil, 481 U.S. at 10 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

⁴¹⁷ *Pennzoil*, 481 U.S. at 11. The Second Circuit had distinguished *Younger* on the basis of this widely held view, observing that the Supreme Court's previous applications of *Younger* had all involved the state government or a state official as a party. See *Texaco*, 784 F.2d at 1149-50 (citing *Middlesex County Ethics Comm. v. Garden St. Bar Ass'n*, 457 U.S. 423, 437 (1982)) (holding that a federal court is required to abstain from enjoining a state supreme court agency from bringing an attorney disciplinary action); see also *Moore v. Sims*, 442 U.S. 415, 434-35 (1979) (holding that a federal court is required to abstain from enjoining an action by the state department of human resources); *Trainor v. Hernandez*, 431 U.S. 434, 446-47 (1977) (holding that a federal court should abstain from enjoining an action by the state department of public assistance); *Juidice v. Vail*, 430 U.S. 327, 338-39 (1977) (holding that a federal court should abstain from enjoining state court judges from enforcing a criminal contempt citation); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (holding that a federal court should abstain from enjoining state officials from enforcing a state civil nuisance statute).

⁴¹⁸ *Pennzoil*, 481 U.S. at 14. To support this proposition, the Court cited its prior decision in *Juidice*, in which it had required a federal court to abstain from adjudicating a challenge to a State's contempt process. See *Pennzoil*, 481 U.S. at 13. The Court found: "There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt." *Id.* The Court thus rejected Justice Stevens's argument, concurring in the judgment, that the state here had no interest beyond "its interest as adjudicator of wholly private disputes." *Id.* at 30 n.2 (concurring on the ground that *Texaco* failed to present a viable Constitutional claim). The Court stated: "Our opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice*, we rely on the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'" *Id.* at 14 n.12 (quoting *Juidice*, 430 U.S. at 336 n.12).

The nature and purpose of the state court action are relevant in determining whether a federal court should abstain from enjoining such a suit. When the Court issued its decision in *Younger*, it carefully distinguished a decision it had issued just six years before in *Dombrowski v. Pfister*,⁴¹⁹ explaining that a federal court would still be justified in enjoining a state court action that was brought to harass defendants rather than with the expectation of securing valid convictions.⁴²⁰ The *Younger* Court similarly cited *Cameron v. Johnson*,⁴²¹ stating that it, too, required a showing of "bad faith and harassment" in order to obtain injunctive relief.⁴²²

3. Application of *Colorado River* and *Younger* Abstention Principles to Federal Courts' Issuance of Pro-Arbitration Antisuit Injunctions

A federal court acts far more intrusively when it directly enjoins a state court action, particularly following issuance of a state court judgment, than when it merely proceeds to consider a matter also being considered by a state court. Thus, even if a federal court is found technically to have jurisdiction to issue such an injunction, it would seem appropriate for a federal court to be able to abstain from enjoining a state court action under certain circumstances.

In light of this distinction, it is surprising how few courts have separately considered whether they should abstain from enjoining an ongoing state court action, even if they need not abstain from issuing a motion to compel arbitration. In fact, this author could not locate a single decision specifically applying abstention concepts to this determination. However,

⁴¹⁹ 380 U.S. 479, 489 (1965) (holding that the district court erred in failing to enjoin the criminal prosecution in state court).

⁴²⁰ In *Dombrowski*, the federal court plaintiffs sought to enjoin their criminal prosecution in state court, alleging that:

[T]he threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.

Id. at 482. The Court found that the injunction was permissible because the plaintiffs showed irreparable injury when they alleged that "defense of the State's criminal prosecution will not assure adequate vindication of [their] constitutional rights," and "a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination." *Id.* at 485-86.

⁴²¹ 390 U.S. 611, 618-22 (1968) (upholding a federal court's refusal to enjoin a state's enforcement on an anti-picketing law where there was no showing of harassment, intimidation, or oppression of the accused).

⁴²² *Younger*, 401 U.S. at 49 (denying the appellee equitable relief given his failure to establish that because the prosecution was brought in bad faith or was one of a series of prosecutions, an injunction was required to prevent irreparable harm).

several courts have implicitly applied abstention concepts to the question by stating that they must consider policies supporting federalism and comity in determining whether to exercise their discretion to issue an injunction they found to be permitted under the AIA. Of the six courts that considered such policies, four decided that it would be inappropriate to enjoin an ongoing state court action,⁴²³ and two determined that such an injunction was permissible.⁴²⁴

⁴²³ In *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1180-82 (11th Cir. 1981), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), the court stated that “[w]here a federal court is asked to interfere with pending state court proceedings it must proceed with caution, taking into account general considerations of federalism and, in particular, the likelihood of seriously disrupting the legitimate functioning of the judicial system of the state.” It went on to affirm the district court’s exercise of its discretion to deny the requested stay of the state court proceedings, emphasizing that the party requesting the injunction “allowed the state court proceedings to continue for many months, turning to the federal court only after most issues had been resolved against it in the state litigation,” and pointing out that the state court did not disregard or refuse to apply federal law. See also *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1274 (7th Cir. 1976) (observing that the district court was justified in exercising its discretion not to enjoin an ongoing state court proceeding in light of “the historical reluctance of federal courts to interfere with state judicial proceedings” (quoting *Southern Cal. Petro. Corp. v. Harper*, 273 F.2d 715, 718 (5th Cir. 1960))); *Swofford v. Shearson Lehman/Am. Express, Inc.*, 604 F. Supp. 1128, 1129 (E.D. Ark. 1985) (refusing to exercise its discretion to stay state court proceedings and to thereby “interrupt the normal flow of judicial business in chancery court”); *Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 585 F. Supp. 770, 782-84 (E.D. Pa. 1984) (observing that although the strict abstention doctrines of *Younger* may not apply, federal courts should nonetheless exercise their discretion to enjoin state proceedings “in light of the historical reluctance of federal courts to interfere with state judicial proceedings,” and concluding that as it is unlikely that further litigation in the state court would endanger the federal court’s arbitration order, a stay would be inappropriate); cf. *Snap-On Tools Corp. v. Vetter*, 838 F. Supp. 468, 474 (D. Mont. 1993) (holding that although a stay of state action was warranted, it was not necessary in that the court assumed that the state system would not now proceed further, and choosing to refrain from issuing a formal stay or injunction “[o]ut of deference to and respect for the state court”); *Nuclear Installation Servs. Co. v. Nuclear Servs. Corp.*, 468 F. Supp. 1187, 1188-89 (E.D. Pa. 1979) (granting a petition to compel arbitration, but refusing to enjoin a state proceeding, without prejudice to renewal of such motion, where a state court has already stayed litigation).

