NOTE

BALANCING COMITY WITH THE PROTECTION OF PRECLUSION: THE SCOPE OF THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT

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INTRODUCTION

HAILED as a linchpin of "Our Federalism,"[1] the Anti-Injunction Act is one of the oldest and most important statutes governing our system of federal-state judiciary relations.[2] Originally enacted in 1793, the current version states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly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."[3] In setting a bar to federal courts enjoining state court litigation, subject to very limited exceptions, the Act promotes a principle crucial to the frictionless functioning of feder-

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[1] Younger v. Harris, 401 U.S. 37, 44–45 (1971) (referring to a common Founding-era slogan describing the new system of government).

[2] In the last century, the Supreme Court has repeatedly addressed questions regarding the statute's meaning. See, e.g., Smith v. Bayer Corp., 131 S. Ct. 2368, 2376 (2011); Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 142 (1988); Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 519 (1986); Cnty. of Imperial v. Munoz, 449 U.S. 54, 55 (1980); Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 626 (1977); Mitchum v. Foster, 407 U.S. 225, 226 (1972); Roudebush v. Hartke, 405 U.S. 15, 20 (1972); NLRB v. Nash-Finch Co., 404 U.S. 138, 139–40 (1971); Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970); Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 512 (1955); Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 126 (1941); Okla. Packing Co. v. Okla. Gas & Elec. Co., 309 U.S. 4, 8 (1940).

[3] 28 U.S.C. § 2283 (2006).

alism: the general independence of the state and federal court systems from each other.

One of the most contested portions of the Act today is the exception for injunctions that are necessary to "protect or effectuate [federal courts'] judgments,"[4] also known as the "relitigation exception." Currently, there is a significant rift within the courts of appeals over the extent of preclusion protection provided by this important exception. Six circuits hold that a federal court can enjoin state court proceedings only if the state court litigation involves "claims or issues actually decided" previously by that federal court.[5] In contrast, four circuits support reading the exception to track the full scope of the modern doctrine of claim preclusion, allowing injunctions to issue for claims that could have been, but were not, raised in the federal court suit.[6] This split has grown rapidly in the past few years. Only ten years ago, the U.S. Court of Appeals for the Ninth Circuit stood alone in its support for providing full claim preclusion protection via relitigation injunctions,[7] while five circuits supported the "claims or issues actually decided" position.[8] The widening conflict among the circuit courts, combined with the centrality of the Anti-Injunction Act to the smooth operation of federalism, makes it likely the Supreme Court will address the issue of the relitigation exception's scope in the next few years.

This Note will argue that the proper scope of the relitigation exception is to limit injunctive protection to "claims or issues actually decided" by the lower federal court. The analysis for this position proceeds as follows. Part I of this Note provides context for the

[4] Id.

[5] See Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 236–37 (4th Cir. 2007); Jones v. St. Paul Cos., 495 F.3d 888, 891–93 (8th Cir. 2007); Weyerhaeuser Co. v. Wyatt, 505 F.3d 1104, 1110–11 (10th Cir. 2007); Smith v. Woosley, 399 F.3d 428, 434 n.8 (2d Cir. 2005); Hatcher v. Avis Rent-A-Car Sys., Inc., 152 F.3d 540, 543 (6th Cir. 1998); In re G.S.F. Corp., 938 F.2d 1467, 1478–79 (1st Cir. 1991).

[6] See Blanchard 1986, Ltd. v. Park Plantation, LLC, 553 F.3d 405, 408–09 n.12 (5th Cir. 2008); Burr & Forman v. Blair, 470 F.3d 1019, 1029–30 (11th Cir. 2006); In re Prudential Ins. Co. of Am. Sales Practices Litig., 314 F.3d 99, 104 (3d Cir. 2002); W. Sys., Inc. v. Ulloa, 958 F.2d 864, 869–72 (9th Cir. 1992).

[7] See *Ulloa*, 958 F.2d at 869–70.

[8] See *Hatcher*, 152 F.3d at 543; Tex. Commerce Bank Nat'l Ass'n v. Florida, 138 F.3d 179, 181 (5th Cir. 1998); *In re G.S.F. Corp.*, 938 F.2d at 1478; LCS Servs., Inc. v. Hamrick, 925 F.2d 745, 749 (4th Cir. 1991); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 642–43 (2d Cir. 1989).

current controversy over the relitigation exception. It reviews the key points of the Anti-Injunction Act's history from its origin to the Supreme Court's most recent consideration of the relitigation exception's scope in *Chick Kam Choo v. Exxon Corp.* in 1988. Part II presents the current circuit court split over the scope of the relitigation exception. The extent of the split is not well-recognized by commentators or many of the courts contributing recent precedent on the scope of the relitigation exception. This Part seeks to clarify the split, analyzing the nuances of the majority position's "claims or issues actually decided" test and exploring the expansion of the full claim preclusion minority position beyond the Ninth Circuit.

Part III seeks to resolve what the proper interpretation of the scope of the relitigation exception should be. Section III.A looks at the text and legislative history of the 1948 revision of the Anti-Injunction Act. It concludes that Congress intended the language of "protect or effectuate its judgments" to be a term of art designed to incorporate meaning from a body of relitigation injunction case law established prior to the controversial 1941 case of *Toucey v. New York Life Insurance*.[9] Section III.B examines this case law to determine the content of this incorporated meaning, finding that these early cases support the majority position of protection for matters "actually decided." The Section also seeks to explain why many courts shifted to a broad interpretation of the exception's preclusive protection in the several decades prior to the Supreme Court's resolution of *Chick Kam Choo*, linking this change to the developments in civil procedure doctrines in the 1960s and 1970s.

Section III.C carefully analyzes the most recent guidance provided by the Supreme Court on the exception's scope, parsing the language and holding of the case at the heart of the circuit split—*Chick Kam Choo*— as well as that case's primary precedent, *Atlantic Coast Line Railroad Co.* This Section also acknowledges *Smith v. Bayer Corp.*, the Court's very recent application of *Chick Kam Choo*'s principles. Furthermore, this Section endeavors to resolve concerns regarding *Parsons Steel*, a precedent that at first glance could appear to imply support for the minority position. This Sec-

[9] 314 U.S. 118, 144 (1941) (Reed, J., dissenting).

tion concludes that the Court's precedents strongly indicate support for the "claims or issues actually decided" test and counsel that the Court should adopt the majority position when it resolves the circuit split in the future. Finally, Section III.D advances a prescriptive argument for the narrow interpretation of the scope of the relitigation exception based on normative considerations of the purpose of the Anti-Injunction Act, the principles of comity, and the Supreme Court's application of the federalism canon in interpreting the Act's exceptions. Based on these arguments from text, history, precedent, and normative concerns, Part III concludes that the majority position, limiting protection to "claims or issues actually decided" previously by the federal court, is the correct interpretation and should be affirmed by the Supreme Court.

I. HISTORICAL OVERVIEW

*A. A Broad History of the Anti-Injunction Act (Pre-*Toucey*)*

The first Anti-Injunction Act was passed in 1793,[10] just a few years after the original Judiciary Act of 1789. Functioning as a limit on the federal courts' equity power rather than their jurisdiction,[11] the statute stated: "nor shall a writ of injunction be granted to stay proceedings in any court of a state."[12] Although the motivations of Congress in passing the Act are somewhat unclear, the emphasis on the protection of states' rights in the political climate surrounding the Act's passage may have contributed to the statute's strong principle of non-interference with state proceedings.[13] Contempo-

[10] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

[11] Charles Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 347 (1930).

[12] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334.

[13] The passage of the Anti-Injunction Act arose during the period of Congressional anger and the drafting of what would become the 11th Amendment in response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793) (upholding the right of citizens of one state to bring suit against another state), which had been decided just two weeks prior. Warren, supra note 11, at 347–48. The importance of the states' rights issue was also apparent in the contemporaneous ratification of the first ten Amendments to the Constitution and the discussions that dominated the debate over the 1789 Judiciary Act. Edgar Noble Durfee & Robert L. Sloss, Federal Injunction Against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145, 1146 (1932); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 131 (1923).

rary distrust of federal courts' equity power and the accompanying potential to disrupt state law courts' proceedings may have been additional factors.[14] Either way, the bar on injunctions against the state courts likely reflected early congressional concerns about the possibility of encroachment by the federal courts on state court jurisdiction.[15]

The Act was initially perceived as an absolute ban on injunctions against state court proceedings.[16] In its first interpretation of the Act, *Diggs & Keith v. Wolcott*,[17] the Supreme Court confirmed this strong version. The *Diggs* Court held, with no explanation, that a federal court "had not jurisdiction to enjoin proceedings in a state court."[18] The unstated implication of the holding is that the Anti-Injunction Act limited the power granted to federal courts in two sections of the earlier Judiciary Act of 1789: Section 12, the removal provision, and Section 14, which gave federal courts the power to issue "writs of *scire facias*, *habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions."[19] This remained the overwhelming majority position for approximately the next sixty years.[20]

In the late nineteenth century, however, the federal courts began undermining the Anti-Injunction Act's prohibition on injunctions against state court proceedings, and a number of exceptions to the ban emerged.[21] These included judicial exceptions for injunctions

[14] Telford Taylor & Everett I. Willis, The Power of Federal Courts to Enjoin Proceedings in State Courts, 42 Yale L.J. 1169, 1171 (1933); Warren, supra note 11, at 347; Note, Federal Power to Enjoin State Court Proceedings, 74 Harv. L. Rev. 726, 727 n.11 (1961) (noting that this distrust may have arisen from "fear that in states lacking equity jurisdiction the federal equity courts would interfere with state law courts by using their power to enjoin actions at law while determining equitable issues crucial to the legal action").

[15] Warren, supra note 11, at 347; Durfee & Sloss, supra note 13, at 1146 n.3 (citing Warren's conclusion approvingly).

[16] Durfee & Sloss, supra note 13, at 1146; Warren, supra note 11, at 347.

[17] 8 U.S. (4 Cranch) 179 (1807).

[18] Id. at 180.

[19] Judiciary Act of 1789, ch. 20, §§ 12, 14, 1 Stat. 73, 79–82; Durfee & Sloss, supra note 13, at 1147.

[20] Durfee & Sloss, supra note 13, at 1148.

[21] Id. at 1149–51, 1164–66; Note, supra note 14, at 726. This was probably due in part to changing political winds following the Civil War. The states' rights-oriented

protecting in rem actions and removal jurisdiction, as well as what would later be codified as the relitigation exception in the modern Anti-Injunction Act.[22] An example of an early case forming the foundation of the relitigation exception is *Julian v. Central Trust Co.*, in which the Supreme Court upheld the issuance of an injunction against a state court proceeding "with a view to protecting the prior jurisdiction of the Federal court and to render effectual its decree."[23]

The Anti-Injunction Act was reenacted in 1875 and 1911 without substantial change except to add an express exception to the statute for bankruptcy cases.[24] The judicial glosses of the developing exceptions to the Act were arguably reenacted along with the statute, although this was a point of contention when the Supreme Court considered the status of the relitigation exception in 1941 in *Toucey v. New York Life Insurance Co*.[25]

B. Toucey v. New York Life Insurance Co.

In *Toucey*, the Supreme Court rejected the relitigation exception, overturning expectations that relitigation injunctions were a settled, valid, judicially-created exception to the Anti-Injunction

position of the Founding era shifted to a more nationalist political mood during Reconstruction. Durfee & Sloss, supra note 13, at 1149.

[22] Note, supra note 14, at 730–32. For cases developing the relitigation exception, see, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 367 (1921); Looney v. E. Tex. R.R., 247 U.S. 214, 221 (1918); Gunter v. Atl. Coast Line R.R., 200 U.S. 273, 293 (1906); Julian v. Cent. Trust Co., 193 U.S. 93, 113–14 (1904); see infra Subsection III.B.1 for a detailed analysis of the cases underlying the historical development of the relitigation exception to the Anti-Injunction Act.

