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Federal Declaratory and Injunctive Relief under the Burger Court

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IN 1908 the United States Supreme Court decided in *Ex parte Young* that a federal court could enjoin the Attorney General of Minnesota from carrying out state legislation designed to regulate the railroad industry. In choosing to recognize this equitable power in the federal trial courts, and in sweeping aside the various defenses that could be raised in opposition, the Court chose to pursue the traditional equitable goal of protecting property rights. For this choice the Court paid the price of controversy and inefficiency that is recorded in the history of the Three-Judge Court Act. In deciding *Ex parte Young*, the Court perhaps did not foresee that it was also laying the theoretical foundation for one of the most controversial roles of federal courts in the future: interference with the functions of state officers and courts by granting declaratory and injunctive relief to protect civil liberties. The friction-making potentialities of this task peaked during the six years following the Court's decision in *Dombrowski v. Pfister*. That opinion inspired conscientious counsel to seek federal injunctive relief whenever their clients were threatened with a state statute that could be claimed to be vague or overbroad. Such relief was sought even if state proceedings had begun, and even if there were few evidentiary facts upon which claims could be made that the state officials were acting in bad faith or for harassment purposes. Thus, because the language in the *Dombrowski* opinion was itself necessarily vague and overbroad, because some lower-court attempts to clarify *Dombrowski* were too generous in granting injunctive relief, and, more importantly, because the outlook of the Supreme Court itself was shifting, a "limiting construction" by the Court was inevitable.
On February 23, 1971, the Court decided six cases that have a significant impact upon the broad field of equitable remedies in the federal courts. Although these decisions definitely limit the application of the Dombrowski doctrine, they may be equally significant for the issues they leave unresolved. The lower federal courts have now begun to work with the principles of the "February sextet," and predictably, are producing uneven patterns of issues, doctrines, and results across a broad spectrum of demands for equitable protection of constitutional rights. This Article attempts to define that pattern as it is emerging under the Burger Court.

I. The Development of Merit-Avoidance Devices

The best known response of Congress to Ex parte Young was the Three-Judge Court Act. There were also less noticed statutes that withdrew certain controversies from the jurisdiction of the district courts. Still, the most significant limitations upon the exercise of the jurisdiction sanctioned in Ex parte Young came from the federal courts themselves. Ample grounds for restraint could be found in the traditional prerequisites to equitable jurisdiction: inadequate remedy at law and irreparable injury. In addition to these equitable principles there was also the traditional principle of maintaining the delicate balance of federalism—which gave rise to another layer of doctrine justifying refusals of federal courts to interpose themselves between states and their citizens. These principles of equity and federalism naturally overlap because they share a common theoretical basis, and because they serve the same function, at least superficially, of avoiding the merits of the controversy. Nevertheless, absolutist, authored all six Younger opinions. Of the three Justices still on the Court who were in the majority in Dombrowski, Justices Brennan and White concurred in the result in the majority of the Younger series, but dissented in part in Perez v. Ledesma, 401 U.S. 82 (1971), and Justice Douglas consistently dissented.

12 See LeFlore v. Robinson, 446 F.2d 715, 716 (5th Cir. 1971) (Goldberg, J., concurring).
13 Judge Goldberg so named the series of cases. Id. at 718.
15 In 1913 Congress provided for a stay of federal injunctive actions if state court enforcement proceedings had been instituted and if, pursuant to such proceedings, the operation of the statute or administrative order had been suspended pending a determination of constitutionality. 28 U.S.C. § 2284(5) (1970). See Traffic Tel. Workers’ Fed’n v. Driscoll, 72 F. Supp. 499 (D.N.J.), aff’d, 332 U.S. 833 (1947). See also Hutcheson, A Case for Three Judges, 47 HARV. L. REV. 795, 822-25 (1934); Pogue, State Determination of State Law and the Judicial Code, 41 HARV. L. REV. 623 (1928); Comment, Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases, 44 YALE L.J. 119, 122-24 (1934).
16 The Johnson Act, now 28 U.S.C. § 1342 (1970), provided that in certain circumstances federal district courts were deprived of jurisdiction to enjoin the operation of or compliance with rate orders promulgated by state administrative agencies for regulation of public utilities.

The Tax Injunction Act of 1937, now 28 U.S.C. § 1341 (1970), prohibits district courts from enjoining “the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” In a recent case the Johnson Act and the Tax Injunction Act, though not technically applicable, were deemed indicative of a policy against interference with the “domestic” matter of allocation of state tax revenues to municipalities, and the court abstained. City of East Chicago v. Whitcomb, Civil No. 71-H-57 (N.D. Ind., Sept. 14, 1971).
less, the principles have evolved sufficiently to justify categorization for analysis as (1) exhaustion of state remedies, (2) abstention, and (3) comity. Of course, since most cases will simultaneously invoke all three concepts and individual judges have their own notions of what fits where, the categories serve only to focus the courts on certain concrete factors that ought to be considered in coming to a judgment about federal intervention.

A. Exhaustion of State Remedies

The requirement of exhausting state remedies is grounded mainly in a desire to avoid needless friction with the states, but is also supported by considerations of standing, ripeness, and justiciability. These considerations, based upon the "case or controversy" requirement and the grant of judicial power in article III of the Constitution, unite to dictate the point in time in the development of a "case" when it is appropriate, if ever, for a federal court to respond to demands for intervention.

The Supreme Court did not hesitate to impose exhaustion restrictions upon Ex parte Young by deciding Prentis v. Atlantic Coast Line Co. in the same year. Because Virginia had vested its Supreme Court of Appeals with legislative powers when reviewing rate orders of the Virginia State Corporation Commission, the railroad was met with the exhaustion principle when it sought injunctive relief in federal court without first appealing to the state appellate court. The Supreme Court essentially held that the case was not yet ripe since all legislative remedies had not been exhausted.