⁴²⁴ See *Specialty Bakeries, Inc. v. RobHal, Inc.*, 961 F. Supp. 822, 830 (E.D. Pa.) (stating that although “[w]e are sensitive to notions of federalism and comity . . . [a] preliminary injunction restraining the RobHal [company] from proceeding in state court is necessary in aid of our jurisdiction so as to preserve the integrity of this arbitration process”), *aff’d as modified and remanded sub nom.* *Specialty Bakeries v. HalRob*, 129 F.3d 726 (3d Cir. 1997); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 495 (N.D. Ga. 1988) (holding that although the court must take into account considerations of federalism, a stay of state proceedings was justified because “in the particular circumstances of this case, the legitimate functioning of the California judicial system would not be disrupted, since the California action proceeded no further than the initial stages of discovery and had been pending less than two months when this court issued its initial stay order”).

To properly address the question of whether a federal court ought to abstain from enjoining an ongoing state court proceeding, the federal court should take into account considerations of wise judicial administration and also federalism and comity concerns. Once again, these issues can be properly analyzed only after examining the complete context of the federal and state actions.

The *Colorado River* doctrine, for example, requires the federal court to consider principles of "wise judicial administration," including the strength of the federal policy, the relative priority and progress of the two actions, the relative convenience of the two fora, and the possibility of obtaining complete rather than "piecemeal" relief in either forum.⁴²⁵ With respect to arbitral antisuit injunctions, these factors would often seem to dictate abstention. Although federal policy under the FAA looks favorably upon arbitration, both state and federal courts are bound by this same policy,⁴²⁶ and thus it would not seem to support a federal injunction under most circumstances. Nor would injunctive relief seem appropriate where a substantial amount of progress has been made in the state court prior to one party's filing of the federal suit. The district court should also resist enjoining a state court action where the federal forum seems more inconvenient, or where all of the parties to the state suit could not be brought into the federal action for want of subject matter or personal jurisdiction. An injunction may be warranted, however, where a dispute was filed first or very shortly after the state suit in federal court, and where a substantial amount of progress was made in the federal court before one of the parties sought to file a parallel state action.⁴²⁷

⁴²⁵ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.* 342 U.S. 180, 183 (1952)) ("Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.").

⁴²⁶ As noted earlier, even where a state court has made a finding in a particular case that the dispute need not be arbitrated, this by no means illustrates that the state court has ignored the FAA or that an injunction is appropriate. See *supra* text accompanying notes 97-99 (noting that a state court will sometimes be justified in ruling that a dispute is not arbitrable).

⁴²⁷ The facts considered by the district and circuit courts in *TranSouth* present a close question on abstention. As the district court emphasized, piecemeal litigation of the sort disfavored in *Colorado River* seems inevitable given that not all of the state court parties are subject to the federal court's jurisdiction. Moreover, the state court would be quite capable of enforcing federal arbitration policy. See *TranSouth Fin. Corp. v. Bell*, 975 F. Supp. 1305, 1313-14 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998). At the same time, the appellate court was correct to emphasize that abstention is generally disfavored, that the federal action was brought only about six weeks after the state action, and that no substantial progress had been made in the state action. See *TranSouth*, 149 F.3d 1292, 1294-95 (11th Cir. 1998). In this author's view, given these

Pursuant to the doctrines enunciated in *Younger* and *Pennzoil*, a federal court must also abstain from enjoining a state court proceeding "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."⁴²⁸ The question of whether the state has such an interest turns on the relative maturity of the two actions. Where a state court action has been filed only very recently, where little or nothing has been resolved, and particularly where the federal court suit was filed prior to the state court action, a federal court injunction will intrude only slightly into the state's sphere of interest. By contrast, the further the state court action has progressed in terms of the amount of discovery exchanged, and in terms of the rulings the court has issued, the more the federal court will intrude by enjoining that state court action. In the extreme situation, where the state court action has already proceeded through a trial and to judgment, stopping that state court action in its tracks blatantly disempowers the state sovereign. The Supreme Court has already found that a state has a substantial interest in both using its contempt powers to assist a party to collect the judgment it is due,⁴²⁹ and in allowing a prevailing party to execute its judgment,⁴³⁰ such that federal courts err in enjoining such state court actions.⁴³¹ While the Court has not yet ruled on whether *Younger* abstention is permitted or required in cases where the state court has not yet entered a judgment,

close facts, a district court could legitimately have exercised its discretion either to abstain or not to abstain from granting the motion to compel arbitration. Thus, the Eleventh Circuit should not have reversed its decision as an abuse of discretion. At minimum, the district court was justified in abstaining from granting the antisuit injunction, even if it was not justified in abstaining entirely from the matter.

⁴²⁸ *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 (1987) (holding that *Younger* abstention is warranted when federal injunctions would interfere with the execution of state judgments on the grounds that they challenge the very process by which those judgments were obtained).