[23] 193 U.S. at 112.

[24] Act of Dec. 1, 1873, ch. 12, § 720, 18 Stat. 136 (adding an exception to the injunction ban for "cases where such injunction may be authorized by any law relating to proceedings in bankruptcy"); Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162.

[25] 314 U.S. 118, 144 (1941) (Reed J., dissenting) (concluding that the 1911 reenactment of the Anti-Injunction Act brought the judicial glosses with it, noting that the Committee on Revision and Codification, "indicative of the then state of the law, cited numerous cases which are relitigation cases"); c.f. Note, supra note 14, at 732–33. But see *Toucey*, 314 U.S. at 140 (majority opinion) (challenging the idea that the 1911 Congress considered the relitigation exception as settled doctrine at the time of the reenactment of the Anti-Injunction Act). The viability of both pre- and post-1911 cases to provide content and meaning for the relitigation exception, however, has been confirmed by the 1948 revision of the Anti-Injunction Act. See infra Section III.A.

Act.[26] The Court held that the federal court could not issue an injunction against a state court suit litigating an issue that the federal court had already decided.[27] The majority characterized the alleged "relitigation cases" as "a few recent and episodic utterances furnish[ing] a tenuous basis for the exception which we are now asked explicitly to sanction."[28] It also characterized other similar cases as actually examples of the in rem exception, which it did find to be a legitimate judicial exception to the text of the Anti-Injunction Act.[29]

The majority decision provoked a lengthy and vehement dissent by Justice Reed. In his dissent, Justice Reed thoroughly analyzed the contested cases alleged to form the basis of the relitigation exception, pointing out that the cases focused on protection of the federal courts' judgments, not merely the resolution of the res.[30] Contrary to the majority's position, he concluded that the cases strongly suggested that once a matter was litigated a federal court could effectuate its judgment by enjoining litigation in state court on the same matter.[31] The contours of this exception as recognized pre-*Toucey* will be fleshed out more thoroughly in Subsection III.B.1.

C. The 1948 Revision of the Act: Codification of the Exception to "Protect and Effectuate" Judgments

In the wake of the controversial *Toucey* decision, Congress revised the Anti-Injunction Act in 1948 to include three categories of exceptions to the injunction bar: federal courts may issue injunctions against state court proceedings "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[32] The "to protect and effectuate its judgments" exception is universally considered a codifica-

[26] 314 U.S. at 139–40; Note, supra note 14, at 732–33.
[27] *Toucey*, 314 U.S. at 139.
[28] Id. at 140.
[29] Id. at 135; Note, supra note 14, at 733.
[30] *Toucey*, 314 U.S. at 148, 152 (Reed, J., dissenting).
[31] Id. at 152–53.
[32] Act of June 25, 1948, ch. 646, 62 Stat. 968 (codified at 28 U.S.C. § 2283 (2006)).

tion of the relitigation exception in response to *Toucey*.[33] Subsection III.B.2 will consider the federal courts' interpretation of the scope of this statutory exception prior to the leading case of *Chick Kam Choo v. Exxon Corp*.[34]

D. Chick Kam Choo v. Exxon Corp.

In 1988, the Supreme Court issued its most recent pronouncement on the scope of the relitigation exception in *Chick Kam Choo*.[35] The case serves as the touchstone for the current dispute in the circuit courts over the precise contours of this exception.[36] Although Subsection III.C.1 will provide an in-depth analysis of *Chick Kam Choo*, a brief overview of the key language from the case is necessary to set the stage for examining the circuit court split. The *Chick Kam Choo* Court stated that the "relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court," characterizing the exception as being "founded in the well-recognized concepts of *res judicata* and collateral estoppel."[37] The Court held that "an essential pre-requisite 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," a pre-requisite that is "strict and narrow."[38] The Court also emphasized that the narrow exceptions to the Anti-Injunction Act are "not [to] be enlarged by loose statutory construction."[39]

[33] Revisor's Note to 28 U.S.C. § 2283, H.R. Rep. No. 308, 80th Cong., 1st Sess.; Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146–47 (1988); Note, supra note 14, at 733–34.

[34] 486 U.S. 140; see infra Subsection III.B.2.

[35] 486 U.S. 140.

[36] See infra Part II for an analysis of the circuit split.

[37] 486 U.S. at 147.

[38] Id. at 148.

[39] Id. at 146 (quoting Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287 (1970)).

II. THE CURRENT SPLIT OVER THE PROPER INTERPRETATION OF THE EXCEPTION

Following *Chick Kam Choo*, the circuits have split over the proper interpretation of the scope of the relitigation exception. Currently "there is disagreement over the precise reach of the relitigation exception's protections," with the circuits debating whether the appropriate test for applying the exception "resembles issue preclusion, claim preclusion, or a hybrid of the two."[40] The majority position is that the relitigation exception provides a hybrid protection that falls between issue preclusion and full claim preclusion. It holds that a federal court can only enjoin a state court proceeding to the extent that the state suit involves "'claims or issues' that 'actually have been decided by the federal court.'"[41] In contrast, the minority position is that the relitigation exception's scope extends to the full amount of modern claim preclusion, allowing a federal court to enjoin state court litigation "both [on] claims actually litigated and those that arise from the same transaction and *could have been* litigated in a prior proceeding" in federal court.[42] Section A of this Part analyzes the majority circuit position, clarifying some of the nuances of the "actually decided" test. Section B of this Part reviews the minority circuit position, elaborating on the case law and tracking the increasing circuit support for the position.

A. Majority Position: "Claims or Issues . . . Actually Decided"

The majority of the circuits applies a "claims or issues actually decided" test to determine if a relitigation injunction is appropriate under the Anti-Injunction Act; this test provides an amount of protection for federal judgments that falls between issue and claim preclusion. The first circuit to adopt the "claims or issues actually decided" test following *Chick Kam Choo* was the U.S. Court of

[40] Blanchard 1986, Ltd. v. Park Plantation, LLC, 553 F.3d 405, 408 (5th Cir. 2008); see also id. at 408 n.12.

[41] See, e.g., Smith v. Woosley, 399 F.3d 428, 434 (2d Cir. 2005) (quoting *Chick Kam Choo*, 486 U.S. at 148).

[42] See, e.g., W. Sys., Inc. v. Ulloa, 958 F.2d 864, 868 (9th Cir. 1992).

Appeals for the Fifth Circuit in *Texas Employers' Insurance Ass'n v. Jackson*.[43] Six other circuits have followed this position.[44]

These cases illustrate two main points about the nuances of the "actually decided" test. First, contrary to characterizations by the minority of circuits,[45] the majority position is broader than just issue preclusion despite not reaching full transactional claim preclusion. In *Smith v. Woosley*, the U.S. Court of Appeals for the Second Circuit provided a description of this hybrid position based on *Chick Kam Choo*'s language. The court stated that "[b]y referring to both 'claims' and 'issues,' . . . [the Supreme Court] permitted the relitigation exception to be applied to protect a federal court[] judgment that would be entitled to more than the issue-preclusion effect of collateral estoppel. A judgment adjudicating a claim could also be protected."[46] Thus, by incorporating some amount of claim preclusion protection, the "actually decided" protection is more extensive than issue preclusion alone. The Second Circuit noted, however, that the Supreme Court in *Chick Kam Choo* stopped short of "permitting protection of the full *res judicata* effect of a judgment—*i.e.*, the preclusion of claims that, while not litigated, arose from the same common nucleus of operative facts as the litigated claim"—based on its insistence, in that case, that the "claims or issues . . . actually had been decided."[47]

Similarly, in *Jones v. St. Paul Cos.*, the U.S. Court of Appeals for the Eighth Circuit argued that the Ninth Circuit's claim in *Western Systems v. Ulloa* that "the more restrictive reading of *Chick Kam*

[43] 862 F.2d 491, 501 (5th Cir. 1988) (en banc) (arguing that providing full claim preclusion protection "appears to be inconsistent with *Chick Kam Choo*'s admonishment that the relitigation exception 'is strict and narrow' so that only 'claims or issues which . . . actually have been decided' in the prior proceeding as reflected by what the prior 'order actually said' are protectable thereunder"); see also Tex. Commerce Bank Nat'l Ass'n v. Florida, 138 F.3d 179, 182 (5th Cir. 1998). Note, however, that in the last ten years the Fifth Circuit has changed approaches and adopted a position that protects full transaction-based claim preclusion, coming in line with the minority interpretation of the relitigation exception. See infra Section II.B.

[44] See, e.g., Bryan v. BellSouth Commc'ns., 492 F.3d 231, 236–37 (4th Cir. 2007); Jones v. St. Paul Cos., 495 F.3d 888, 891–94 (8th Cir. 2007); Weyerhaeuser Co. v. Wyatt, 505 F.3d 1104, 1110–11 (10th Cir. 2007); Smith v. Woosley, 399 F.3d 428, 434 n.8 (2d Cir. 2005); Hatcher v. Avis Rent-A-Car Sys., Inc., 152 F.3d 540, 543–44 (6th Cir. 1998); In re G.S.F. Corp., 938 F.2d 1467, 1478–79 (1st Cir. 1991).

[45] *Blanchard 1986, Ltd.*, 553 F.3d at 408–09 n.12; *Ulloa*, 958 F.2d at 870.

[46] *Woosley*, 399 F.3d at 434 n.8.

[47] Id.

Choo reads res judicata entirely out of § 2283" was a mischaracterization based on "conflat[ing] the distinct concepts of issue preclusion and claim preclusion."[48] While the court agreed that true "issues" actually litigated would be protected by issue preclusion, the court argued that the part of the test referring to "claims . . . actually decided" provided additional and separate protection.[49] The Eighth Circuit provided a good hypothetical to illustrate this point:

> For example, assume a plaintiff brings a workers[']compensation claim against another party. One of the disputed issues is whether the parties have an employee/employer relationship. The court decides there is no employee/employer relationship and dismisses the claim. The plaintiff subsequently files another action against the same party, bringing the same workers[']compensation claim. The subsequent claim would be barred by res judicata, not collateral estoppel, because the same claim was actually litigated in the prior proceeding. The second court would not have to address collateral estoppel, because res judicata would bar the entire claim without having to determine whether particular issues were actually litigated.[50]

The application of the relitigation exception by the U.S. Court of Appeals for the First Circuit in *In re G.S.F. Corp.* provides an additional illustration of how the scope of the "actually decided" test differs from solely issue preclusion.[51] In this case, the federal court in the first federal suit had set out a judgment that included a stipulation that explicitly released a party from "[n]ot only claims actu-

[48] 495 F.3d at 893.
[49] Id.
[50] Id.
[51] 938 F.2d 1467, 1478–79 (1st Cir. 1991). It should be noted that the case involved a bankruptcy dispute and thus potentially was governed by § 105 of the Bankruptcy Code, a statutory exception to the Anti-Injunction Act "expressly authorized by Act of Congress." Id. at 1477. The injunction at issue in the lower federal court, however, was not the typical bankruptcy injunction (for example, an automatic stay) but rather a relitigation injunction. Id. at 1478. As a result, the First Circuit stated that it was appropriate to use the scope of a federal court's power to issue a non-bankruptcy relitigation injunction under the Anti-Injunction Act in order to determine the limits of the bankruptcy court's analogous power. Id. The court concluded that, regardless of whether the equity power limits of the Anti-Injunction Act applied to the situation directly or by analogy, the injunction in question met the requirements for a relitigation injunction. Id.

ally asserted, but any that could have been asserted, and indeed any disputes related to the transaction."[52] The opposing party then brought suit in state court for several state environmental claims that had not been presented or discussed in the first federal decision.[53] The First Circuit determined that state law claims based on a state environmental statute "had been *resolved*" by the stipulation and release, based on its broad terms, even though the claims had not specifically been litigated.[54] Thus, since those claims were "actually encompassed in the . . . court judgment" due to the stipulated release of all associated claims, the First Circuit concluded that it was appropriate for the district court to issue a relitigation injunction against the state court proceedings under the "claims . . . actually decided" test of *Chick Kam Choo*.[55]

The application of a relitigation injunction in this context provides judgment protection broader than issue preclusion. To trigger the protections of issue preclusion, an issue must have been "actually *litigated* and determined."[56] An issue covered by a stipulation does not satisfy this requirement.[57] Although explicit resolution (despite non-litigation) of a claim by a federal court judgment would not satisfy the test for issue preclusion, this was sufficient to satisfy the "claims . . . actually decided" test.[58] This suggests that the "claims . . . actually decided" part of the "actually decided" test encompasses broader protection than issue preclusion.