The Prentis doctrine is not materially different from the general rule that state administrative remedies must be exhausted before resort to a federal court. However, the principle that state judicial remedies must also be exhausted differs substantially in that it is not based upon the lack of a justiciable controversy, but upon considerations of friction-avoidance. This principle has been legislatively adopted by Congress in at least three situations, including federal habeas corpus procedure. Some federal courts, in addition, have engrafted such a requirement onto actions brought under the Civil Rights Act of 1871. But in a series of cases the Supreme Court cast severe doubts upon

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17 U.S. CONST. art. III, § 2.
16 Id. § 1.
19 211 U.S. 210 (1908).
An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The other two provisions, the Johnson Act and the Tax Injunction Act of 1937, mentioned at note 15 supra, divest district courts of jurisdiction if "a plain, speedy and efficient remedy may be had in the [state] courts." Id. §§ 1342(4), 1341.
the continuing validity of this approach. The first case, *Monroe v. Pape*, indicated that because the federal remedies provided by the Civil Rights Act were supplementary to any state remedy that might be available to redress unconstitutional action under color of state law, a plaintiff need not exhaust state judicial remedies before suing under the Act. Then in *McNeese v. Board of Education*, *Damico v. California*, *King v. Smith*, and *Houghton v. Shafer* the Supreme Court held that a civil rights plaintiff need not exhaust his state administrative remedies.

Because the last four decisions perfunctorily cited *Monroe v. Pape* as authority, and because that decision is not clear, some courts and commentators have hesitated to pronounce the death sentence upon the exhaustion principle in civil rights cases. This skepticism has been encouraged by a reference in *Monroe* to the inadequacy or unavailability of a state remedy under

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28 U.S. 167 (1961) (plaintiffs alleged that police officers illegally searched their home).

29 U.S. 668 (1963) (plaintiffs sought to enforce their right to attend racially integrated schools).

30 U.S. 416 (1967) (plaintiffs alleged that a California welfare statute and regulation were discriminatory).

31 U.S. 309 (1968) (the plaintiffs alleged that a state welfare regulation violated the equal protection clause). In *King* the Court rather curiously stated: "Decisions of this Court . . . establish that a plaintiff in an action brought under the Civil Rights Act . . . is not required to exhaust administrative remedies, where the constitutional question is sufficiently substantial, as here, to require the convening of a three-judge court." Id. at 312 n.4 (emphasis added). This interesting gloss was discounted in *Ricciotti v. Warwick School Comm.* 319 F. Supp. 1006, 1011 (D.R.I. 1970), in which the court said:

Thus *King* seemed to have narrowed the broad language of *Damico*. However, given a further opportunity to explain the status of the exhaustion doctrine in 1983 actions, in *Houghton* v. *Shafer*, . . . which had been heard by a single District Judge, the Court stated in dictum that, 'In any event, resort to [state administrative] remedies is unnecessary in light of our decisions in [McNeese and Damico].'

It is this type of Supreme Court language that prompted the Second Circuit to retain the exhaustion requirement in certain instances. See text accompanying note 32 infra.

In any event, the expansion of abstention, see notes 60-79 infra, may put renewed emphasis on exhaustion of state remedies—even in civil rights actions.

32 U.S. 639 (1968) (per curiam).

The language of *Monroe* is, it must be admitted, susceptible of narrower interpretations on the exhaustion issue. For instance, it may be that exhaustion is not appropriate only when legal rather than equitable relief is sought. See *Potwora v. Dillon*, 386 F.2d 74, 76 (2d Cir. 1967); "*Monroe v. Pape* was an action for damages and . . . must be read in that light . . . ." See also Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1204 (1968). In *Wright v. McMann*, 387 F.2d 519, 523 (2d Cir. 1967), Judge Kaufman explained:

It is appropriate to note, however, that recently we had occasion to observe that the Supreme Court did not intend *Monroe* and *McNeese* to abrogate the historic principle that federal courts will not entertain a suit in equity when 'plain, adequate and complete' remedy may be had at law. *Potwora v. Dillon* . . . Of course, *Monroe* settled beyond cavil that exhaustion is not required when only legal relief is sought. And, in any event, in this suit for both legal and equitable relief it is only too clear that New York's remedies are inadequate.


28 See Note, supra note 28; Note, supra note 22.
the particular circumstances." Thus, the Second Circuit has refused to cast off the exhaustion principle, at least with respect to administrative remedies. In Eisen v. Eastman, after an analysis of Monroe, McNeese, Damico, Smith, and Houghton, the court concluded in the words of Judge Friendly:

Despite the breadth of some of the language, particularly in the Damico per curiam, we thus read these decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in McNeese, or where it is certainly or probably futile, as in Damico, Smith and Houghton. . . . We shall need much clearer directions than the Court has yet given or, we believe, will give, before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction.

The same reasoning might suggest the survival of the related principle with respect to state judicial remedies. However, the Fifth Circuit has held that such exhaustion is not a prerequisite to a Civil Rights Act suit, "since the cause of action established by that statute is fully supplementary to any remedy, adequate or inadequate, that might exist under state law."4

As the above sampling indicates, the exhaustion principle has been dealt some mortal blows, but the particular circumstances of a given case and a friendly judge can breath life back into it. Even if the exhaustion principle is discarded as a doctrine of independent force, nevertheless the existence of adequate, untried state remedies may enter as a factor disguised under the rubrics of abstention or comity.5

B. Abstention

In contrast to exhaustion of state remedies, the principle of abstention does not arise from a jurisdictional or even "pseudo-jurisdictional" requirement. Rather, abstention is a device reflecting a judicial policy of avoiding decisions on constitutional questions unless absolutely necessary to the disposition of the case.6 There are also a cluster of other supporting policies, such as the varying degrees of state interest that emerge in various categories of cases.7