⁴²⁹ See *Juidice v. Vail*, 430 U.S. 327, 338-39 (1977) (holding that the district court erred in enjoining the enforcement of state court contempt proceedings due to principles of comity and federalism as enunciated in *Younger*).

⁴³⁰ See *Pennzoil*, 481 U.S. at 13-14. The Court explained:

There is little difference between the State's interest in forcing persons to transfer property in response to a court's judgment and in forcing persons to respond to the court's process on pain of contempt. Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. (footnotes omitted).

⁴³¹ See *id.* at 17 (concluding that the district court should have abstained); *Juidice*, 430 U.S. at 338 (same).

the logic of the Court's approach places greater and greater restraints on the federal court as the state action progresses further and further.⁴³²

In determining whether a federal court is required to abstain from interfering with an ongoing state court action, the courts should also consider whether either party has engaged in "harassing" or "bad faith" tactics. The Court has explicitly held that injunctions which might otherwise be barred by *Younger* abstention are permitted where the state court action was brought in bad faith or to harass.⁴³³ In *Moses H. Cone*, the Court reserved the question whether a court might consider the harassing nature of either the federal or state suit in determining whether *Colorado River* abstention was required.⁴³⁴ This Article suggests that the Court ought to examine whether either the federal or state action was brought in bad faith as one factor in its discretionary abstention analysis. Although it often may be difficult for a court to make a finding of bad faith, certain scenarios seem to call for such a finding.⁴³⁵ For example, imagine a scenario in which a party files an action in state court and then, several years later, having now suffered adverse rulings, files a motion to compel arbitration in federal court and also requests that the federal court enjoin the ongoing state action. Certainly these facts would seem to weigh against the grant of the injunction.⁴³⁶ On the other hand, where it could be shown that a party was repeat-

⁴³² Cf. *TranSouth*, 149 F.3d at 1296 n.1 (concluding that *Younger* did not support abstention by a federal court that was requested to compel arbitration and to issue an arbitral antisuit injunction because, in light of the applicability of the FAA, "no compelling state interest exists in having the state courts, instead of the federal courts, decide this case").

⁴³³ See *supra* text accompanying notes 419-22 (discussing *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and noting that *Younger* abstention requires an examination of the nature and purpose of the state court action).

⁴³⁴ See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 n.20 (1983) (stating that even though "the vexatious or reactive nature of either the federal or the state litigation may influence the decision whether to defer to a parallel state litigation under *Colorado River*, . . . [w]e need not rely on such reasoning here").

⁴³⁵ See *supra* text accompanying notes 160-62 (noting that false forum shopping, illegitimate delay, and repetitive litigation may point to an inappropriate, vexatious, or harassing action).

⁴³⁶ In *Lorentzen v. Levolor Corp.*, 754 F. Supp. 987, 992-93 (S.D.N.Y. 1990), the court abstained, emphasizing that the plaintiff had initially filed in state court, which held the dispute arbitrable, before filing a federal action 20 months later. Some courts have used the concept of "waiver" to apply a similar analysis. See *PPG Indus. v. Webster Auto Parts Inc.*, 128 F.3d 103, 107-10 (2d Cir. 1997) (affirming the district court's finding of waiver where a party seeking arbitration initially filed two actions in court and obtained substantial discovery before seeking to compel arbitration of counterclaims); *S & H Contractors, Inc., v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (holding that a foreign corporation waived its right to arbitrate by waiting eight months from the time the opposing party filed the complaint to demand arbitration, during which time parties filed several motions and took several depositions); cf. *Distajo Second Circuit II*, 107 F.3d 126, 130-34 (2d Cir. 1997) (stating "the general rule that waiver of the right to arbitrate occurs when a party 'engages in protracted litigation'").

edly filing litigation in state court, notwithstanding numerous rulings that the dispute must be arbitrated, such facts would seem to weigh in favor of a federal court injunction. In sum, in considering whether or not to abstain from enjoining a state court action, the federal court should, once again, examine the four policies discussed in this Article in light of the factual context of the situation.

V. FEDERAL COURTS' OVERZEALOUS ISSUANCE OF PRO-ARBITRATION ANTISUIT INJUNCTIONS AGAINST STATE COURTS REFLECTS THEIR EXCESSIVE ENTHUSIASM FOR CONTRACTUAL ARBITRATION

Federal courts have, at least since 1983,⁴³⁷ evinced tremendous faith in and favoritism toward arbitration. In a series of decisions that I have discussed elsewhere, the Supreme Court and other federal courts have relied on this preference to interpret the FAA and its scope very broadly,⁴³⁸ to read arbitration clauses themselves very expansively,⁴³⁹ and to reject various potential common law defenses to arbitration agreements.⁴⁴⁰ In one commentator's words, judges "have chosen to deal with their lack of resources by

tion that results in prejudice to the opposing party," but affirming the district court's refusal to find waiver where, although the party now seeking arbitration had pursued eviction actions in state court, the federal court concluded that the issues were sufficiently unrelated so as not to constitute waiver (quoting *Cotton v. Sloane*, 4 F.3d 176, 179 (2d Cir. 1993))). See generally *MACNEIL ET AL.*, *supra* note 96, at 21.2-21.4.3 (discussing the time limits, pursuant to the FAA, in which parties must agree to arbitrate, and examining the law involving waiver of a party's right to arbitrate).

⁴³⁷ *Moses H. Cone*, discussed earlier in this Article at some length, is also the decision in which the Court first enunciated the view that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24; see also *Sternlight*, *supra* note 54, at 660-61 (arguing that the Court's statement of a policy favoring arbitration is a "myth" for which the Court has not provided a sufficient rationale or support).

⁴³⁸ The federal courts have typically found that the FAA applies to employment disputes despite statutory language that would seem to preclude such coverage. The courts have also found that the statute applies broadly to cover disputes brought in state court, and that it pre-empts almost all state arbitration legislation. Also, the courts have rejected virtually all public policy exclusions to the FAA. See *Sternlight*, *supra* note 55, at 19-22 (discussing how the Court "took additional steps to ensure that the FAA would be applied very broadly" (citation omitted)).