Second, the majority circuit position, limiting claim preclusion to "claims actually decided" and not transactionally-related claims that could have been decided, does not necessarily mean that the state court plaintiff could create an end run around the exception. One might worry that the plaintiff could try to disguise the same claim resolved by the federal court by advancing the claim in state court using a different strategy or focusing on different issues in the subsequent complaint. The analysis presented in *Bryan v. Bell-*

[52] Id. at 1479.
[53] Id. at 1471.
[54] Id. at 1479 (emphasis added).
[55] Id. at 1478–79 (citing *Chick Kam Choo*, 486 U.S. at 148).
[56] Restatement (Second) of Judgments § 27 (1982) (emphasis added).
[57] Id. § 27 cmt. e.
[58] The First Circuit's conclusion is consistent with pre-*Toucey* cases allowing the issuance of relitigation injunctions based on stipulated claims. See infra Subsection III.B.1.

South Communications, however, indicates that the majority position would prevent this from occurring.[59] In *Bryan*, the U.S. Court of Appeals for the Fourth Circuit confirmed that it followed the majority interpretation of the relitigation exception, stating that an injunction could issue under the relitigation exception "only if the claims or issues subject to the injunction have actually been decided by the federal court; the exception is inapplicable where an injunction is sought to prevent the litigation of claims or issues that *could have* been decided in the original action but were not."[60]

In evaluating whether the claim raised in the state court proceedings had already actually been decided, however, the Fourth Circuit scrutinized the complaints in the original federal suit and the later state court suit and applied a functional analysis.[61] The court stated that in both the federal and state court suits, the claims in the plaintiff's complaints had "the *legal effect* of challenging or seeking to change the terms of BellSouth's tariff," that "nothing about the nature of her damages claim has changed," and that the "allegations in the damages section [of the state court complaint] are the same as they were in the federal complaint."[62] The court concluded that "[t]he claim asserted in state court is therefore functionally identical" to the claim decided in the federal suit and thus, because the plaintiff "in the state-court action is seeking to litigate the very claim that we have concluded must be dismissed [in the first federal suit] . . . , the requirements for the relitigation exception to the Anti-Injunction Act are satisfied."[63] This sort of analysis in applying the relitigation exception would prevent a possible end run around the majority test. Furthermore, despite applying a functional analysis, the Fourth Circuit seems to stay within the majority position by seeking to determine if the same claim is effectively at issue in both the previous federal suit and the state suit and by limiting preclusion to such a situation.[64]

[59] 492 F.3d 231, 237 (4th Cir. 2007).
[60] Id. at 236–37.
[61] Id. at 237.
[62] Id. at 237–38.
[63] Id. at 239.
[64] It is possible that this functional approach might bring the Fourth Circuit closer to the transactional approach to claim preclusion.

B. Minority Position: "Full" Res Judicata Protection

In contrast to the "actually decided" test employed by the majority of circuit courts, the minority position is to allow a federal court to issue an injunction against the state court litigation of any claim that would be barred by the full modern reach of claim preclusion.[65] These circuits employ "a transactional test in relitigation exception cases, asking whether the two claims are based on the same nucleus of operative fact."[66] As a result, they extend the preclusive effects of the relitigation exception "beyond claims actually litigated to claims that could have been litigated."[67]

For approximately a decade following *Chick Kam Choo*, the Ninth Circuit was the only dissenting circuit from the "claims or issues actually decided" test.[68] In *Western Systems v. Ulloa*, the Ninth Circuit stated that the Supreme Court's language in *Chick Kam Choo* was ambiguous and focused on the Court's statement that the relitigation exception was "founded in the well-recognized concepts of *res judicata* and collateral estoppel."[69] The court in *Ulloa* argued that the majority position would read claim preclusion out of the Anti-Injunction Act.[70] Thus, the court rejected the "actually decided" test and held that the "test for whether a subsequent action [can be] barred is whether it arises from the same 'transaction, or series of transactions' as the original action,"—that is, the transactional test for full modern claim preclusion.[71]

Since 2000, however, three other circuits have adopted or indicated support for the Ninth Circuit's position,[72] a change in the ex-

[65] See, e.g., Blanchard 1986, Ltd. v. Park Plantation, LLC, 553 F.3d 405, 408–09 n.12 (5th Cir. 2008); Burr & Forman v. Blair, 470 F.3d 1019, 1029–30 (11th Cir. 2006); W. Sys., Inc. v. Ulloa, 958 F.2d 864, 869–72 (9th Cir. 1992). Dicta in *In re Prudential Insurance Co. of America Sales Practices Litigation*, 314 F.3d 99, 104 (3d Cir. 2002), suggest that the Third Circuit may now support the minority position.

[66] *Blanchard 1986, Ltd.*, 553 F.3d at 408 n.12.

[67] Id.

[68] *Ulloa*, 958 F.2d at 869–72.

[69] Id. at 870 (quoting *Chick Kam Choo*, 486 U.S. at 147).

[70] Id. at 870.

[71] Id. at 871.

[72] See Burr & Forman v. Blair, 470 F.3d 1019, 1029–30 (11th Cir. 2006); In re Prudential Ins. Co. of Am. Sales Practices Litig., 314 F.3d 99, 104 (3d Cir. 2002) (suggesting in dicta a position on the relitigation exception that is in line with full claim preclusion); N.Y. Life Ins. Co. v. Gillispie, 203 F.3d 384, 387 (5th Cir. 2000) (adopting the

tent of the current circuit split that seems to have gone unnoticed by a number of the circuits that have considered the scope of the relitigation exception.[73] Like the Ninth Circuit, the U.S. Court of Appeals for the Eleventh Circuit has held that a relitigation injunction is appropriate whenever the claims in the state court proceedings would be precluded by claim preclusion, including not only "those theories and claims actually raised in the prior proceeding but also encompass[ing] all claims that could have been raised from the same nucleus of operative facts."[74] Additionally, despite its original alignment in *Texas Employers' Insurance Ass'n v. Jackson* with the majority position that the scope of the relitigation exception was limited to protecting "claims or issues actually decided,"[75] in the last decade the Fifth Circuit has shifted and adopted the Ninth Circuit's position, employing a transactional test in relitigation exception cases.[76]

Furthermore, although the U.S. Court of Appeals for the Third Circuit in *In re Prudential Insurance Co. of America Sales Practices Litigation* decided the case based on the "in aid of jurisdiction" exception, dicta from the case indicate that it would potentially accept a full claim preclusion position.[77] In its discussion of the relitigation exception, the court cites only to *Chick Kam Choo*'s statement that the exception was founded in the concepts of res judicata and collateral estoppel, and not to the language indicating claims and issues must actually have been decided.[78] The court then

transactional test featured in full modern claim preclusion as the scope of the relitigation exception for the Anti-Injunction Act).

[73] For example, the Tenth Circuit stated in *Weyerhaeuser Co. v. Wyatt*, 505 F.3d 1104, 1110 (10th Cir. 2007), that the Ninth Circuit appeared to be the only circuit that had rejected the majority reading of *Chick Kam Choo* and the exception. See also Blanchard 1986, Ltd. v. Park Plantation, LLC, 553 F.3d 405, 408–09 n.12 (5th Cir. 2008) (noting the Ninth Circuit's support for the minority position, in addition to the Fifth Circuit's support for that position after the latter circuit's shift from the majority position in *Jackson* to the minority position in *Gillispie*).

[74] *Blair*, 470 F.3d at 1030.

[75] 862 F.2d 491, 501 (5th Cir. 1988) (en banc); see also Tex. Commerce Bank Nat'l Ass'n v. Florida, 138 F.3d 179, 182 (5th Cir. 1998) (rejecting the application of the relitigation exception to "claims that could have been raised before the federal court, but were not in fact litigated there").

[76] See *Blanchard 1986, Ltd.*, 553 F.3d at 408–09 n.12; Assurance Co. of Am. v. Kirkland, 312 F.3d 186, 189 n.8 (5th Cir. 2002); *Gillispie*, 203 F.3d at 387.

[77] 314 F.3d at 104.

[78] Id.

went on to argue that the state court plaintiff's state law claims probably would be precluded by claim preclusion because the facts supportive of these claims were too tightly connected to the facts and issues underlying the claims that had been resolved in the first federal court suit.[79] This language is suggestive of the transactionally related test employed under the modern full claim preclusion doctrine.

* * *

The widening rift in the circuit courts has increased the need for theoretical consideration of the scope of the relitigation exception. Approximately ten years ago, the circuit split was five to one for the majority position.[80] Today, it appears that the split has most likely increased to six to four.[81] Given the likelihood that the Supreme Court will address such a significant split in the next several years, it is important to examine closely what the proper interpretation of the scope of the exception should be.

[79] Id. ("It is far from certain, therefore, that plaintiffs could state these claims in a manner sufficiently detached from the issues resolved in the class action to avoid claim preclusion.").

[80] At that time, the U.S. Courts of Appeals for the First, Second, Fourth, Fifth, and Sixth Circuits held that the relitigation exception was limited to "claims or issues actually decided." See Hatcher v. Avis Rent-A-Car Sys., Inc., 152 F.3d 540, 543–44 (6th Cir. 1998); *Tex. Commerce Bank Nat'l Ass'n*, 138 F.3d at 182; In re G.S.F. Corp., 938 F.2d 1467, 1478 (1st Cir. 1991); LCS Servs. v. Hamrick, 925 F.2d 745, 749 (4th Cir. 1991); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 642, 643–44 (2d Cir. 1989). The Ninth Circuit was alone in its position. See W. Sys., Inc. v. Ulloa, 958 F.2d 864, 869–72 (9th Cir. 1992).

[81] As noted above, the First, Second, Fourth, Sixth, Eighth, and Tenth Circuits have used or indicated support for the "actually decided" test. See Bryan v. BellSouth Commc'ns., 492 F.3d 231, 236–37 (4th Cir. 2007); Jones v. St. Paul Cos., 495 F.3d 888, 891–94 (8th Cir. 2007); Weyerhaeuser Co. v. Wyatt, 505 F.3d 1104, 1110–11 (10th Cir. 2007); Smith v. Woosley, 399 F.3d 428, 434 n.8 (2d Cir. 2005); *Hatcher*, 152 F.3d at 543–44; *In re G.S.F.*, 938 F.2d at 1478–79. At this point, the Third, Fifth, Eleventh, and Ninth Circuits hold or support the minority position of full claim preclusion for the relitigation exception. See *Blanchard 1986, Ltd.*, 553 F.3d at 408–09 n.12; Burr & Forman v. Blair, 470 F.3d 1019, 1029–30 (11th Cir. 2006); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d at 104); *Ulloa*, 958 F.2d at 869–72.