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52 421 F.2d 560, 569 (2d Cir. 1969) (emphasis added) (plaintiff, a landlord, alleged city rent control law authorized deprivation of property without due process of law).
53 Hobbs v. Thompson, 448 F.2d 456, 461 (5th Cir. 1971), citing Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970).
54 See Planned Parenthood Ass'n v. Nelson, 327 F. Supp. 1290 (D. Ariz. 1971), and Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970), aff'd mem. sub nom. Hodgson v. Randolph, 402 U.S. 967 (1971), in which the availability of state declaratory judgment relief weighed heavily in the balancing of federal and state interests required under the principle of comity. But see Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam), in which an abstention order was vacated because the lower court's only basis for abstaining was the conviction that a state declaratory judgment remedy must be pursued prior to the maintenance of a federal action seeking to invalidate a state statute on fourteenth amendment grounds. See also Lake Carriers' Ass'n v. MacMullen, 40 U.S.L.W. 4569, 4573 (U.S. May 30, 1972): "Similarly, the availability of declaratory relief in Michigan courts on appellants' federal claims is wholly beside the point."
55 Moreno v. Henckel, 431 F.2d 1299, 1307 (5th Cir. 1970).
The best known example of abstention occurred in *Railroad Commission v. Pullman Co.* The Texas Railroad Commission's order requiring that all "sleeping cars" be operated only in the continuous charge of a Pullman conductor was challenged as being violative of the fourteenth amendment to the Constitution and as ultra vires under state law. Negro porters intervened, arguing that because all Pullman conductors were white and all porters were Negro, the order constituted segregation violative of the fourteenth amendment. Because the case could possibly be resolved by an interpretation of the state statute without reaching the constitutional issue, the Supreme Court, in its equitable discretion, ordered the trial court to abstain from the case, but retain jurisdiction pending a state court determination.

Although other types of abstention have been labeled, Pullman-type abstention has been the one most often used by federal courts to avoid civil rights issues. From its inception abstention has been held to be applicable "only in narrowly limited 'special circumstances.'" For instance, abstention should be applied only when the issue of state law is uncertain. If a statute will be unconstitutional regardless of how it may be construed by state courts, abstention is improper. Again, although it has been held that abstention may be invoked in civil rights cases, certain types of civil rights actions may have a preferred claim to a federal forum.

When a state statute is challenged as being facially unconstitutional, several guidelines have emerged for determining the propriety of abstention. When the state statute could be narrowly construed so as to avoid all constitutional issues, and state courts have not yet authoritatively construed the statute, abstention is generally proper. Affirmative answers to the following questions generally lead to abstention in any particular context: (1) Is the state law uncertain? (2) If it is uncertain, is narrowing construction of the state statute likely and available in the state courts?

In several cases the Supreme Court has indicated that when a state statute is attacked on its face on first amendment grounds, abstention is not proper. But a closer look at these cases shows that the Court was merely applying in a first amendment context the principle of *Harman v. Forssenius.* The Forssenius principle is that abstention is improper when the state statute would be...
unconstitutional regardless of the construction a state court might give it. Thus, refusal to abstain is justified, in the language of *Dombrowski v. Pfister*, when "a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hardcore' conduct that would obviously be prohibited under any construction." Therefore, in first amendment cases, not only must the state law be uncertain and subject to a narrowing construction, but that remedy must be readily available in a single criminal prosecution.

A distinction is drawn between challenges for overbreadth and those for vagueness. The above-quoted language from *Dombrowski* indicates that abstention is not proper when a state statute is legitimately challenged as being overbroad in the sense that the statute clearly criminalizes protected speech or activity. However, when the substance of the claim is that the statute is merely vague in the sense that the scope of the statute is ambiguous, abstention may be proper if: (1) a limiting construction is "readily to be anticipated as the result of a single criminal prosecution"; and (2) the plaintiff's conduct is "hardcore." The reasoning is essentially that although every vague statute is also overbroad in that it potentially reaches protected speech or activity, nevertheless a vague statute could at least possibly receive a limiting construction in a single criminal prosecution. When the statute, on the other hand, is overbroad—i.e., clearly reaching protected speech or activity—such a limiting construction is impossible.

It, therefore, would seem to be inaccurate to say that abstention has been eliminated from first amendment cases, for although its role is severely limited, in certain vagueness cases it may operate to remit a plaintiff to state court for a determination of the intended or permitted scope of the challenged statute.

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48 See WRIGHT § 52, at 207.
53 In Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969), the Supreme Court commented upon the state court's "remarkable job of plastic surgery upon the face of the ordinance." See Hunter v. Allen, 422 F.2d 1158, 1162 (5th Cir. 1970), *rev'd on other grounds sub nom.* Embry v. Allen, 401 U.S. 989 (1971) (if the statute is merely vague, "federal judicial review must be secured through other channels"); Carmichael v. Allen, 267 F. Supp. 985, 996 (N.D. Ga. 1967) (injunctive relief is proper only when the statute is overbroad).
54 See WRIGHT 207-08. Abstention is also improper if the statute is being enforced in bad faith or for harassment purposes—i.e., "for the purpose of discouraging protected activities." *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).
55 The Fifth Circuit has apparently refused to recognize any distinction between vagueness and overbreadth cases, lumping them both under the latter label. This seems to be based upon a skepticism that any vague statute could ever be acceptably construed in one single state proceeding as to all persons potentially affected. However, one can also detect an overriding desire by the court to assure a federal forum in all freedom of speech cases: Abstention . . . might be quite appropriate in the normal case to assure that the challenged state statute will actually be interpreted to reach the activities of the persons attacking its validity. But in an overbreadth case, where particular applications of a statute are not determinative and where
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Recent Supreme Court decisions outside the first amendment area demonstrate a renewed emphasis upon the use of Pullman-type abstention. The Pullman rationale, the avoidance of constitutional questions, is still recited. Nevertheless, it is apparent that the present Court is now bootlegging into the concept of abstention the objective of stemming the tide of three-judge court convenings and direct appeals, and is requiring, in practical effect, the exhaustion of state judicial remedies. These recent abstention cases will be viewed first against the cases from the 1960's.