⁴³⁹ Courts have often found disputes to be arbitrable although they do not clearly fall within the scope of the arbitration agreement. See *id.* at 29-30 ("[C]ourts have frequently held that a securities industry employee who signed a U-4 registration statement . . . was required to arbitrate all claims against the employer, even though the U-4 does not specify which disputes are arbitrable.").

⁴⁴⁰ Courts have tended not to void arbitration clauses on such grounds as fraud or unconscionability. See *id.* at 25-39 ("Purporting to apply state law, courts seem committed to a belief that all binding arbitration agreements are conveyed with sufficient clarity as to be comprehensible to the parties, are agreed to absent fraud or duress, and are fair, although perhaps lacking formal protection.").

creating a fictitious new public policy that trumps all others—"the policy in favor of clearing my docket."⁴⁴¹ Many have argued that federal courts' great enthusiasm for arbitration has caused them to ignore the rights and interests of consumers, workers, franchisees, or other "little guys."⁴⁴²

This Article has shown that federal courts' great enthusiasm for arbitration has caused them to pay insufficient attention to federalism and comity concerns, instead proving overly willing to enjoin ongoing state court proceedings in order to ensure that disputes are arbitrated rather than litigated. The preceding discussion demonstrates that federal courts have frequently ignored relevant doctrines or interpreted exceptions quite broadly in issuing injunctions against state courts in order to support federal court pro-arbitration rulings.⁴⁴³

Federal courts' excessive enthusiasm for arbitral antisuit injunctions also tends to benefit larger employers, manufacturers, franchisors, and brokerages over employees, small distributors, franchisees, and customers. As discussed earlier, it is usually the "little guy" who files in state court.⁴⁴⁴ It then tends to be the "big guy" who files in federal court, often in a location

⁴⁴¹ Cliff Palefsky, *Arbitrary Arbitration: The Founders Would Frown on Mandatory ADR*, S.F. DAILY, Mar. 1, 1995, at 4; see also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (critiquing the Court's expansion of binding arbitration); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 ("Our legal sensibilities tell us that where waiver of so important a right as access to the courts is imposed through a contractual form infamous for the absence of real consent, courts should draw a protective line by holding the form term at least presumptively unenforceable." (citation omitted)).

⁴⁴² See, e.g., Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1955-67 (1996) (arguing that the institution of arbitration "is being exploited as a tool by which to achieve a surreptitious reduction of justice services in our society"); Carrington & Haagen, *supra* note 441, at 401 (stating that the Court's decisions will allow "birds of prey" to "sup on workers, consumers, shippers, passengers and franchisees"); Sternlight, *supra* note 54, at 712 ("Congress must act quickly to prevent companies from using arbitration as a tool of oppression.").

⁴⁴³ In some instances, the courts that have issued arbitral antisuit injunctions have failed to set out the factual context in detail, thereby making it difficult or impossible to say whether the federal court acted improperly in enjoining the state court action. See, e.g., McGuire, Cornwell & Blakey v. Grider, 765 F. Supp. 1048 (D. Colo. 1991) (enjoining a state proceeding filed a year and a half prior to a federal ruling without noting the date that the federal action was filed or discussing in any depth the progress made in the state action); Pervel Indus., Inc. v. TM Wallcovering, Inc., 675 F. Supp. 867 (S.D.N.Y. 1987) (staying a state court action without specifying the date of filing of the state or federal action or discussing the status of the state action), *aff'd*, 871 F.2d 7 (2d Cir. 1989); Novik & Co. v. Jerry Mann, Inc., 497 F. Supp. 447 (S.D.N.Y. 1980) (enjoining multiple state proceedings without providing any information as to when they were filed or how far they had proceeded).

⁴⁴⁴ See *supra* note 58 and accompanying text (citing cases in which "little guys" filed state actions).

distant from where the “little guy” filed suit and where the dispute is centered. The “big guy” requests not only an order compelling arbitration but also an injunction to shut down the state court proceeding.⁴⁴⁵ Thus, to the extent that federal courts are too willing to shut down state court proceedings they also provide a strategic benefit of forum choice to the “big guy” over the “little guy.” I do not contend that the federal courts intend to provide such a benefit, nor even that they are necessarily conscious or aware of the effect of their actions. Nonetheless, based on my analysis of the reported decisions, it does seem clear that federal courts’ decisions have such an effect.⁴⁴⁶ Interestingly, federal courts have proved much more deferential to state court judgments ordering arbitration to proceed. In *Southeast Resource Recovery Facility Authority v. Montenay International Corp.*,⁴⁴⁷ for example, the state court had refused to stay arbitration.⁴⁴⁸ The party opposing arbitration then filed an action in federal court and successfully moved to stay arbitration.⁴⁴⁹ On appeal, the Ninth Circuit reversed, finding that the state court’s refusal to enjoin arbitration was equivalent to an order to compel arbitration and that this decision must be afforded full faith and credit by the federal court.⁴⁵⁰ In reversing the district court’s interference with the state court’s pro-arbitration order, the Ninth Circuit went on at some length about the “values underlying the full faith and credit statute,” including the promotion of comity and the conservation of judicial resources.⁴⁵¹ Similarly, in *Integrated Pet Foods, Inc. v. Common-*

⁴⁴⁵ See *supra* note 58 and accompanying text (citing cases in which “big guys” filed a motion to compel arbitration in federal court and asked the federal court to enjoin the state court proceeding).

⁴⁴⁶ It would be fascinating to further explore this point, and to investigate whether federal courts appear less willing to enjoin state court proceedings when it is the “little guy” who seeks relief. See *supra* note 58 (discussing two federal courts’ denials of motions to enjoin state court refusals to order arbitration where the “big guy” filed the state suit). It would also be interesting to compare the backgrounds of the judges (both state and federal) who are more and less enthusiastic about arbitration. These projects, however, are for another research leave.