III. THE PROPER INTERPRETATION OF THE RELITIGATION EXCEPTION

This Part seeks to discern the correct interpretation of the relitigation exception based on text, history, Supreme Court precedent, and the consideration of federalism and comity. It concludes that the "claims or issues actually decided" test adopted by the majority of the circuits is the correct interpretation of the relitigation exception. The argument for this conclusion unfolds in four steps. First, the statutory language of the 1948 revision and accompanying indicators of Congressional intent suggest that the codification of the relitigation exception was meant to restore the pre-*Toucey* case landscape. Second, a thorough review of the historical practice shows that the majority of courts applying a judicial relitigation exception to the Anti-Injunction Act pre-*Toucey* only did so for claims or issues that already had actually been decided by the federal court. Third, Supreme Court precedent indicates support for the "claims or issues actually decided" interpretation of the relitigation exception. Fourth, this interpretation is normatively preferable in light of the purposes of the overall Anti-Injunction Act, the principle of comity between the state and federal courts, and the resulting federalism principle of statutory interpretation.

A. Statutory Language and Congressional Intent

The text of the 1948 revision of the Anti-Injunction Act and its accompanying legislative history indicate that the exception for injunctions "necessary . . . to protect and effectuate [federal courts'] judgments" was a term of art designed to incorporate the relitigation exception present in pre-*Toucey* cases. The meaning of the language of the third exception, "necessary . . . to protect or effectuate its judgments" is not readily apparent. It is a standard principle of statutory interpretation, however, that a statutory phrase may function as a term of art that imports accompanying meaning and connotations from the case law.[82] Viewing "necessary . . . to protect or effectuate its judgments" as a term of art, it is crucial to determine what this statutory phrase meant in 1948 based on the

[82] John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 81 (2006) ("A given statutory phrase may reflect the often elaborate (but textually unspecified) connotations of a technical term of art.").

historical case law from which it arose. The exception's language was taken from previous cases that found exceptions to the pre-1948 absolute ban on injunctions against state court proceedings.[83] Additionally, the Revisor's Note, the sole piece of legislative history for Section 2283, supports this reading of "protect or effectuate." The Note explained:

> The exceptions [in the proposed 28 U.S.C. § 2283] 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 relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Insurance Co.*, 62 S. Ct. 139, 314 U.S. 118, 86 L. Ed. 100. A vigorous dissenting opinion (62 S. Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts[] of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change.) Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucy [sic] decision.[84]

Likewise, early post-enactment cases and commentators interpreting the "protect and effectuate" exception acknowledged that it was designed to restore pre-*Toucey* case law and allow relitigation injunctions.[85] Therefore, in order to understand the relitigation injunction law that was incorporated by the "protect or effectuate" exception (also known as the "relitigation exception"), it is important to examine the state of the law prior to *Toucey*.

B. Historical Practice

This Section reviews the pre-*Toucey* cases establishing the judicially created relitigation exception upon which the statutory exception was based. It concludes that, contrary to some assertions, the cases largely support the "claims or issues actually decided" test. Although these pre-*Toucey* cases supply the meaning that

[83] See cases discussed infra Section III.B.

[84] Revisor's Note to 28 U.S.C. § 2283, H.R. Rep. No. 308, at A181–A182 (1947).

[85] See, e.g., Jacksonville Blow Pipe Co. v. Reconstruction Fin. Corp., 244 F.2d 394, 398–99 (5th Cir. 1957) (alternative holding); Jackson v. Carter Oil Co., 179 F.2d 524, 526–27 (10th Cir. 1950); Note, supra note 14, at 734.

Congress intended to invoke with the "protect or effectuate" language, it is also useful to consider the cases following the 1948 revision of the Anti-Injunction Act to clarify the state of the law prior to *Chick Kam Choo*. This Section finds that cases applying the codified exception post-1948 followed the pre-*Toucey* position initially, but courts later shifted to more expansive claim preclusion protection under the relitigation exception. This section argues that these shifts, however, were the result of changing civil procedure doctrines in the 1960s and 1970s, and were not part of Congress's intent in the 1948 revision of the act.

*1. Pre-*Toucey *Case Landscape*

To begin, it is important to examine the pre-*Toucey* cases developing the judicially created version of the relitigation exception doctrine to determine the content of the doctrine Congress intended to incorporate into the "protect or effectuate its judgments" exception. Because of their age and lack of clarity, these cases are easily misunderstood. As a result, some have characterized the cases as supporting the broad minority position of allowing the relitigation exception to extend to claims that could have been raised but were not resolved by the federal court.[86] This is a mistake. A careful and thorough scrutiny of the cases reveals that they best support limiting relitigation injunctions to "claims or issues actually decided" by the federal court.

Cases granting a relitigation injunction can be grouped into three categories. First, a number of injunctions were granted in cases that involved issues that had already been litigated by the federal court. Second, several cases enjoined state court proceedings where the state cases involved claims that had already been litigated by the federal court. Third, some relitigation cases involved upholding injunctions against state court suits that involved claims that had not been raised in federal court but had been resolved by stipulation in the court's judgment.

[86] See *Jones*, 495 F.3d at 890–91 (concluding that historical cases supported issuing an injunction against claims that could have been litigated but adopting the "actually decided" test based on its analysis of *Chick Kam Choo*); George A. Martinez, The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception, 72 Neb. L. Rev. 643, 663–70 (1993).

Regarding the first category of cases, in developing the relitigation exception, pre-*Toucey* courts consistently emphasized their power to enjoin state court relitigation of closed issues—of questions that had already been determined by the federal court.[87] In doing so, the courts were in line with the issue preclusion protection provided by the current majority test of "claims or issues actually decided." A good example of this application of a relitigation injunction is *Sharon v. Terry*.[88] In *Terry*, an earlier federal court decision had held that a marriage contract was invalid based on its fraudulent character. Later, a party brought a state court suit seeking to determine the marriage contract valid.[89] The court in *Terry* held that the federal court could enjoin the state court in order to enforce the federal court's earlier resolution of the issue of the contract's validity.[90] In his dissent in *Toucey*, Justice Reed argued that *Terry* is a "good illustration of the permeation of our law by the principle of protection of federal decrees by injunctions against prosecuting state suits which relitigate settled issues."[91]

Another example of this category of relitigation cases is *Gunter v. Atlantic Coast Line Railroad Co.*[92] Despite arguments that *Gunter* supports the full modern claim preclusion position,[93] the case is better understood as an application of issue preclusion. The controversy underlying *Gunter* involved an earlier suit in which the state was a party, where a federal court had held that a state tax was unconstitutional. Several years later, the state brought a suit in state court to collect the tax that the federal court had ruled was unconstitutional.[94] In *Gunter*, the Supreme Court upheld an injunction against the state court proceeding, stating that the injunction was not barred by the Anti-Injunction Act.[95] The Court argued that the federal court had "the power to protect the . . . rights previ-

[87] Gunter v. Atl. Coast Line R.R., 200 U.S. 273, 291–93 (1906); Mo. Pac. Ry. v. Jones, 170 F. 124, 125–26 (C.C.W.D. Mo. 1909); Sharon v. Terry, 36 F. 337, 365 (C.C.N.D. Cal. 1888).
[88] 36 F. at 365.
[89] Id. at 338–40.
[90] Id. at 364–66.
[91] Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 149 (1941) (Reed, J., dissenting).
[92] 200 U.S. at 278–79.
[93] Martinez, supra note 86, at 667–69.
[94] *Gunter*, 200 U.S. at 278–79.
[95] Id. at 292.

ously secured under a decree of the court."[96] Although the particular claim for the collection of the tax had not been previously litigated by the federal court, this does not mean that modern claim preclusion (precluding claims that *could* have been raised) is at work in *Gunter*. Instead, it makes more sense to read *Gunter* as applying issue preclusion, as the issue of the unconstitutionality of the state tax had already been litigated and determined against the state as a party in the original federal suit.

The second category of cases involved federal courts prior to *Toucey* upholding relitigation injunctions to protect claims that had actually been litigated in an earlier federal suit.[97] The best example of this situation is *Supreme Tribe of Ben Hur v. Cauble*.[98] In *Supreme Tribe*, a federal court had dismissed a federal class action against the Supreme Tribe of Ben Hur regarding the alleged misuse of trust funds.[99] Later, several individuals who were not plaintiffs in the earlier federal suit, but who were members of the class, brought in state court the exact same claims that had been resolved by the federal court.[100] The Supreme Court in *Supreme Tribe* reversed the lower federal court's refusal to enjoin the state court proceedings, arguing that an injunction was appropriate because the federal court had already rendered a conclusion on the claims.[101] Thus, the case supports the protection of some measure of claim preclusion (claims actually decided) under the relitigation exception.

Finally, a number of the pre-*Toucey* cases did involve the protection of federal court judgments by enjoining claims that had not actually been litigated—the third category of cases.[102] These cases, however, do not actually support the full modern claim preclusion position. Although the claims at issue had not been specifically *litigated*, they had been explicitly *resolved* by stipulations in the fed-

[96] Id. at 293.
[97] See, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366–67 (1921).
[98] Id.
[99] Id. at 360–62.
[100] Id. at 361–62.
[101] Id. at 366–67.
[102] See, e.g., Julian v. Cent. Trust Co., 193 U.S. 93, 94, 97–98, 100, 112 (1904); Prout v. Starr, 188 U.S. 537, 540–41, 544–45 (1903); Miss. Valley Trust Co. v. Franz. 51 F.2d 1047, 1048–49 (8th Cir. 1931); Wilson v. Alexander, 276 F. 875, 877, 879, 881–82 (5th Cir. 1921).

eral courts' judgments. As noted in the discussion in Section II.A, enjoining stipulated claims is consistent with the amount of claim preclusion provided by the "claims . . . actually decided" portion of the current majority position on the scope of relitigation injunctions.[103] One of the key cases cited by Justice Reed in his *Toucey* dissent as demonstrating the relitigation exception, *Julian v. Central Trust Co.*, fits this category.[104] A consideration of the *Julian* controversy's facts and the opinion's analysis is useful to illuminate this relitigation injunction scenario.

In *Julian*, a federal court had resolved the sale of a piece of a railroad's property under foreclosure proceedings. Included in the court's decree was a stipulation that the sale of the property was to occur free of all claims by all parties. Several years later, two individuals brought suit in state court against the original mortgagor of the property, seeking the property as payment for damages in wrongful death actions.[105] The federal court enjoined the state proceedings, and the Supreme Court in *Julian* upheld the injunction.[106] The Court held that it was appropriate for the lower federal court to issue an injunction against the state court proceedings in order "to render effectual [the federal court's] decree."[107] The *Julian* Court acknowledged that the federal right under a preclusion defense could have been raised and dealt with in the state court, and the preclusion issue could always be brought for final determination by writ of error to the Supreme Court from the state court proceeding.[108] Nonetheless, the Court argued that the federal court had the power to protect its decree "upon direct proceedings such as are now before us," that is, via an offensive relitigation injunction.[109] In *Toucey*, Justice Reed emphasized that *Julian* was significant not for its protection of a *res* but rather for its demonstration of the federal courts' power to "avoid[] relitigation by executing its

[103] See supra notes 51–58 and accompanying text.

[104] See Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 147–48 (1941) (Reed, J., dissenting) (citing *Julian*, 193 U.S. at 112, 114).

[105] *Julian*, 193 U.S. at 94, 97.

[106] Id. at 100, 112–13.

[107] Id. at 112.

[108] Id. at 114.

[109] Id.

decrees" and to "enjoin[] state suits [that] sought relitigation of *closed* issues."[110]

As illustrated by the cases discussed above, the pre-*Toucey* case law demonstrates that relitigation injunction protection was limited to claims or issues that had actually been resolved previously by the federal court, whether actively in litigation or by stipulation.