Although the Court had previously held that abstention may be proper in civil rights cases, some of the reasoning and language in Monroe v. Pape and McNeese v. Board of Education hinted that the Court might be coming to the view that abstention was improper. Thus, Monroe asserted that the Civil Rights Act remedy was supplementary to the state remedy, and that it was irrelevant that the state action complained of was violative of the state constitution and laws. These assertions seemed to allow little room for deference to the state courts. And in McNeese it was thought that the Court was expressly creating a civil rights exception to the abstention doctrine when it said: "We would defeat [the purposes of 42 U.S.C. § 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." However, in 1971 the Court in Askew v. Hargrave refused to give such a broad effect to the two previous decisions. The plaintiffs in Askew challenged the Florida public education financing system, arguing that the system effected an invidious discrimination against poor school districts in violation of the equal protection clause of the fourteenth amendment. After the suit was filed, other plaintiffs brought a state court action challenging the financing system on state constitutional grounds. The three-judge federal court, however, refused to abstain, relying upon Monroe and McNeese for the proposition that "[t]he fact that a state remedy is available is not a valid basis for federal court abstention." The Supreme Court vacated and remanded, saying:

The reliance upon Monroe v. Pape and McNeese was misplaced. Monroe v. Pape is not in point, for there 'the state remedy, though adequate in theory, was not available in practice.' . . . McNeese held that 'assertion of a federal

conceptions of standing and ripeness are modified, such assurances are largely irrelevant. . . . Moreover, even if it be assumed that a state court could resolve the overbreadth problems, either by means of an acceptable limiting construction readily to be anticipated or by avoiding the statute on its face, abstention is nevertheless inappropriate. In such a situation the state courts would simply be deciding a federal constitutional issue within the framework of construing state law. A primary motive for abstaining—avoidance of constitutional issues—is not served. The issue is simply referred to another forum. The state courts, however, possess no special institutional competence to decide such issues. Since the federal courts are at least as adequate a forum, no real purpose would be served by denying a litigant his choice of a federal forum.

Hobbs v. Thompson, 448 F.2d 456, 463 (5th Cir. 1971).

54 See text at note 44 supra. See also Koehler v. Ogilvie, 53 F.R.D. 98, 103 (N.D. Ill. 1971).
55 See Maraist, supra note 7, at 540.
56 373 U.S. at 672.
57 401 U.S. 476 (1971) (per curiam).
claim in a federal court [need not] await an attempt to vindicate *the same claim in a state court.* ... Our understanding from the colloquy on oral argument with counsel for the parties is that the [pending state] case asserts, not the 'same claim,' that is, the federal claim of alleged denial of the federal right of equal protection, but primarily state law claims under the Florida Constitution, which claims, if sustained, will obviate the necessity of determining the Fourteenth Amendment question.

It is difficult to predict the effect *Askew* will have upon civil rights abstention. The opinion is ambiguous in many respects. First, what is the importance of the fact that the state court action, though filed after the federal suit, was nevertheless pending during the federal proceedings? Second, if *Askew* is not limited to cases actually pending in state courts, does it require abstention when a potential challenge could be made on state constitutional grounds? It should be noted here that the court distinguishes *McNeese,* in which a state action was pending, as a case involving the *same* [federal] claims in both state and federal court. By implication, whenever a state constitution has a due process or equal protection clause, and a state action can be brought, or is pending, challenging a state law on such grounds, federal abstention may be proper. Although the intent of *Monroe* and *McNeese* was to disapprove abstention in such a situation, it is now apparent that in particular instances the federal court must undertake the difficult chore of determining the worth of a potential state constitutional law claim. Third, how much discretion has the Supreme Court left the trial judge to abstain or not to abstain? In remanding *Askew* the Court referred the district court to *Reetz v. Bozanich* as a recent case stating the abstention principles *that should inform the exercise of the district Court's discretion as to whether to abstain,* but did not order abstention. Thus, the Court in *Askew* did not hold that abstention was called for, but merely that *Monroe* and *McNeese* did not preclude abstention. How-

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401 U.S. at 478.

In this connection *Askew* raises another important question: Was the single fact that a state proceeding was pending in *Askew* sufficient in itself to justify abstention, not because the state law was uncertain and a narrowing construction was possible, but solely because a decision holding the statute unconstitutional on state law ground would have avoided the federal constitutional questions? In *Spencer v. Kugler,* 326 F. Supp. 1235, 1238 (D.N.J. 1971), the court, in dictum, answered this question affirmatively, saying essentially that the uncertainty requirement drops out "when the identical issue is pending in the state court." However, the *Spencer* court found *Askew* inapplicable because the *Spencer* plaintiffs in the federal case were challenging the racial balance in the schools; whereas, the state plaintiffs alleged a violation of equal protection resulting from the taxing measures used to finance the educational system.

A district court has so read *Askew,* *Monroe,* and *McNeese.* Osmond v. Spence, 327 F. Supp. 1349, 1351 n.4 (D. Del. 1971): "We think *Reetz v. Bozanich* [the case cited in *Askew* as providing correct abstention guidelines] ... is distinguishable because the case before us involves substantially the same claim under the Delaware State Constitution."

In *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970) (per curiam), the Court by way of a footnote pointed out that the Puerto Rico Constitution had a due process provision. *Id.* at 44 n.3. Thus, the Court implied that at least one consideration behind the order to abstain was the possibility that the state rather than the federal constitutional provision would be used to invalidate the statute, if invalidation was called for. *See also Wisconsin v. Constantineau,* 400 U.S. 433, 439-43 (1971) (dissenting opinion), in which Chief Justice Burger noted that although the Wisconsin Constitution had no due process or equal protection clause as such, the Wisconsin Supreme Court had interpreted one provision as having substantially the same effect.