⁴⁴⁷ 973 F.2d 711 (9th Cir. 1992).

⁴⁴⁸ See *id.* at 712 (referring to an earlier state court decision rejecting the application of a California statutory provision, Cal. Civ. Proc. Code § 1281.2(c), allowing “a court to stay arbitration if a party to the arbitration agreement is involved in related litigation with a third party”).

⁴⁴⁹ See *id.* (noting that the district court held that section 1281.2(c) applied).

⁴⁵⁰ See *id.* at 714 (holding that because of “the full faith and credit statute, the promotion of comity and the conservation of judicial resources,” parties with a state court decision cannot relitigate the same issues in federal court).

⁴⁵¹ See *id.* (stating that “[a] federal court cannot reexamine arguments that already have been considered and rejected by a state court because such review of a state court decision creates needless friction between the state and federal forums,” and that “[t]he district court also wasted judicial resources by reexamining the state court order”).

wealth,⁴⁵² the federal district court refused to enjoin a state court proceeding in which the state court had ordered a dispute to proceed to arbitration.⁴⁵³ The district court explained that it denied the motion for a temporary restraining order and also dismissed plaintiff's complaint on the ground that the relief sought was barred by the AIA.⁴⁵⁴ The court noted, as well, that the motion "appeared to be inconsistent with the *Rooker-Feldman* doctrine" in that "it sought, indirectly, to challenge the correctness of a decision of the Court of Common Pleas of Bucks County."⁴⁵⁵

It seems that federal courts have also proven more deferential to state court rulings in the nonarbitration context. For example, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*,⁴⁵⁶ the Third Circuit recently upheld a district court's decision to deny a motion for injunctive relief against a state court's approval of an allegedly collusive class action settlement, even though the Third Circuit had previously refused to certify the plaintiff class or to accept a virtually identical settlement.⁴⁵⁷ The court explained that while the parties' alleged "end run" around the prior federal court order "gives us pause,"⁴⁵⁸ the court was blocked from interfering with the state court procedures by the Full Faith and Credit Act,⁴⁵⁹

⁴⁵² No. CIV.A. 95-7847, 1996 WL 153216 (E.D. Pa. Apr. 1, 1996). For a similar case, see *Lorentzen v. Levolor Corp.*, 754 F. Supp. 987, 987, 991-94 (S.D.N.Y. 1990), citing principles of federalism and policies opposing forum shopping, and relying on *Colorado River* abstention in refusing to consider the plaintiff's claims where a state court had previously ruled that the dispute was arbitrable.

⁴⁵³ See *Integrated Pet Foods*, 1996 WL 153216, at *1 (discussing the district court's previous judgment and noting that it had rejected the moving party's argument that "the state court had erroneously barred it from asserting a number of defenses").

⁴⁵⁴ See *id.* (quoting 28 U.S.C. § 2283, stating that "[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").

⁴⁵⁵ *Id.*

⁴⁵⁶ 134 F.3d 133 (3d Cir. 1998).

⁴⁵⁷ The original Third Circuit decision, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), held that the district court erred in certifying a nationwide settlement class of GM truck owners seeking relief as the result of alleged defects in GM truck fuel systems. See 134 F.3d at 136-37. The 1995 decision both vacated the class certification order and set aside the settlement, but allowed the parties the option of curing the defects in the district court. See *id.* at 137; *General Motors*, 55 F. 3d at 819. Rather than seeking to cure such defects, the plaintiffs simply filed a new action in Louisiana state court. See *General Motors*, 134 F.3d at 137.

⁴⁵⁸ *General Motors*, 134 F.3d at 137.

⁴⁵⁹ The Third Circuit found that the Full Faith and Credit statute blocked the federal court from issuing an injunction because, after the district court refused to enjoin the state court action, the Louisiana court entered final judgment approving the settlement. See *id.* at 141-43.

the *Rooker-Feldman* doctrine,⁴⁶⁰ and the AIA.⁴⁶¹ Similarly, in *Kamilewicz v. Bank of Boston Corp.*,⁴⁶² the Seventh Circuit found that the *Rooker-Feldman* doctrine precluded the federal district court from hearing a legal malpractice action, where the action was based on a claim that attorneys had committed malpractice in securing a class action settlement in state court that required plaintiffs to pay more in attorney fees than they received on the merits.⁴⁶³ In so ruling, the Seventh Circuit found that the federal court lacked jurisdiction to act, even though plaintiffs alleged that the state court judgment was itself void for lack of personal jurisdiction and lack of due process,⁴⁶⁴ and even though the question of whether the settlement was void for fraud or other reasons was not resolved by the state court until after the federal suit was filed.⁴⁶⁵ Finally, in *News-Journal Corp. v. Foxman*,⁴⁶⁶ the Eleventh Circuit affirmed a district court's dismissal of a federal suit on the grounds of *Younger* abstention although the federal court plaintiff claimed

The Third Circuit found that judgment would be considered final in Louisiana and must therefore be afforded full faith and credit by the federal courts. *See id.* at 142.

⁴⁶⁰ The Third Circuit found *Rooker-Feldman* applicable because, prior to the Third Circuit's consideration of the appeal (although subsequent to the district court's denial of the motion to enjoin), the Louisiana court entered a final judgment approving the settlement. *See id.* at 143.