2. Case Law After the 1948 Revision but Prior to Chick Kam Choo

A review of the cases in the interval between the 1948 Revision of the Anti-Injunction Act and the Supreme Court's decision in *Chick Kam Choo* reveals that very early applications of the relitigation exception followed the pattern of narrow protection seen pre-*Toucey*.[111] Beginning in the 1960s, however, the majority of courts shifted to providing broader claim preclusion protection.

The cases following soon after the 1948 Revision of the Anti-Injunction Act clearly acknowledged that the exception allowing injunctions necessary "to protect or effectuate" a federal court's judgment was meant to overcome *Toucey*'s holding and restore to the federal courts the power to issue relitigation injunctions.[112] Although they did not explicitly reject the idea of protecting claims that could have been—but were not—raised, the earliest cases only provided examples of allowing a relitigation injunction for claims or issues that had been decided.[113] Additionally, the language analyzing the application of the relitigation exception in these cases supports the narrow interpretation of the exception. For example, in *Jackson v. Carter Oil*, the court emphasized that protection against relitigation was proper for "controversies which have been

[110] *Toucey*, 314 U.S. at 147 n.14, 148 (emphasis added).

[111] Modern cases and commentators have not considered these early cases in their historical reviews of this time period. See, e.g., Jones v. St. Paul Cos., 495 F.3d 888, 891 (8th Cir. 2007); Martinez, supra note 86, at 649.

[112] See, e.g., Jacksonville Blow Pipe Co. v. Reconstruction Fin. Corp., 244 F.2d 394, 397–98 (5th Cir. 1957); Jackson v. Carter Oil Co., 179 F.2d 524, 526–27 (10th Cir. 1950).

[113] *Jacksonville Blow Pipe*, 244 F.2d at 395–96, 400 (finding that an injunction was permissible because the district court had already resolved the issue of the bankruptcy sale of a piece of property free of liens and unencumbered); *Carter Oil*, 179 F.2d at 525, 527 (holding that an injunction could be issued because the state court litigant's claim to be the allotee of a piece of land had been "already fully determined" in federal court).

fully adjudicated" and for "matters already fully determined."[114] A slightly later case, *Southern California Petroleum Corp. v. Harper*, supports this characterization of these early cases.[115] The *Harper* court noted that in the cases thus far in which federal courts had upheld a relitigation injunction, the state court proceeding had "constituted a *direct* assault on a prior federal court judgment."[116] Rejecting an injunction against an issue that had not been litigated, the court continued this early pattern of limiting protection to matters already resolved by the federal court and provided further analysis to support this position.[117] The *Harper* court emphasized that the Anti-Injunction Act was "essentially a rule of comity" and that the Supreme Court had indicated there was a strong presumption of non-interference in state court proceedings.[118] As a result, the court set out the strict test that "a complainant must make a strong and *unequivocal* showing of relitigation of the same issue in order to overcome the federal courts' proper disinclination to intermeddle in state court proceedings."[119] It further justified this position by arguing for state courts' equal competency "to protect a litigant by the doctrines of res adjudicata and collateral estoppel."[120]

Despite these early cases, from the 1960s until 1988 the majority of courts supported providing preclusion protection for the full extent of modern claim preclusion, allowing injunctions to issue against state court litigation of claims that could have been, but were not, raised in the earlier federal court proceeding.[121] For example, in *Woods Exploration & Product Co. v. Aluminum Co. of*

[114] *Carter Oil*, 244 F.2d at 526–27.

[115] 273 F.2d 715, 718–19 (5th Cir. 1960).

[116] Id. at 719 (emphasis added) (citing cases including *Jacksonville Blow Pipe*, 244 F.2d 394, and *Carter Oil*, 179 F.2d 524).

[117] Id.

[118] Id. at 718–19 (citing Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511 (1955)).

[119] Id. at 719 (emphasis added).

[120] Id.

[121] See, e.g., Harper Plastics, Inc. v. Amoco Chems. Corp., 657 F.2d 939, 942, 947 (7th Cir. 1981); Browning Debenture Holders' Comm. v. Dasa Corp., 605 F.2d 35, 39 (2d Cir. 1978); Woods Exploration & Prod. Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1315 (5th Cir. 1971); Lee v. Terminal Transp. Co., 282 F.2d 805, 807 (7th Cir. 1960); see also Charles A. Wright et al., Federal Practice and Procedure § 4226, at 108–12 (1998) (summarizing the law).

America, the court stated that res judicata enforced via a relitigation injunction could preclude the state law claims raised in the state suit because those claims arose out of the same facts as the earlier federal court proceedings, and the plaintiffs had had the opportunity to bring those claims in that federal suit under pendant jurisdiction.[122] In *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, after losing a federal antitrust lawsuit in federal district court, the plaintiffs brought a breach of contract claim in state court based on the same conduct of the defendants.[123] In finding that an injunction could issue to bar the previously unlitigated state law claims, the Seventh Circuit argued that the claim preclusion protection provided by the relitigation exception extended to all transactionally related claims arising from a common nucleus of facts—in other words, all claims that could have been raised in the previous federal suit.[124]

The shift towards a broad interpretation of the claim preclusive protection provided by the relitigation exception from the 1960s until *Chick Kam Choo* can perhaps be explained by looking at broader shifts in civil procedure doctrine. During that time period, federal courts began to move toward a broader concept of what counted as a "claim" or cause of action for purposes of claim preclusion, adopting a transactionally-related test.[125] Around the same time and based on similar reasoning, the Supreme Court held in *United Mine Workers of America v. Gibbs* that federal courts could exercise supplemental jurisdiction over state law claims that arose out of a common nucleus of facts with federal claims and that these claims together "comprise[] but one constitutional 'case.'"[126] The modern limits of claim preclusion, therefore, possibly extended to precluding an unlitigated state law claim that was transactionally related to federal law claims and could have been brought in federal court. Thus, the expanding interpretation of the relitigation

[122] 438 F.2d at 1315.

[123] 657 F.2d at 942.

[124] Id. at 945–47.

[125] Compare Restatement of Judgments § 68 (1942) (describing the requirements of claim preclusion), with Restatement (Second) of Judgments § 61(1) (Tentative Draft No. 1, 1973) (proposing a transactional test for what counts as a "claim" for claim preclusion purposes). See also David P. Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 339–41 (1978).

[126] 383 U.S. 715, 724–25 (1966).

exception tracked the broadening preclusive effects provided by these changes in civil procedure doctrines. The scope of these preclusive effects, however, was arguably broader than Congress may have intended in 1948 in providing for injunctions to "protect and effectuate" federal courts' judgments, creating significantly more interference with state court proceedings than anticipated.[127]

Ultimately, however, the post-1948 cases are not determinative of the proper scope of the relitigation exception. The pre-*Toucey* cases and the Supreme Court precedent of *Chick Kam Choo* provide the overriding guidance on the interpretation of the exception. Although one might raise a legislative acquiescence argument, claiming that Congress ratified the broad interpretation of the relitigation exception by its silence and inaction following this trend of interpretation in the lower federal courts, there are three problems with such an argument that counsel against accepting it.[128] First, the idea of ratification through silence creates constitutional problems due to its failure to meet the requirements of bicameralism and presentment.[129] Second, even a weaker version of a legislative acquiescence argument (that Congress's silence indicates support or approval—but not ratification—of the courts' interpretation of the statute) is a descriptively poor canon of statutory interpretation. The difficulties in discerning intent arising from the collective action of Congress are heightened when dealing with inferences from *inaction*. Third, insofar as the Supreme Court's decision in *Chick Kam Choo* is inconsistent with the broad interpre-

[127] While it seems fairly clear that Congress did intend to adopt the understanding of the judicially created relitigation exception occurring prior to *Toucey*, it is unclear whether Congress meant to adopt a static measure of preclusion protection (that is, fix the preclusion protection at 1948 levels) or a dynamic measure that expanded parallel to civil procedure doctrines. We can infer that Congress deemed acceptable the amount of interference with the state judiciary that resulted from the preclusion protection provided by pre-*Toucey* cases under the preclusion doctrine *at the time of passage*: if Congress had not, it would not have enacted the relitigation exception. In contrast, we cannot make such an inference of Congressional intent with the same amount of confidence in regards to future expansions of preclusion doctrine. When deciding under such uncertainty, it makes more sense to select a static interpretation of preclusion protection because this minimizes possible error costs: it vindicates Congress's intent to restore pre-*Toucey* law and avoids the possible error of judicially enacting broader preclusion protection than Congress intended.

[128] For such a legislative acquiescence argument, see Martinez, supra note 86, at 670–71.

[129] See Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 957–59 (1983).

tation of the exception, as this Note argues in Section III.C, the Supreme Court's interpretation should override any weak inference of Congressional approval that may arise from Congress's silence.

Although the modern tests for claim preclusion are clearly and unavoidably the measure of federal preclusion doctrine, these preclusive effects can be applied and carried out as a defense by the state court. Thus, while preclusion doctrine is settled law, this does not mean that the scope of the relitigation exception must capture and apply the full extent of modern preclusion doctrine offensively via an injunction against the state court proceedings.[130]

C. Guidance from Supreme Court Precedent

In addition to the meaning supplied by the pre-*Toucey* historical case law, the two major Supreme Court cases considering and applying the relitigation exception, *Chick Kam Choo v. Exxon Corp.*[131] and *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*,[132] provide valuable insight into the proper scope of the exception's preclusive effects. This Section closely analyzes both cases, concluding that they support the narrow majority position of "claims or issues actually decided." This Section also briefly discusses the Court's most recent Anti-Injunction Act case, *Smith v. Bayer Corp.*,[133] noting that the case is essentially an application or "rerun of *Chick Kam Choo*."[134] Finally, this Section also addresses concerns about a possibly contradictory precedent, *Parsons Steel v. First Alabama Bank*[135] and determines that the Court's opinion and holding in that case do not actually undermine the "claims or issues actually decided" test.

1. A Close Analysis of Chick Kam Choo

In determining the proper interpretation of the scope of the relitigation exception, it is important to consider the guidance pro-

[130] For more discussion of this idea, see infra Subsection III.D.1.
[131] 486 U.S. 140, 146–48 (1988).
[132] 398 U.S. 281, 287 (1970).
[133] 131 S. Ct. 2368 (2011).
[134] Id. at 2279.
[135] 474 U.S. 518, 526 n.4 (1986).

vided by the Supreme Court in the leading case of *Chick Kam Choo v. Exxon Corp.*[136] A careful analysis of the Supreme Court's opinion supports the interpretation that the protection provided by the relitigation exception is limited to "claims or issues actually litigated," in line with the majority circuit position.