401 U.S. at 478.
ever, in *Reetz* the Supreme Court ordered abstention. There the plaintiff challenged an Alaska statute governing salmon net gear licensing for commercial fishing. The application of several Alaska constitutional and statutory provisions relating specifically to the use of fish resources could have obviated the necessity of reaching federal constitutional issues. Emphasizing that the regulation of the use of fishing resources is particularly a matter of state concern, the Court ordered the district court to abstain. It is, therefore, unclear whether in *Askew* the Supreme Court might allow the trial judge not to abstain if he were not to find present the *Reetz* elements, such as unresolved questions of state law, novel and difficult problems of construction for the federal court, and a regulatory scheme in which the state has a strong interest.

There is another odd point about the *Askew* decision. The Court did not discuss why the Florida law was "uncertain." Perhaps uncertainty was presumed because the statute was relatively new. On the other hand, a finding of uncertainty has always been an important threshold prerequisite to *Pullman*-type abstention. Indeed, the mere fact that the state law question may be dispositive of the case is not enough; a prior condition is that the state law must also be unclear.

The reality is that the uncertainty requirement of abstention is a judicial chameleon. "State law" is always uncertain to the extent it cannot be determined from reading statute books or legal digests but depends upon a prediction of what the state courts in fact will do with the controversy. And unless full state and federal constitutional challenges have recently been made by some other parties in state court, then to an abstentionist, any question—whether it involves a new statute fresh out of the legislature, or a procedure from antiquity—will raise "uncertainty" under state law, and the federal court should abstain. On the other hand, "certainty" can also be judicially imposed upon the state law, by assuming away the ambiguities, and thus refusing the abstention. In *Wisconsin v. Constantineau*, decided in January 1971, the Supreme Court thus affirmed a three-judge court decision invalidating the old

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68 In a more recent decision, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (per curiam), the Supreme Court also ordered abstention in a case challenging the Puerto Rico Dealer's Contract Law. That law imposed liability on manufacturers for unilaterally terminating contracts with local dealers, regardless of the terms of the contracts, for other than "just cause." The First Circuit held that the statute was violative of the due process clause of the fourteenth amendment, primarily on the strength of its own interpretation that the statute was to have retrospective effect. 423 F.2d 563 (1st Cir. 1970). The Supreme Court ordered abstention because Puerto Rico courts had not authoritatively construed the statute, and the statute could conceivably be construed to avoid the fourteenth amendment issue. However, as in *Reetz*, the Court emphasized that the peculiarly local nature of the subject matter (here the Spanish tradition of Puerto Rico's laws) should cause a federal court to give deference to state, or as in this case, territorial courts.


70 Id.

71 By analogy consider the jurisprudential debate over how to "guess" state law under the *Erie* doctrine. See generally WRIGHT § 58.

72 If the same parties begin in state court, they may be precluded by res judicata from returning to federal court, unless they can understand the difficult decision in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).


75 400 U.S. 439 (1971).
Wisconsin drunk-posting statute over objections that the state courts should be given the first chance at it.

In his dissent Chief Justice Burger revealed rather forcefully his views on quibbling over uncertainty and set out the dominant values that make it easy for him to decide abstention cases:

It is no answer to contend that there is no ambiguity in the Wisconsin statute and hence no need to abstain; in *Reetz* the Alaska statute could not have been more plain, or less susceptible of a limiting construction. Yet, in furtherance of this Court's firm policy to steer around head-on collisions with the States by avoiding unnecessary constitutional decisions, we reversed the District Court and remanded with instructions to stay its hand while the litigants exhausted state court remedies for resolution of their challenge to the statute.6

The Chief Justice continued, explaining his reasons for advocating a rule requiring a litigant to exhaust state judicial remedies before resort to federal court:

I quite agree that there is no absolute duty to abstain—to stay our hand—until the state courts have at least been asked to construe their own statute, but for me, it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of case on a three-judge federal district court, and then, by direct appeal, on this Court. Indeed, in my view, a three-judge district court would be well advised in cases such as this, involving no urgency or question of large import, to decline to act.

This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve. Neither the historic role of this Court nor any reasonable duty placed on us, calls for our direct intervention when no reason for expedited review is shown. Here we have an example of an unwise statute making direct review *prima facie* available, and an unwillingness by the Court to follow its own precedents by declining to pass on the Wisconsin statute before Wisconsin does so. We should remand this case with directions to the three-judge court to refrain from acting until the Wisconsin courts have acted.7

Thus, if the Chief Justice's approach is found persuasive by other members of the Court, it could be that the Court will do away with the uncertainty requirement altogether and simply apply his "non-urgent state cases" test.8 In any event, abstention principles will represent a formidable obstacle to the federal courthouse door in the 1970's.9
C. Comity

Before there was a United States, equity courts were busy weaving a body of principles restraining the use of injunctive relief unless there was inadequate remedy at law and irreparable injury. There were many variations of this major theme, such as equity only acts to protect property rights, equity will not enjoin parties from proceeding in other courts, or equity will not enjoin a criminal prosecution. These maxims developed from a keen judicial sense of restraint based upon pragmatic political considerations. Much of this equity jurisprudence, insofar as it rested upon respect for the functioning of other courts, has been called "comity."

In Hilton v. Guyot Justice Gray characterized comity in the legal sense as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." In the United States one peculiarly American variety of comity has evolved within the concept of "federalism." In essence the principle requires of the federal government nothing more or less than a "decent respect for the states."

As if this delicate balance of federalism would not have been difficult enough for the federal courts to maintain by their own lights, Congress has at times been inconsistent in granting with one hand, and taking away with the other, powers that regulate federal judicial intrusion into state processes. The general grant of federal question jurisdiction and, more significantly, the jurisdiction granted in the Civil Rights Act of 1871 have over the years put great pressure on the federal courts to intervene in state executive, legislative, and judicial functions to protect federal constitutional rights. On the other hand, since 1793 some form of federal statute has been on the books expressly prohibiting federal courts from enjoining state court proceedings. The present

judge court cases] with their accompanying burdens almost exclusively in the federal courts. This deliberate by-pass of state courts and administrative tribunals or agencies is unexplainable to many responsible lawyers as well as the citizenry insomuch as the issues arise basically from the wording and purposes of State laws. Courts in difficulty will stretch to divert or abstain when valid and new distinctions can be found to limit the open door policy of unrestricted entry if the choice be made continuously to file in the federal court system when competent and clearly available judicial remedy is present unquestionably in the state court system.