⁴⁶¹ The Third Circuit found that the injunction was not necessary in aid of the federal court's jurisdiction because the state court's action did not threaten to cause havoc in any way with proceedings taking place in the federal court. *See id.* at 143-46. It contrasted the situation with the court's prior decision in *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993), in which the court had ruled that the AIA permitted federal courts to use an injunction in a multi-district litigation case where settlement was imminent. *See General Motors*, 134 F.3d at 145 (citing *Carlough*, 10 F.3d at 203-04). The Third Circuit similarly found that no injunction was needed to protect or effectuate a federal judgment since neither denial of class certification nor rejection of a settlement were properly considered a judgment. *See id.* at 145-46. Finally, the Third Circuit also found that the federal courts lacked personal jurisdiction to consider the challenge to the Louisiana action. *See id.* at 140-41.

⁴⁶² 92 F.3d 506 (7th Cir. 1996).

⁴⁶³ *See id.* at 511-12. The Seventh Circuit found that, although characterized as a malpractice action, the federal suit was effectively an appeal of the state court judgment in that plaintiffs' injuries resulted from the state court judgment. *See id.* at 510.

⁴⁶⁴ *See id.* at 510-11. Judges Easterbrook, Posner, Manion, Rovner, and Wood vigorously dissented from the en banc Seventh Circuit's refusal to grant plaintiff's petition for a rehearing on a variety of grounds, including the ground that the malpractice action was not really an appeal of the state judgment, and that the state judgment was alleged to be void for lack of personal jurisdiction or lack of due process. *See Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1349-53 (7th Cir. 1996).

⁴⁶⁵ 92 F.3d at 510-11. After the federal action was filed, the federal defendants filed a motion with the Alabama court requesting an order directing them to show cause why they should not be bound by the prior settlement. *See id.* at 509. The Alabama court did not reaffirm its order of settlement until January 30, 1996, several weeks after the district court dismissed that suit for lack of jurisdiction. *See id.*

⁴⁶⁶ 939 F.2d 1499 (11th Cir. 1991).

its First Amendment rights were in jeopardy.⁴⁶⁷ In affirming the district court's abstention, the appellate court emphasized that "a federal court [should] 'tread lightly' when a state proceeding is already underway,"⁴⁶⁸ and that the federal court plaintiff could raise its concerns in the adequate state forum.⁴⁶⁹ It explained that "[w]hile the News-Journal was entitled to review of its federal claims in state court, it was not guaranteed its desired result."⁴⁷⁰

If federal courts applied similar considerations in determining whether or not to grant arbitral antisuit injunctions, they would issue far fewer such injunctions. While this Article does not contend that all arbitral antisuit injunctions are improper, it does assert that federal courts have been far too willing to grant such injunctions. *Doctor's Associates, Inc. v. Distajo*⁴⁷¹ is an example of a case in which the federal courts seemed overly willing to interfere with state court proceedings.⁴⁷² In one aspect of that factually complex case,⁴⁷³ the franchisor, DAI, had its leasing company file an action in state court to evict franchisee Emily Distajo.⁴⁷⁴ Distajo then responded by filing a state court action claiming, inter alia, fraud and breach of contract by DAI and its leasing company.⁴⁷⁵ Only after Distajo had filed this dispute did DAI assert the arbitration clause in its contract and file an action in federal court seeking to compel arbitration.⁴⁷⁶ Before the federal court ruled on the motion to compel, the state court, on October 24, 1994, issued partial summary judgment in favor of the plaintiff, concluding after sub-

⁴⁶⁷ The case involved a criminal action, pending in state court, in which the court had placed a gag order on trial participants. *See id.* at 1504-05.

⁴⁶⁸ *Id.* at 1508 (quoting *Blalock v. United States*, 844 F.2d 1546, 1549 (11th Cir. 1988) (per curiam)).

⁴⁶⁹ *See id.* at 1508-11 (discussing the plaintiff's requests for rehearing and review).

⁴⁷⁰ *Id.* at 1511.

⁴⁷¹ 870 F. Supp. 34 (D. Conn. 1994), *aff'd in part, rev'd in part*, 66 F.3d 438 (2d Cir. 1995), *on remand*, 944 F. Supp. 1010 (D. Conn. 1996), *aff'd*, 107 F.3d 126 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 365 (1997).

⁴⁷² *See Distajo Second Circuit I*, 66 F.3d at 458 (affirming the district court's decision not to accord full faith and credit to judgments of Illinois and North Carolina state courts).

⁴⁷³ The suit involved consolidated litigation from several states. In the interests of brevity and clarity, this Article will only discuss one set of the claims. It should however be noted that the Second Circuit did conclude that the judgment of an Alabama court was entitled to full faith and credit and thus reversed the district court's injunction issued as to that proceeding. *See id.* at 446-49.

⁴⁷⁴ *See id.* at 443. DAI conceded that the leasing company was wholly owned by DAI, that it had no assets or net income, that no rent was paid to the leasing company, and that DAI made the decision that the leasing company should file an eviction action. Nonetheless, DAI argued that the leasing company was a separate entity that was not bound by the arbitration agreement between franchisor and franchisee.

⁴⁷⁵ *See id.*

⁴⁷⁶ *See id.*

stantial analysis that the arbitration clauses were void and unenforceable.⁴⁷⁷ Nonetheless, two and a half weeks following the issuance of the state order, the federal court granted DAI's motion to compel arbitration.⁴⁷⁸ A few weeks later, the district court granted first a temporary restraining order and then a preliminary injunction barring Distajo from seeking enforcement of her Illinois judgment.⁴⁷⁹ The district court found that the injunction was not barred by the AIA because continued state litigation "would impair the integrity of the order of arbitration."⁴⁸⁰ On appeal the Second Circuit upheld the district court's ruling. It concluded that the Illinois court's grant of summary judgment was not final under Illinois law and that the district court need not afford it full faith and credit.⁴⁸¹ The Second Circuit further concluded that because the federal court motion to compel arbitration had been filed (though not ruled on) prior to the state court's issuance of its ruling, the *Rooker-Feldman* doctrine did not preclude the federal court from ruling in the case.⁴⁸²

The outcome in the *Distajo* litigation seems wrong, given the analysis in this Article.⁴⁸³ As the state court was fully capable of applying the FAA, the district court's ruling was not justified by requirements of federal policy.⁴⁸⁴ Moreover, interests pertaining to federalism and efficiency opposed

⁴⁷⁷ *Distajo v. Doctor's Associates Inc.*, No. 94-L-155 (3d Jud. Cir., Ill., Oct. 24, 1994) (finding the arbitration clause void and unenforceable on grounds of waiver, lack of mutuality, unconscionability, and fraud).