As mentioned previously in the broad historical overview in Part I, the *Chick Kam Choo* Court stated that the relitigation exception was "founded in the well-recognized concepts of *res judicata* and collateral estoppel" and was designed to "permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court."[137] Emphasizing that the narrow exceptions to the Anti-Injunction Act are "not [to] be enlarged by loose statutory construction,"[138] the Supreme Court held that a relitigation injunction could only issue if "the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court."[139] Such a finding was an "essential prerequisite" and should be determined by carefully scrutinizing "the precise state of the record [in the first federal court judgment] and what the earlier federal order *actually* said."[140]

Although this language on its face seems to strongly indicate that the exception's scope is limited to the "actually decided" test, three issues must be resolved in order to confirm this assessment. First, one must determine the meaning of the Court's statement that the relitigation exception is based on the "well-recognized concept[] of *res judicata*" as well as the concept of collateral estoppel. One might argue that this reference to res judicata requires incorporating the entire conception of modern claim preclusion—applying both to claims actually decided and those that could have been decided but were not—into the scope of the exception.[141] Such a perspective conflicts with setting "claims or issues . . . actually de-

[136] 486 U.S. at 146–48.
[137] Id. at 147.
[138] Id. at 146 (quoting *Atl. Coast Line*, 398 U.S. at 287).
[139] Id. at 148 (citing *Atl. Coast Line*, 398 U.S. at 290).
[140] Id.
[141] See Weyerhaeuser Co. v. Wyatt, 505 F.3d 1104, 1110 (10th Cir. 2007) (raising, although ultimately dismissing, such an argument); cf. W. Sys., Inc. v. Ulloa, 958 F.2d 864, 870 (9th Cir. 1992) (implying that reference to res judicata could only be properly acknowledged by importing the full extent of the term "res judicata" into the scope of the relitigation exception).

cided" as the scope of the relitigation exception. The Ninth Circuit goes so far as to claim that acceptance of the "actually decided" test's restrictive interpretation of *Chick Kam Choo* and the relitigation exception "would in essence be to read res judicata entirely out of section 2283."[142]

While the concept of res judicata or claim preclusion may be connected to the meaning of the relitigation exception, the text of the exception ("protect and effectuate its judgments") does not explicitly reference res judicata.[143] As a result, the relitigation exception can use the concept of res judicata to provide some measure of the substantive content of the exception without having to "encompass the full parameters of *res judicata*."[144] That is, the exception can draw on the concept of res judicata while limiting the protection of claim preclusive effects to the extent "necessary to protect or effectuate a federal court judgment, and thus is not the equivalent of res judicata."[145] Restricting protection of claims to "claims . . . actually decided" still engages with a limited form of claim preclusion protection, protection extending beyond issue preclusion, as noted earlier.[146] This is a better interpretation of the *Chick Kam Choo* Court's reference to the relitigation exception being founded in res judicata because it resolves the tension between that language and the Court's statement that the actual decision of a claim or issue by the federal court is a prerequisite for triggering the exception's protection.

Second, one should assess whether the Supreme Court's reference to "claims" should be considered to incorporate the broad definition or concept of "claim." In *Jones v. St. Paul Cos.*, the Eight Circuit considered the argument that the *Chick Kam Choo* Court meant the word "claim" to "refer to all assertions or a right to relief by a plaintiff with respect to a particular set of facts, such that the word should be interpreted to encompass both claims that could have been litigated and those claims actually litigated."[147]

[142] *Ulloa*, 958 F.3d at 870.

[143] Tex. Commerce Bank Nat'l Ass'n v. Florida, 138 F.3d 179, 182 n.4 (5th Cir. 1998).

[144] Id.

[145] Hatcher v. Avis Rent-A-Car Sys., Inc., 152 F.3d 540, 543 (6th Cir. 1998).

[146] See supra notes 45–57 and accompanying text, particularly *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007).

[147] *Jones*, 495 F.3d at 893.

This argument should be rejected for three reasons. Most obviously, it seems illogical that the Court would use a broad definition of "claim" but then "immediately modify the term by limiting application of the relitigation exception to 'claims' which 'actually have been decided by the federal court.'"[148] Additionally, the *Chick Kam Choo* Court emphasized that the Anti-Injunction Act exceptions are "narrow" and are "not [to] be enlarged by loose statutory construction."[149] This language establishes a presumption against expansively construing the Court's test defining the scope of the exception. More specifically, such a broad interpretation of the word "claim" in the description of the "essential prerequisite" for a relitigation injunction would seem to go against the Supreme Court's characterization of this prerequisite as "strict and narrow" and its emphasis on looking at what "the earlier federal order *actually* said."[150]

Third, even if these two statements can be reconciled, one must assess whether the *Chick Kam Choo* Court's reference to the extent of *claims* protected, as opposed to *issues* protected, should be considered mere dicta. In *Chick Kam Choo*, the particular question presented was whether a relitigation injunction could enjoin Texas state court litigation of a claim that the federal court had previously decided to dismiss under federal forum non conveniens doctrine.[151] Applying an "issues decided" analysis, the Court held that the issue of whether Texas state courts were an appropriate forum had not yet been litigated because it was a different issue than what had been decided in the federal suit: that Texas federal courts were not an appropriate forum.[152] As a result, only the scope of the relitigation exception's *issue* preclusive protection was necessary to the Court's holding.

Although this indicates that the Court's reference to "claims" was technically dicta, the statement is still relevant in assessing the

[148] Id. at 894 (quoting *Chick Kam Choo*, 486 U.S. at 148).

[149] *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atl. Coast Line*, 398 U.S.at 287); see also Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 514 (1955).

[150] See *Chick Kam Choo*, 486 U.S. at 148.

[151] *Chick Kam Choo*, 486 U.S. at 148–49. Note that this dismissal for forum non conveniens did not have any claim preclusive effects because such a dismissal is not on the merits. Thus, no form of a claim preclusion-based test for the relitigation exception's application would have been relevant here.

[152] Id. at 149.

appropriate scope of the relitigation exception. As noted previously, the Court acknowledged that at least some aspect of claim preclusion was subsumed in the exception by noting that the concept of res judicata contributed to the foundation of the exception.[153] Also, in setting out the "essential prerequisite for applying the relitigation exception," the Court specifically referred to both "issues" and "claims."[154] This has implications for both the circuit courts and the Supreme Court. In terms of vertical precedent for the circuit courts, as the Eight Circuit notes, "[w]e are not free to ignore the references to res judicata and 'claims' as accidental."[155] Federal courts are not "free to limit Supreme Court opinions precisely to the facts of each case" but rather they "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement."[156]

Of course, this principle may not constrain the Supreme Court to the same degree as the lower federal courts. When the Court eventually addresses the scope of the relitigation exception, it could decide to completely dismiss the dictum from *Chick Kam Choo*. The *Chick Kam Choo* Court's references to claims still should hold some weight as horizontal precedent for the Supreme Court, however. While the Supreme Court may not be bound by mere dicta in terms of stare decisis, insofar as the dictum contributes to the foundational reasoning underlying the ultimate holding of the case, the dictum may be considered part of the rationale behind the holding.[157] As such, it deserves some precedential weight, which—

[153] Id. at 147.

[154] Id. at 148; see also *Jones*, 495 F.3d at 893.

[155] *Jones*, 495 F.3d at 893.

[156] Id. (quoting McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991)) (internal quotation marks omitted).

[157] See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996) ("[W]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound."); Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.") (Kennedy, J., concurring and dissenting); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 490 (1986) ("Although technically dicta . . . an important part of the Court's rationale for the result it reache[s] . . . is entitled to greater weight . . . .") (O'Connor, J., concurring).

alongside historical and normative arguments—counsels in favor of the Court explicitly adopting the "claims or issues actually decided" test as the scope of the relitigation exception.

Based on this resolution of the issues discussed above, it is appropriate to conclude the majority circuit position of a "claims or issues actually decided" test is the better interpretation of *Chick Kam Choo*'s language regarding the scope of the relitigation exception. Furthermore, for the same reasons, the language of *Chick Kam Choo* supports the Supreme Court ultimately affirming the majority position.

2. Atlantic Coast Line Railroad Co.

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,[158] an earlier Supreme Court case on which the *Chick Kam Choo* Court relied extensively, also provides useful insight into the proper scope of the relitigation exception.[159] Although the Court did not address the precise question of whether a relitigation exception could protect against the state court litigation of a claim that could have been, but was not, brought in an earlier federal court suit, the Court's assessment of the applicability of the relitigation exception further supports the modern Supreme Court rejecting such a broad interpretation.

A brief overview of the facts of the case is necessary to understand this assertion. The federal and state court suits in *Atlantic Coast Line* involved a union's decision to picket a railroad.[160] The railroad brought a suit in federal court to enjoin the picketing, based on alleged violations of federal law.[161] The federal court held that the union had a right "to engage in self-help" by picketing insofar as federal law could not be invoked to enjoin the activity.[162] Following this denial, the railroad sued in state court for an injunction against the picketing based on state law claims, which the state court issued.[163] Later, the union requested a relitigation injunction

[158] 398 U.S. 281 (1970).

[159] See *Chick Kam Choo*, 486 U.S. at 147 (stating that "[t]he proper scope of the exception is perhaps best illustrated by this Court's decision in *Atlantic Coast Line*").

[160] *Atl. Coast Line*, 398 U.S. at 283–84.

[161] Id. at 288.

[162] Id. at 290.

[163] Id. at 283, 295.

from the federal court to prevent the enforcement of the state court injunction against the picketing.[164] The Supreme Court distilled the union's position as claiming "that a[] [relitigation] injunction was necessary to protect the 1967 order," and the union furthered its position by arguing that a recent Supreme Court case "operated to define the scope of the right to self-help which the District Court had found the union entitled to exercise, and that the state court injunction interfered with that right as so defined."[165]

In analyzing whether it would be appropriate for the federal court to grant a relitigation injunction, the Supreme Court carefully parsed the original federal court order to determine what the court had actually stated and decided.[166] The Court emphasized that "[a]t no point during the entire argument did either side refer to state law, the effects of that law on the picketing, or the possible preclusion of state remedies as a result of overriding federal law."[167] The Court concluded that the federal court had not decided the question of whether an injunction against the picketing could issue under state law. It stated that such a decision on that issue was "an essential prerequisite for upholding the 1969 injunction as necessary 'to protect or effectuate' the 1967 order."[168] To rephrase this conclusion in *Chick Kam Choo*'s language, a relitigation injunction was inappropriate because the federal court had not actually decided the issue that the railroad brought in state court.

The Supreme Court's opinion in *Atlantic Coast Line* is important for two reasons. First, it is the foundation for much of the language and ideas underlying the *Chick Kam Choo* "actually decided" test. This should be apparent from the description of the opinion above and the *Chick Kam Choo* Court's heavy citation to the case. Second, but less obviously, the *Atlantic Coast Line* Court's opinion is

[164] It should be noted that today the federal court's action might raise Full Faith & Credit problems. See *Parsons Steel*, 474 U.S. at 524–25. The *Parsons Steel* Court made clear that once a state court has made a determination on the preclusive effects of the previous federal decision, then the subsequent federal court must respect the state court's decision to the extent required by the Full Faith and Credit Act, providing "the same preclusive effect [the state court judgment] would have had in another court of the same State" (the analysis of which is outside the scope of this Note). Id. at 525.

[165] *Atl. Coast Line*, 398 U.S. at 292–93.

[166] Id. at 289–93.

[167] Id. at 289.

[168] Id. at 290.

instructive on the scope of the relitigation exception based on what it did *not* do. The Court acknowledged that the state law claims to cease the picketing brought in the state court suit probably could have been brought in the original federal court suit based on supplemental jurisdiction.[169] If the relitigation exception truly protected the full claim preclusive effects of a judgment, including against claims that *could* have been brought, then a federal court could have issued a relitigation injunction against the state court's litigation of these state law claims. The Supreme Court did not do this, nor did it indicate that this was an option under its understanding of the test for triggering the relitigation exception. Instead, the Court focused its analysis on whether *an issue* involved in the state claim brought in the state court had been decided by the federal court in its resolution of the federal claims. Indeed, if full claim preclusion applied, then the Court would never have reached this question. It would have been sufficient for the Court to determine that the state law claims previously could have been raised (but were not). Based on such a determination, the Court would probably have arrived at an opposite conclusion and held that it was appropriate for a relitigation injunction to issue. The Court, however, did not follow such analysis.

Thus, the *Atlantic Coast Line* Court's analysis and application of the relitigation exception supports a narrow interpretation of the extent of its claim preclusive effect.

3. Smith v. Bayer Corp.

In a case that it deemed as "little more than a rerun of Chick Kam Choo," *Smith v. Bayer Corp.*, the Supreme Court very recently applied *Chick Kam Choo*'s principles in the area of class action certifications.[170] The Court's restatement of *Chick Kam Choo*'s test for applying the relitigation exception supports the above analysis of *Chick Kam Choo*.