86 Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818); see Webber v. Gray, 228 Ark. 289, 307 S.W.2d 80 (1967); Ex parte Warfield, 40 Tex. Crim. 413, 50 S.W. 933 (1899).
87 Z. CHAFEE & E. RE, supra note 81, at 99-138; J. POMEROY, supra note 81, § 1361b.
88 Z. CHAFEE & E. RE, supra note 81, at 935-79; J. POMEROY, supra note 81, § 1361b.
89 159 U.S. 113, 163-64 (1895) (here, comity between nations).
90 Ex parte Young, 209 U.S. 123, 176 (1908) (Harlan, J., dissenting).
91 Judge Wisdom noted that the coexistence in the United States of both centripetal and centrifugal forces under the banner of federalism "is something like Alexander Hamilton and Thomas Jefferson sharing an apartment happily together." Wisdom, supra note 4, at 413.
statute, 28 U.S.C. § 2283, has figured prominently as evidence of a countervailing national policy in favor of allowing state courts to carry on their business free of interference by federal courts.

Appropriately, the blunt prohibitions of the anti-injunction statute have often been found inapplicable. To create more finely honed instruments of flexibility, the federal judiciary has instead used principles of equity and comity to shape its own guidelines on a case-by-case basis. These guidelines, then, result from attempts in each case to balance the importance of the claims to federal court protection of constitutional rights against the interest of the states in being the deciders in the first instance. A closer look at these comity-inspired limits upon the equitable powers of federal courts reveals a great deal of kinship with abstention.

Judicially Created Limits on Equitable Discretion. In anticipation of the criticism that the result in Ex parte Young would inaugurate a "great flood of litigation" of the same kind, the Court in Young responded: "[I]n the first place, . . . no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts." Beginning with this vague assurance, the Court has seen fit to restrict the exercise of federal equitable jurisdiction. First, this was accomplished solely by the general principles of equity, and later by additional qualifiers and caveats such that it can safely be said that federal courts may enjoin pending or threatened state proceedings only in special, limited circumstances.

In 1923 in Terrace v. Thompson the Court upheld an injunction against the enforcement of an alien land law. The traditional prerequisites to equitable relief were relied upon:

The unconstitutionality of a state law is not itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as that which equity could afford. . . . Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable . . . .

However, only three years later in Fenner v. Boykin the Court further restricted the equitable discretion of federal courts:

Ex parte Young . . . and following cases have established the doctrine that when absolutely necessary for protection of constitutional rights courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate.

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86 209 U.S. 123, 166-67 (1908).
87 263 U.S. 197 (1923).
88 Id. at 214.
89 271 U.S. 240, 243 (1926) (emphasis added).
It thus became the rule that injunctions against threatened state prosecutions were rarely issued. Many cases were reversed on the basis that the plaintiffs failed to demonstrate a likelihood of "both great and immediate" irreparable injury. But in these cases and the few in which injunctive relief was upheld the Court began to outline in greater detail just what kinds of injuries would justify equitable intervention. Focusing on the circumstances attending a state criminal prosecution under an allegedly unconstitutional statute, the Court had said in *Fenner*:

> Ordinarily, there should be no interference with [state] officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.

Thus, the ordinary trials and tribulations of a state criminal prosecution without more were insufficient to authorize an injunction. But the italicized phrase above from *Fenner* indicated that in extraordinary circumstances, when the single state prosecution for some reason did not afford the defendant adequate protection, injunctive relief would be proper.

In *Hague v. CIO* the 1939 Court was faced with a case which clearly foreshadowed the many 1960 cases which would charge bad faith and harassment by city officials. The plaintiff labor organizers alleged an intentional plan of harassment by city officials for the purpose of denying the plaintiffs first amendment rights. The harassment consisted of arrests, threats of continuing arrests, unlawful searches and seizures, and, in addition, banishment of the plaintiffs from the city. In these extraordinary circumstances the Court upheld an injunction against the city officials and declared an ordinance, which arbitrarily denied freedom of assembly, unconstitutional.

In *Beal v. Missouri Pacific Railroad* the Court stated that a multiplicity of prosecutions brought in bad faith under an unconstitutional statute would satisfy the standard of equitable discretion set out in *Fenner*. The threat of multiple prosecutions was, in *Watson v. Buck*, distinguished from the situation in which the state officers merely stand ready to perform their duty under a statute: "[S]uch a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts." In 1943 the *Fenner* rule of nonintervention except in extraordinary circumstances, as described in *Hague, Beal, and Watson*, was reaffirmed in *Douglas v. City of Jeannette*.

79 271 U.S. at 244 (emphasis added).
80 307 U.S. 496 (1939).
81 312 U.S. 45 (1941).
82 Id. at 50.
83 313 U.S. 387, 400 (1941).
84 319 U.S. 157 (1943).
In 1964 in *Baggett v. Bullitt* the Court seemed to create a first amendment exception to the rule of *Fenner*. The statute in *Baggett* required state teachers to take an oath that they would "by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington ...." The Court stated: "The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'the free dissemination of ideas may be the loser.'"

There were also a few lower-court applications of the *Fenner* rule that appeared to permit courts to consider the importance of the right sought to be protected as part of a totality of circumstances indicating great and immediate irreparable injury. This was the state of the law prior to the Court's decision in *Dombrowski v. Pfister*.