⁴⁷⁸ See *Distajo Second Circuit I*, 66 F.3d at 443 (noting the grant of motion to compel on Nov. 10, 1994).

⁴⁷⁹ See *id.* (noting the grant of a Temporary Restraining Order on Nov. 22, 1994 and a grant of a preliminary injunction on Dec. 14, 1994); see also 870 F. Supp. 34, 36 (D. Conn. 1994) (granting a preliminary injunction).

⁴⁸⁰ *Doctor's Assocs.*, 870 F. Supp. at 36. The Second Circuit apparently was not asked to review this ruling as it is not discussed in either of the two *Distajo* appeals. See *Distajo Second Circuit I*, 66 F.3d at 438; *Distajo Second Circuit II*, 107 F.3d 126 (2d Cir. 1997), cert. denied, 118 S. Ct. 365 (1997).

⁴⁸¹ See *Distajo Second Circuit I*, 66 F.3d at 449-50 (noting that "[t]he Illinois Supreme Court has held that an Illinois judgment is not final, and thus not entitled to preclusive effect, until the time for appeal has expired" (citations omitted)).

⁴⁸² See *Distajo Second Circuit II*, 107 F.3d at 136-38. While the Second Circuit did not rule on the abstention question with respect to the *Distajo* set of facts, it did conclude in a related piece of litigation that abstention was not required because the state court had not engaged in a substantial proceeding. See *id.* at 138.

⁴⁸³ Although the ultimate outcome does seem wrong, in a technical sense the Second Circuit's analysis was not erroneous to the extent appellants failed to present certain of these arguments in their appellate briefs. Moreover, it should be recognized that the *Distajo* courts, at least, made a serious effort to consider many of the doctrines governing the issuance of anti-suit injunctions by federal courts against their state counterparts.

⁴⁸⁴ See *supra* text accompanying notes 77-113 (arguing that federal policy does not support issuance of arbitral anti-suit injunctions by federal courts against state courts, but rather supports the assumption that the state courts will adequately enforce the FAA). The state

the federal override of the state decision. The state court had already invested substantial resources in the case. Discovery had been conducted and the state court had considered and ruled on a motion for partial summary judgment, which resolved multiple factual and legal issues. When the federal district court effectively ignored the state court decision, it not only disrespected the state court but also required the federal court and the parties to expend additional resources to present the same issues a second time. In addition, the vexatious litigation factor dictated in favor of allowing the state court judgment to stand. DAI was the party that originally initiated litigation in state court, albeit acting through its wholly owned leasing company. Furthermore, DAI waited at least several months before filing the motion to compel arbitration in federal court. Thus, this is not a case where a party, from the outset, sought federal court interpretation of the arbitration clause, but rather one in which a party seemingly tried to shop between two forums in order to gain a strategic advantage.

The doctrines discussed in this Article could easily have been interpreted to allow or even require the federal district court in *Distajo* to defer to the state court. Even assuming the district court's analysis of Illinois res judicata law was correct, and that the Full Faith and Credit statute therefore did not require preclusion,⁴⁸⁵ the district court might nonetheless have interpreted the *Rooker-Feldman* doctrine to bar an effective appeal of the state court decision.⁴⁸⁶ Alternatively, even if the district court had found that it was justified in granting the motion to compel, it could have drawn the line at enjoining the state court proceeding by concluding that the injunction was not permitted either by traditional equitable principles⁴⁸⁷ or by any exception to the AIA.⁴⁸⁸ Finally, the federal court should, at a minimum, have exercised its discretion to abstain from interfering with a state court proceeding in which the state court had already invested substantial time and energy by permitting discovery and making a substantial ruling on the merits.⁴⁸⁹

Two rare federal court decisions show how the sort of analysis set out in this Article might be used to deny an arbitral antisuit injunction. In

found that the defenses it relied on to void the arbitration clause were applicable under the FAA. See *Distajo v. Doctor's Associates Inc.*, No 94-L-155 (Cir. Ct., 3d Jud. Cir., Ill., Oct. 24, 1994).

⁴⁸⁵ Without broadening the scope of this Article to examine Illinois law on res judicata, it is not possible to consider whether or not Illinois law would have allowed for a contrary decision on this point.

⁴⁸⁶ See *supra* text accompanying notes 200-33 (discussing the *Rooker-Feldman* doctrine).

⁴⁸⁷ See *supra* text accompanying notes 239-47 (discussing the equitable constraints on the issuance of injunctions by federal courts).

⁴⁸⁸ See *supra* text accompanying notes 248-369 (discussing the AIA).

⁴⁸⁹ See *supra* text accompanying notes 370-438 (discussing abstention doctrines).