In *Smith*, the question before the Court was whether a previous federal court's rejection of a class certification under Federal Rule of Civil Procedure 23 justified a relitigation injunction against a

[169] Id. at 295 (citing *Gibbs*, 383 U.S. 715).
[170] 131 S. Ct. at 2379.

later state court adjudication of class certification under state law.[171] Applying *Chick Kam Choo*, the Court stated that the relitigation exception was "designed to implement 'well-recognized' concepts of claim and issue preclusion" and that the exception "authorizes an injunction to prevent state litigation of a *claim or issue 'that previously was presented to and decided* by the federal court.'"[172] The Court also confirmed that the "essential prerequisite for applying the relitigation exception" was that the "issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court."[173]

In the case at hand, the proposed class in the state proceeding "mirrored" the one in the federal proceeding, and the substantive claims underlying the proposed class actions in both suits "broadly overlapped."[174] The *Smith* Court, however, found that the "two legal standards" for class certification under Federal Rule 23 and class certification under the state's Rule 23 "differ[ed] (as federal and state *forum non conveniens* law differed in *Chick Kam Choo*)."[175] As a result, the Court concluded that "the federal court resolved an issue not before the state court" and thus that the prerequisite for the relitigation injunction was not satisfied.[176]

By the Court's own assessment, *Smith v. Bayer Corp.* is a simple rerun or application of *Chick Kam Choo*'s principles to the question of whether the "same issue" is being litigated when dealing with parallel litigation of state and federal class certification, *not* a resolution of the circuit split over the appropriate scope of the relitigation exception. The *Smith v. Bayer Corp.* Court's restatement of *Chick Kam Choo*, however, provides support for the "claim and issues actually decided" rule as the proper test for the relitigation exception.

[171] Id. at 2376.
[172] Id. at 2378 (quoting *Chick Kam Choo*, 486 U.S. at 147–48) (emphasis added).
[173] Id. at 2375–76 (quoting *Chick Kam Choo*, 486 U.S. at 148).
[174] Id. at 2377.
[175] Id.
[176] Id.

4. Parsons Steel, Inc. v. First Alabama Bank

In considering Supreme Court precedent, it is also important to analyze *Parsons Steel, Inc. v. First Alabama Bank*,[177] a case that raised but did not resolve the scope of the preclusive protection provided by the relitigation exception. Although the Court ultimately based its holding on Full Faith and Credit doctrine, at first glance one might view its analysis as operating under certain assumptions about the scope of the relitigation exception. A close read of the case, however, quickly reveals that the Court reserved judgment on this issue and that its analysis does not have any implications for how it eventually will or should resolve the issue.

In *Parsons Steel*, the plaintiffs initiated parallel state and federal litigation against the defendants, bringing a state suit alleging fraudulent inducement and a federal suit alleging a violation of a federal statute based on the same conduct.[178] After the federal court reached a final decision, ruling in favor of the defendants, the defendants raised preclusion defenses in the state court proceedings. The state court rejected their arguments, however, holding that res judicata did not bar the state suit from going forward.[179] The defendants returned to federal court seeking a relitigation injunction against the state court suit, and despite the state court's determination, which arguably had possible preclusive effects under the Full Faith and Credit Act, the district court issued a relitigation injunction. The district court held that such preclusion protection was appropriate because the state claims were transactionally related to the federal claims, which were raised in the previous suit and thus should have been raised as pendent claims in the earlier federal suit.[180] Put simply, the district court provided relitigation injunction protection for the full scope of modern claim preclusion.

When the case eventually reached the Supreme Court, the Court concluded that the lower federal court erred in not analyzing the possible preclusive effect of the state court judgment prior to issuing a relitigation injunction, holding that "the Full Faith and Credit

[177] 474 U.S. 518 (1986).
[178] Id. at 520.
[179] Id.
[180] Id. at 520–21.

Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State."[181] The Court held that the Anti-Injunction Act and the Full Faith and Credit Act should be construed consistently "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."[182]

Initially, based on this language and the case's procedural history, one could argue that *Parsons Steel* implies that if the timing was right, that is, if the state court had *not* yet ruled on the merits of the preclusive effect of the earlier federal court's decision, then the subsequent federal court could issue a relitigation injunction for transactionally related claims that could have been, but were not, raised in the earlier federal court proceeding. That is, such a reading would conclude that the *Parsons Steel* Court's sole focus on Full Faith and Credit issues raised by the relitigation injunction's timing—devoid of any inquiry into whether the scope of protection provided by the injunction was proper—suggests that the Court otherwise supported the theory of the scope of the relitigation exception underlying the issuance of the injunction in the lower courts.

Such an inference, however, should be rejected for two reasons. First, it is undermined by a footnote at the end of the *Parsons Steel* opinion. The Court acknowledged that petitioners raised an argument regarding the proper scope of the relitigation exception as an alternative reason to overturn the court of appeals, advocating that the "relitigation exception to the Anti-Injunction Act was never intended by Congress to allow the issuance of a federal court injunction in situations where the later state action involves claims that could have been litigated, but were not actually litigated, in the prior federal action."[183] In response, the Court explicitly noted that "[b]ecause of our resolution of the primary issue raised by petitioners"—whether Full Faith and Credit obligations apply—"we do not address these additional arguments."[184] In other words, the

[181] Id. at 525.
[182] Id. at 524.
[183] Id. at 526 n.4.
[184] Id.

Court's statements in the footnote indicate that it viewed the question of the scope of the relitigation exception as an open question following *Parsons Steel*.

Second, even without the Court's statement in the footnote, the Court's resolution of the case solely on the Full Faith and Credit issue should not give rise to any inference about the Court's operating assumptions regarding the scope of the relitigation exception. When faced with two questions—whether Full Faith and Credit obligations were triggered and what was the proper scope of the relitigation exception—the Court could resolve the case on the narrowest grounds by addressing only the first issue. If the Court determined, as indeed it did, that Full Faith and Credit obligations were triggered when the state court made a final determination regarding the preclusive effects of the earlier federal court decision, then it would be *unnecessary* to address the subsequent question of whether a federal court unconstrained by the Full Faith & Credit Act could provide preclusion protection via a relitigation injunction under the particular circumstances. Thus, the Court's lack of discussion regarding the scope of the relitigation exception should be more appropriately viewed as a refusal to engage in unnecessary dicta rather than a revelation of an underlying assumption on the exception's scope.

For these reasons, one should not view *Parsons Steel* as implicitly supporting the minority position of broad preclusion protection under the relitigation exception.[185]

D. Normative Considerations

Finally, several normative considerations support the interpretation of the relitigation exception as limited to protecting "claims or issues actually decided." This Section deals with these considerations in three arguments. First, this Section considers the costs and benefits of enjoining state court litigation in light of the requirement that injunction be "necessary" to protect or effectuate the federal court's judgment. Second, the Section examines the pur-

[185] As this Section only seeks to demonstrate what *Parsons Steel* does *not* stand for or imply, its conclusions regarding *Parsons Steel* admittedly do not provide any additional guidance on what the Court should conclude is the proper scope of the exception. It does, however, clarify confusion regarding the Court's precedents.

poses underlying the Anti-Injunction Act and the resulting federalism canon of interpretation. Third, this Section seeks to address and rebut the argument that the optimal protection of federal rights supports selecting the minority courts' interpretation.

1. Weighing When It Is "Necessary" to Enjoin State Court Litigation

The threatened harms to be prevented by an expansive interpretation of the relitigation exception's claim preclusive effects do not meet the requisite threshold set by the exception, in light of the costs to comity and the balance between federal and state courts. To begin, it is important to recognize that the grant of an injunction against a state court imposes a number of costs. Recognizing these costs will help assess when their imposition is justified. First, the relitigation exception alters the normal operation of preclusion. Ordinarily, preclusion is raised as a defense in a second court and that court is trusted to assess the effects of the first court's judgments.[186] In contrast, the relitigation exception "empowers a federal court to be the final arbiter of the res judicata effects of its own judgments because it allows a litigant to seek an injunction from the federal court."[187]

Second, permitting federal courts to enjoin state court proceedings may have efficiency costs by multiplying the number of courts and stages of review associated with a controversy. Without a relitigation injunction, the state court would resolve the preclusion issue as a defense in the state court proceeding. Its decision could be appealed up the state court system and ultimately to the Supreme Court. If an injunction against the state proceedings is a possibility, this involves an additional court (the enjoining federal court) in the process. Additionally, the federal court's decision on whether to grant or deny such an injunction may provoke an ap-

[186] Martin H. Redish, The Anti-Injunction Statute Reconsidered, 44 U. Chi. L. Rev. 717, 723 (1977); see also Smith v. Bayer Corp., 131 S. Ct. at 2375. In this recent case, the Supreme Court noted that "a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment.'" Id. (citing 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4405 (2d ed. 2002)). The Court emphasized that "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court" and thus that "issuing an injunction under the relitigation exception is resorting to heavy artillery." Id.

[187] Burr & Forman v. Blair, 470 F.3d 1019, 1030 n.30 (11th Cir. 2006).

peals process on this collateral issue, adding more complexity and stages of review to the controversy.[188]

Third, any injunction against a state court results in a set of costs to federalism. As the Supreme Court has noted, an injunction against a state suit prevents the state "from effectuating its substantive policies, . . . from continuing to perform the separate function of providing a forum competent to indicate any constitutional objections interposed against those policies . . . and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'"[189] Additionally, allowing the federal courts to interfere with state court proceedings may add "an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties."[190]

In light of these potential costs imposed by enjoining a state court proceeding, it is crucial that the threatened harms to a federal court's judgment be sufficient to justify issuing a relitigation injunction. The Anti-Injunction Act states that a relitigation exception may only be issued when it is *necessary* "to protect or effectuate its judgment[]."[191] In *Atlantic Coast Line*, the Supreme Court described the requisite level of threatened harm under this exception as occurring when a state court's proceeding would "so interfere[] 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."[192]

This standard is best met by restricting relitigation injunctions to only "claims or issues actually decided" because this test strikes the best balance between the costs and benefits of imposing a relitigation exception, "respect[ing] comity while also 'ensur[ing] the effectiveness and supremacy of federal law.'"[193] A state proceeding presents a greater threat to a federal court's judgment if the state suit involves the same claims or issues actually decided in the fed-

[188] Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 519 (1955); see also Huffman v. Pursue, Ltd., 420 U.S. 592, 603–04 (1975).

[189] *Huffman*, 420 U.S. at 604 (quoting Steffel v. Thompson, 415 U.S. 452, 462 (1974)).

[190] *Amalgamated Clothing Workers*, 348 U.S. at 519.

[191] 28 U.S.C. § 2283 (2006).

[192] *Atl. Coast Line*, 398 U.S. at 295.

[193] Weyerhaeuser Co. v. Wyatt, 505 F.3d 1104, 1110 (10th Cir. 2007) (quoting *Chick Kam Choo*, 486 U.S. at 146, 148).

eral court suit than if it only involves matters that could have been raised but were not.[194] As the U.S. Court of Appeals for the Tenth Circuit has argued, if a federal court has *affirmatively* decided a matter, then it is clear that such a decision is "entitled to respect and finality."[195] If the federal court has not affirmatively resolved a specific claim, however, it is less obvious whether the federal court's decision is threatened by subsequent litigation. Instead, the primary concern raised by such litigation is harassment of the prevailing party in the first federal suit.[196] This harassment concern can be adequately addressed by raising a preclusion defense in the state court suit without needing to resort to a relitigation injunction.[197]

It is possible, however, that the "claims or issues actually decided" test should be refined in its application to include claims that are technically different facially but virtually identical functionally, as seen in the Fourth Circuit's functional analysis of the majority circuit test.[198] In assessing the threatened harms to a federal court judgment, the Eleventh Circuit has acknowledged that there may be more potential for harm if the claims raised in the federal and state suits are "virtually identical" because the "same primary rights" are at stake in both claims.[199] For example, consider a situation where a federal suit involves a claim for a violation of federal antitrust law through a particular conspiracy and a later state suit involving a state antitrust law claim based on the same conspiracy. The Eleventh Circuit noted that, in such a scenario involving different but exactly parallel claims based on the same primary rights, the federal court could "reasonably fear that a state

[194] Delta Air Lines v. McCoy Rests., 708 F.2d 582, 586 (11th Cir. 1983).