In *Dombrowski* the plaintiffs, the Southern Conference Educational Fund, Inc. (SCEF), a southern Negro civil rights organization, and its executive director, sought declaratory and injunctive relief against state officials to prohibit them from prosecuting or threatening to prosecute the plaintiffs under the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law. The laws were alleged to be overbroad, but in addition, the plaintiffs alleged that Louisiana officials had conducted raids on SCEF's headquarters and the homes of its officers, unlawfully searching and seizing organization records and membership lists. Other allegations were made to the effect that the plaintiffs were arrested and indicted under the two above laws and that the official harassment had frightened off potential members and contributors. The Supreme Court granted the plaintiffs relief, and in so doing held that: (1) the anti-injunction statute was not applicable; (2) abstention was not proper; and (3) comity did not preclude injunctive relief.

Although the words of section 2283 do not speak to the question, the Court, Justice Brennan writing for the majority, held that its prohibition did not apply to state court proceedings not commenced before the filing of the complaint in federal court. Thus, despite the fact that indictments had been returned against the plaintiffs during the pendency of the federal suit, no proceedings

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107 Id. at 362. *But see note 247 infra.*
108 Id. at 374.
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were in being at the critical point in time." To hold otherwise would mean that any threat of prosecution sufficient to justify equitable intervention would also be a 'proceeding' for § 2283." Therefore, the actual holding in Dombrowski did not speak to the propriety of equitable intervention in pending state criminal prosecutions.

Abstention was deemed improper in cases in which "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." Justice Brennan did not at this point in the quoted language distinguish between overbroad statutes and merely vague statutes. However, he later qualified the prohibition on abstention and allowed that abstention could be proper when a merely vague statute regulating expression is challenged by one whose conduct could be validly punishable under a narrowed construction of the statute, and when such a narrowing construction is readily obtainable from a single criminal prosecution. In any event, Justice Brennan's first use of the disjunctive clearly meant that either facial overbreadth or bad faith enforcement or harassment would make abstention improper. But abstention is one thing and comity is another.

Since abstention and comity are distinct but related concepts, the use of the disjunctive in the abstention discussion of Dombrowski might have been responsible in part for many lower courts applying the same disjunctive to the issue of comity. Although the Dombrowski Court often repeated the words "in this case" and "here" when reaching its conclusions on the propriety of injunctive relief, the opinion, when taken with the abstention discussions, is subject to a fair interpretation that proof of bad faith or harassment is not required to impart "chilling" properties to an overbroad statute—and that either the mere presence of an overbroad statute or bad faith enforcement of or harassment under a statute regulating expression will justify injunctive relief. However, that is not what Dombrowski held. Justice Brennan's opinion relied heavily upon the presence of evidence of bad faith enforcement and harassment—and made it clear that mere facial unconstitutionality of a statute regulating free expression, absent bad faith or harassment, will not justify

118 "The indictments were obtained only because the District Court erroneously dismissed the complaint and dissolved the temporary restraining order issued by Judge Wisdom in aid of the jurisdiction of the District Court properly invoked by the complaint." 380 U.S. at 484 n.2.
119 Id.
114 Id. at 489-90 (emphasis added).
118 See notes 50-53 supra, and accompanying text.
118 380 U.S. at 489-90.
118 E.g.: "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights." 380 U.S. at 486.
119 It is clear that just any statute will not do. See Porter v. Kimzey, 309 F. Supp. 993, 995 (N.D. Ga. 1970), aff'd, 401 U.S. 985 (1971): There must be a 'nexus' between the right sought to be protected and the right ostensibly restricted by the statute. . . . To cite an extreme example, Dombrowski could not be used to enjoin a state prosecution for the offense of rape, murder, or the like, the ingredients of which are unconnected with First Amendment rights, on the grounds that the statute was vague on procedural matters or that it is being used to chill First Amendment rights.
118 See also Bukolich v. Jury Comm'rs, 394 U.S. 97 (1969); Damon v. Horson, 364 F.2d
injunctive relief. But in such cases relief was not necessarily to be denied altogether, and in Zwickler v. Koota the Court held that in such a situation declaratory relief was proper—that, indeed, federal courts had a duty to consider prayers for declaratory and injunctive relief separately.

The Anti-Injunction Statute. Despite an unpropitious beginning as an obscure and ambiguous provision in the Judiciary Act of 1793, section 2283, the anti-injunction statute, came first to be considered a codification of the principle of comity among the federal and state courts. After the Supreme Court's decision in Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, the statute, when applicable, is a binding jurisdictional prohibition upon the exercise of federal injunctive power. The statute provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Because Atlantic Coast Line put to rest arguments that the statute is merely a codification of principles of comity to be disregarded in certain circumstances, if a federal court, after an application of the rules of restraint of equity and comity, still is convinced that an injunction against a state proceeding should issue, it must come to grips with section 2283. As with any general prohibition the applicability of the statute in particular situations is not always certain. The statute is drafted so that its prohibition may be avoided in either of two


92 Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 334-35; see Reaves & Golden, supra note 90, at 295-97; Comment, supra note 90, at 293-94.


135 "[I]t is intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal court. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention." Id. at 286-87. In Atlantic Coast Line the Court held that a state court injunction that prohibited picketing could not be enjoined by a federal district court on the basis that such federal action was "necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Court reached this conclusion after determining that there was no existing federal court judgment to protect and that the state court had concurrent jurisdiction over the subject matter. Id. at 290, 295.


ways: (1) by not coming within the terms of its main prohibitory clause\textsuperscript{118}—e.g., when the state proceeding is not in a "state court"; or (2) by coming within one of the three stated exceptions—i.e., when an injunction is expressly authorized by Act of Congress, necessary in aid of the federal court's jurisdiction, or necessary to protect or effectuate its judgments.