TranSouth Financial Corp. v. Bell,⁴⁹⁰ the district court concluded that where a borrower filed a state court action on October 4, 1996, and where the lenders did not file a federal court action until November 25, 1996, the district court should abstain from hearing the petition to compel arbitration,⁴⁹¹ and that the AIA did not permit the federal court to enjoin the ongoing state proceedings.⁴⁹² As well, in *Ultracashmere House, Ltd. v. Meyer*,⁴⁹³ the Eleventh Circuit relied on equitable and full faith and credit principles to affirm a district court's refusal to enjoin a state court's determination that an arbitration clause was void, where the federal court plaintiff waited until "four days before the state court trial and almost nine months after initiation of the state court proceedings" to seek a federal stay.⁴⁹⁴

The analysis set out in this Article may, however, also be used to support the *grant* of an arbitral antisuit injunction. Such injunctions may be appropriate where, for example, the motion to compel arbitration was first filed in federal court and was ruled upon by that court before an action was brought in state court. In such a situation the federalism interests are weak, the efficiency interests favor grant of an injunction, and the principles opposing vexatious litigation may also come into play. *Hunt v. Mobil Oil Corp.*⁴⁹⁵ illustrates the point. In that case, plaintiffs filed a federal court action in 1975. After three years of discovery and an eight week trial, the court dismissed several of the plaintiffs' claims on the merits and ruled that others should be arbitrated.⁴⁹⁶ The dispute then went to arbitration, but in 1982, plaintiffs filed a lawsuit in state court in New York seeking to vacate an alleged final award by the arbitrators.⁴⁹⁷ Defendants requested the fed-

⁴⁹⁰ 975 F. Supp. 1305 (M.D. Ala. 1997), *aff'd in part, vacated in part on other grounds, and remanded*, 149 F.3d 1292 (11th Cir. 1998).

⁴⁹¹ The district court found it appropriate to abstain in large part because the impossibility of adding certain of the state court parties to the federal court action would necessitate piecemeal dispute resolution. See *TranSouth*, 975 F. Supp. at 1308. The Eleventh Circuit reversed on this issue. See *TranSouth*, 149 F.3d at 1294-96. See *supra* note 427 for a discussion of both courts' analyses.

⁴⁹² See *TranSouth*, 975 F. Supp. at 1309-11 (finding that exceptions to the AIA did not apply). The Eleventh Circuit did not reverse but hinted that an antisuit injunction might be justified if the district court were to compel arbitration. See *TranSouth*, 149 F.3d at 1296-97. See *supra* note 427 for discussion of both courts' analyses.

⁴⁹³ 664 F.2d 1176 (11th Cir. 1981), *overruled on other grounds by* *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997), *cert. denied*, 119 S. Ct. 105 (1998).

⁴⁹⁴ *Id.* at 1179; see also *id.* at 1179-84.

⁴⁹⁵ 557 F. Supp. 368 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1438 (2d Cir. 1983).

⁴⁹⁶ See *id.* at 370.

⁴⁹⁷ See *id.* at 370-71 (noting the plaintiffs' allegation of misconduct by the arbitrators).

eral court to enjoin plaintiffs from pursuing their state action.⁴⁹⁸ The federal court granted the request,⁴⁹⁹ and this author agrees that it was justified. The state court had not issued any decision that would bring into play either the Full Faith and Credit statute or the *Rooker-Feldman* doctrine. Moreover, the injunction would seem to have been warranted as a matter of equity and under the “in aid of jurisdiction” exception to the AIA, given the extensive time invested by all of the parties in the federal proceeding, the substantial priority of the federal action over the state court action, the fact that the plaintiffs had chosen first the federal but then the state forum, and the existence of at least the possibility that the plaintiffs were engaging in vexatious or harassing conduct. Finally, abstention was not appropriate in light of the state court’s minimal investment in time compared to the proceedings that had already taken place in federal court.

CONCLUSION

This Article suggests that many federal courts have been overly willing to issue arbitral antisuit injunctions. However, it by no means contends that “big guys” are more likely to engage in forum shopping than “little guys,” that arbitral antisuit injunctions are always inappropriate, or that federal courts should refrain from issuing arbitral antisuit injunctions in order to benefit the “little guys.” Consumers, franchisees, and distributors seek an advantage by filing in state court just as manufacturers, franchisors, and dealers seek an advantage by filing their motions to compel arbitration in federal court. The Second Circuit was right when, in *Distajo Second Circuit I*, it stated “[t]his case is about forum-shopping, by one and all.”⁵⁰⁰

Thus, this Article does not contend that federal courts should attempt to favor “little guys” over “big guys,” but only that they should treat “little guys” fairly by using the same principles in considering arbitral antisuit injunctions as they do in considering other antisuit injunctions. That is, federal courts should base their determinations of whether to issue arbitral antisuit injunctions on considerations of federal arbitration policy, comity and federalism, efficiency, and the desirability of deterring vexatious litigation.

To fully consider these policies, federal courts must examine the specific factual context of both the state and federal actions. They should rec-

⁴⁹⁸ See *id.* at 371 (noting the defendants’ extension of the scope of their pending motion to enjoin the plaintiffs from commencing an action that would interfere with the arbitration and to order the plaintiffs to continue with the arbitration).

⁴⁹⁹ See *id.* at 377.

⁵⁰⁰ *Distajo Second Circuit I*, 66 F.3d 438, 441 (2d Cir. 1995), *on remand*, 944 F. Supp. 1007 (D. Conn. 1996), *aff’d*, 107 F.3d 126 (2d Cir. 1997) (“*Distajo Second Circuit II*”), *cert. denied*, 118 S. Ct. 365 (1997).

ognize that because federal arbitration policy applies equally to state and federal courts, federal policy does not typically justify federal antisuit injunctions. If the state court suit has progressed far in terms of the issuance of judgments or the conducting of discovery, both federalism and efficiency concerns will typically weigh against the issuance of a federal antisuit injunction. The federal courts should also be wary of granting arbitral antisuit injunctions that support a party's use of harassing or vexatious litigation tactics.

Where federal courts fail to consider the full array of policies and doctrines that are relevant to the issuance of arbitral antisuit injunctions, they ironically use the force of federal supremacy to subordinate state interests in favor of a third forum, non-judicial private dispute resolution. In sum, when federal courts allow their great enthusiasm for arbitration to overwhelm their proper analysis of arbitral antisuit injunctions, they will inevitably issue decisions that are not only damaging to the relationship between federal and state courts, but also unjust.

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