[195] *Wyatt*, 505 F.3d at 1110.

[196] Id.

[197] Id. at 1110–11; see also *Smith*, 131 S. Ct. at 2376 n.5 ("[A relitigation] injunction is not the only way to correct a state trial court's erroneous refusal to give preclusive effect to a federal judgment. As we have noted before, 'the state appellate courts and ultimately this Court' can review and reverse such a ruling.") (quoting *Atl. Coast Line*, 398 U.S. at 287); Staffer v. Bouchard Transp. Co., 878 F.2d 638, 643 (2d Cir. 1989) ("Here, the proper forum for a complete investigation of the res judicata effects of the district court's judgment is the state court . . . ."); *Chick Kam Choo*, 486 U.S. at 150 (asserting that state courts "are presumed competent to resolve" a preclusion defense).

[198] Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 236–39 (4th Cir. 2007).

[199] *Delta Air Lines*, 708 F.2d at 587.

court determination of liability might effectively nullify the prior federal court determination of non-liability."[200] A relitigation injunction, therefore, is more justifiable. Such a position, however, would still deny a relitigation injunction for a claim that could have been brought that is transactionally-related to the claims decided in the federal suit but that involves fundamentally different rights.[201] Such a functional analysis would be a compromise between a strictly applied "claims or issues actually decided" test and an all transactionally-related-claims test.

2. The Application of the Statutory Federalism Principle

Additionally, based on the considerations of the purpose and values underlying the Anti-Injunction Act, the Supreme Court has concluded that there is a presumption of noninterference with the state courts and set out a rule of statutory federalism in interpreting the Anti-Injunction Act's exception. Applying this principle to the relitigation exception supports narrowly construing the exception's preclusive effects.

The purpose and values underlying the act have implications for how to interpret its exceptions. As argued by a commentator shortly after the 1948 revision of the Anti-Injunction Act, the Act is "an affirmation of the rules of comity, and hence it should be read in conjunction with the judicial principles developed for our dual system of courts."[202] These considerations were foundational in the Supreme Court's decisions in *Atlantic Coast Lines* and *Chick Kam Choo*. The Anti-Injunction Act acknowledges the Founders' structural choice of federalism and represents Congress's decision on how to balance the inherent tensions stemming from such a system.[203] As the *Atlantic Coast Line* Court noted, a point of debate during the framing of the Constitution was whether separate federal courts were necessary at all, as one of the powers reserved by the states in our federal system was independent state judicial sys-

[200] Id.

[201] Id. at 587. For example, if the federal court suit decided a federal antitrust claim and then the state court suit dealt with a state constitutional claim arising out of the same controversy underlying the federal suit. Id.

[202] James W. Moore, Commentary on the Judicial Code ¶ 0.03(49), at 407 (1949).

[203] *Chick Kam Choo*, 486 U.S. at 146.

tems.[204] Some Framers believed state courts were sufficient to protect state and federal rights, while others believed a separate federal court system should be provided to deal with federal legal problems.[205] As a compromise, the Constitution set out that there should be a federal Supreme Court and allowed optional, not mandatory, lower federal courts.[206] Following the Judiciary Act of 1789 that created the lower federal courts, the ultimate result was two separate, independent, parallel legal systems.[207]

As the Supreme Court has emphasized in both *Chick Kam Choo* and *Atlantic Coast Line*, as well as elsewhere (most recently in *Smith v. Bayer Corp.*), the Anti-Injunction Act was at least in part a response to the dual court system and the accompanying potential for friction between the state and federal courts.[208] As noted in the previous section, frequent federal court intervention in state court proceedings produces friction and inefficiency and undermines the effectiveness of the dual court system.[209] The act's presumption of a bar against such intervention, except under the narrow enumerated exceptions, is designed to forestall this friction.[210]

Drawing on the considerations above, the argument for a narrow interpretation of the relitigation exception proceeds as follows. First, based on the "fundamental constitutional independence of the States," the Anti-Injunction Act creates a presumption of noninterference: state court suits should normally be allowed to proceed without the intrusion of the lower federal courts.[211] Second, a principle of narrow statutory construction follows from this presumption. The codified exceptions to the Anti-Injunction Act's default rule are narrow and are "not [to] be enlarged by loose statutory construction."[212] Indeed, the Supreme Court has emphasized that by the enactment of the 1948 revision, "Congress made clear

[204] *Atl. Coast Line*, 398 U.S. at 285.
[205] Id.
[206] Id.
[207] Id. at 285–86.
[208] Id. at 286; *Smith*, 131 S. Ct. at 2375; *Chick Kam Choo*, 486 U.S. at 146; Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 630–31 (1977) (plurality opinion).
[209] *Chick Kam Choo*, 486 U.S. at 146 (citing *Vendo Co.*, 433 U.S. at 630).
[210] Id.
[211] Id.; *Atl. Coast Line*, 398 U.S. at 287.
[212] *Chick Kam Choo*, 486 U.S. at 146 (quoting *Atl. Coast Line*, 398 U.S. at 287) (internal quotation marks omitted); see also *Smith*, 131 S. Ct. at 2375; Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 514 (1955).

beyond cavil that the prohibition is not to be whittled away by judicial improvisation."[213] Third, the principle of narrow statutory interpretation is specifically a principle of statutory federalism. The Supreme Court has stated that "[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."[214] In fact, the Supreme Court recently restated this rule, emphasizing that "every benefit of the doubt goes toward the state court" and that "an injunction can issue only if preclusion is clear beyond peradventure."[215] This rule can be seen as a variant of the federalism canon of statutory interpretation, a rule of construction "based upon the nation's federal system of government, with its division of responsibilities among national, state, and local governments."[216]

The application of this statutory federalism principle of construction suggests that the federal courts should select the "claims or issues actually decided" test as the proper scope of the relitigation exception. If any doubt about the breadth of the exception's preclusive effects is to be resolved in favor of not allowing a relitigation exception, this indicates that the narrow majority circuit test should prevail.

3. Interpretation and the Protection of Federal Rights

Distrust of the state courts' ability to protect federal rights is not an acceptable reason to read the relitigation exception broadly. In his article advocating for the broad minority interpretation of the relitigation exception, Professor Martinez argues that the narrow

[213] *Amalgamated Clothing Workers*, 348 U.S. at 514.

[214] *Atl. Coast Line*, 398 U.S. at 297. This principle was again cited and emphasized in the Court's most recent application of the relitigation exception doctrine. *Smith*, 131 S. Ct. at 2375. For other confirmations of this principle of statutory federalism, see Chief Justice Rehnquist's opinion in *Vendo Co. v. Lektro-Vend Corp.*, 423 U.S. 623, 630–31, 643 (1977); see also Mitchum v. Foster, 407 U.S. 225, 243 (1972); *Amalgamated Clothing Workers*, 348 U.S. at 518, 520–21.

[215] *Smith*, 131 S. Ct. at 2376.

[216] William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 665 (1990). In the most common variant, the federalism canon is expressed as a "clear statement rule[] [that] protects the value of federalism by presuming that, absent a clear statement to the contrary, acts of Congress do not intrude upon the states either by regulating state functions or displacing state law." John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 407 (2010).

minority interpretation would displace the federal courts "from their traditional role as the protectors of the people's federal rights."[217] He acknowledges that this view of the federal courts is based in part on the belief that "state courts are not as fair or competent as federal courts in the adjudication of federal rights."[218] He also notes that because federal law governs the preclusive effects of federal judgments, a party's right to the claim preclusive effect of such a judgment is a federal right.[219] As a result, he argues that federal courts need to be the primary decision makers of a party's federal right to claim preclusion.[220]

Professor Martinez's argument is unpersuasive for two reasons. First, one should reject his premise that state courts are not equally competent to protect federal rights. In analyzing the Anti-Injunction Act soon after the 1948 revision, the Supreme Court in *Amalgamated Clothing Workers of America* explicitly rejected such a lack of confidence in the state courts. The Court noted that for a significant portion of our history, from the Founding to 1875,[221] Congress relied in large part on the state judiciary system to enforce federal rights.[222] Additionally, the federal and state courts face many of the same hurdles in adjudicating federal rights, whether it is the risk of mistakes in applying precedent or delays in litigation.[223] The Court also emphatically concluded that the "prohibition of § 2283 is but continuing evidence of confidence in the state courts."[224] Today, the Court's perspective on the Anti-Injunction Act and its support for the competency of state courts

[217] Martinez, supra note 86, at 677.

[218] Id. at 678; see also Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1121–22, 1124–27 (1977).

[219] Martinez, supra note 86, at 678.

[220] Id.

[221] Lower federal courts were not given general jurisdiction over federal questions until 1875. Judiciary Act of 1875, Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

[222] Amalgamated Clothing Workers of Am. v. Richman Bros., 348 U.S. 511, 518 (1955).

[223] Id. at 519.

[224] Id. at 518; see also Redish, supra note 186, at 724; Note, supra note 14, at 727 ("Certainly the concurrent power in the state courts to decide controversies within [A]rticle III suggest[s] that they are as fair as the federal courts and as competent to decide those controversies. Though each system of courts moves in a certain sphere of special competence, there is no reason to believe that a state court is more likely to err in its legal analysis, more likely to flout legal precedent, or more likely to entertain improper litigation than is a federal court.").

remains the same. In the most recent term, the Court proclaimed that the Anti-Injunction Act's "core message is one of respect for state courts."[225]

Second, a desire to promote the protection of federal rights is not a sufficient reason to override the decision that Congress has already made about how to weigh the values of respecting comity and protecting federal rights. Congress has set out its preferred balance by enacting the Anti-Injunction Act's general bar against enjoining state court proceedings, and the Supreme Court has stated that the federal courts are to read the statutory exceptions narrowly in light of this decision. The courts are not supposed 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 [the Anti-Injunction Act]."[226] As the *Chick Kam Choo* Court noted, a federal court does not have the "inherent power" to disregard the restrictions of the Anti-Injunction Act and "enjoin state court proceedings merely because those proceedings interfere with a protected federal right . . . , even when the interference is unmistakably clear."[227]

CONCLUSION

Given the importance of the Anti-Injunction Act and the increasing rifts in the interpretation of the relitigation exception by the circuit courts, it seems highly likely that the Supreme Court will address in the near future the proper scope of the exception. Based on consideration of text, history, precedent, and federalism principles, the Supreme Court ought to affirm the majority circuit position of the "claims or issues actually decided" test. This is the optimal interpretation of the relitigation exception both descriptively and substantively. Limiting preclusion protection via injunction to only "claims or issues actually decided" by federal courts best promotes the balance of power between the federal and state courts that Congress intended to set in the 1948 revision. This in-

[225] *Smith*, 131 S. Ct. at 2375.

[226] Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 639 (1977).

[227] *Chick Kam Choo*, 486 U.S. at 149 (quoting *Atl. Coast Line*, 398 U.S. at 294) (internal quotation marks omitted); see also *Amalgamated Clothing Workers*, 348 U.S. at 518–19.

terpretation respects the value of comity between the dual judicial systems as well as provides the necessary protection for federal judgments.

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