(1) "Injunction To Stay Proceedings." It is well settled that the prohibition of section 2283 is not avoided by directing an injunction to the parties to a lawsuit rather than to the state court itself.\textsuperscript{119} Further, because the intrusion accomplished by a declaratory judgment is supposed to be as severe as that of an injunction,\textsuperscript{120} the rule has been emerging that the statute proscribes declaratory relief when an injunction would also be prohibited.\textsuperscript{121} Some courts have hinted in dictum that this is not true, if under the circumstances of the particular case declaratory relief is a sufficiently milder interference with the state court proceeding.\textsuperscript{122} However, on this issue these courts perhaps were under the impression that they were restrained only by considerations of comity and equity, since they are pre-Atlantic Coast Line decisions.\textsuperscript{123}

The question of whether a specific, partial injunction constitutes a "stay" of the state proceedings, like the declaratory judgment question, also presents an opportunity for technical construction of the statute. In \textit{Stefanelli v. Minard}\textsuperscript{124} the Supreme Court disallowed a lower-court injunction that prohibited the use of illegally seized evidence in a state criminal proceeding.\textsuperscript{125} The Court relied on the restraints of equity, comity, the anti-injunction statute, and the policy against the "piecemeal" determination of issues.\textsuperscript{126} Thus, there, as in other cases, the independent force of section 2283 is difficult to ascertain. However, the fact that the Court made no finding that the federal injunction would have actually halted the state prosecution in \textit{Stefanelli} indicates that section 2283 may prohibit interferences with state proceedings that fall short of a full-fledged stay order.

(2) "In a State Court." The key words here are "in" and "state court." The

\textsuperscript{118} The statute has been held inapplicable when the injunction is sought by the United States. \textit{Leiter Minerals, Inc. v. United States}, 352 U.S. 220 (1957). \textit{See also Reaves \& Golden}, supra note 90, at 300.


\textsuperscript{120} \textit{See notes 201-05, 228-30 infra, and accompanying text.}

\textsuperscript{121} \textit{H.J. Heinz Co. v. Owens}, 189 F.2d 505 (9th Cir. 1951); \textit{Ballard v. Mutual Life Ins. Co.}, 109 F.2d 388 (5th Cir. 1940); \textit{Maryland Cas. Co. v. Consumers Fin. Serv.}, 101 F.2d 514 (3d Cir. 1938); \textit{Aetna Cas. \& Sur. Co. v. Yeatts}, 99 F.2d 665 (4th Cir. 1938).


\textsuperscript{124} 342 U.S. 117 (1951).

\textsuperscript{125} \textit{See also Cleary v. Bolger}, 371 U.S. 392 (1963). The situation in \textit{Stefanelli} and \textit{Cleary}, in which state officers are attempting to introduce or testify with respect to illegally obtained evidence, must be distinguished from the situation in which federal officers are attempting to testify in a state trial and federal relief is sought to suppress that testimony on constitutional grounds. In the latter instance federal injunctive relief is proper. \textit{Rea v. United States}, 350 U.S. 214 (1956). Recently, in \textit{United States v. Navarro}, 441 F.2d 409 (5th Cir. 1971), the Fifth Circuit refused to consider the possible effect of the \textit{Younger} sextet on \textit{Rea}.

\textsuperscript{126} 342 U.S. at 122-23.
rule is that "court" refers to a body that performs judicial functions and not administrative or legislative functions. Justice Holmes attempted to define the legislative and judicial functions in *Prentis v. Atlantic Coast Line Co.*: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and its end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." With this as a standard, federal courts must look to state law to determine the character of the particular proceeding. Even though an administrative agency must go to a state court to enforce its rulings, until such enforcement is actually sought there is no proceeding in a state court. If the agency may impose the sanctions of a state penal statute, its proceedings in such matters may be deemed quasi-criminal proceedings subject to section 2283.

Whether there is an action pending, or "in," a state court may also be a difficult issue in particular cases. If a part of a state court proceeding is actually begun prior to the filing of the federal action, clearly a state court proceeding is pending. In *Dombrowski v. Pfister* the Court emphasized that the critical point in time is the moment at which federal jurisdiction attaches. Thus, section 2283 was deemed inapplicable in *Dombrowski* even though, when the federal hearing was held, state proceedings had been commenced.

Whether a case is "in" a state court also depends upon what is considered to be a part of a state judicial proceeding. Justice Brandeis stated an extremely all-inclusive definition in *Hill v. Martin*:

The prohibition of [§ 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other.

This definition, difficult enough to apply to the variety of procedures in civil actions, has been applied in criminal prosecutions with divergent results. One court required that a formal indictment (or presumably an information) be returned to commence a state criminal prosecution for the purposes of section

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138 211 U.S. 210, 226 (1908).
142 See notes 111-13 supra, and accompanying text.
143 296 U.S. 393, 403 (1935).
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2283.144 Another held that it was sufficient if the matter had been docketed for presentation to the grand jury and subpoenas issued to the witnesses.145 Still another court has held that an arrest suffices as a state court proceeding.146

(3) "Except as Expressly Authorized by Act of Congress." Even though the general terms of the anti-injunction statute might otherwise apply, a court must look to the statute relied upon by the plaintiff to determine if that act of Congress "expressly authorizes" the issuance of an injunction against state court proceedings. This particular language was inserted in lieu of a single specific reference to the bankruptcy exception in the revision of 1948.147

The Atlantic Coast Line decision by the Supreme Court in 1971, which held that the statute was jurisdictional and not a mere rule of comity, has foreclosed an approach in the construction of this language that would permit "flexibility supplied by judicial interpretation . . . to meet the needs of our expanding jurisprudence."148 And the tenets of construction set down by the Court leave little room, if any, for judicial "improvisation."149 Still, the statutory exception need not specifically refer to section 2283;150 indeed, most of the recognized exceptions were passed prior to the 1948 revision. On the basis of a review of the statutes that have been held to be exceptions to section 2283, the following conclusions may be drawn: It is sufficient if the statute provides:

(1) that an injunction may be issued against state court proceedings;151 and

(2) that the statute allows a stay of any proceedings or otherwise requires that all other proceedings cease.152 Twelve statutes have been held to be exceptions to the anti-injunction statute: the interpleader provision;153 the habeas corpus statute;154 the Bankruptcy Act;155 the Frazier-Lemke Act;156 the statute limiting shipowners' liability;157 the removal statutes;158 the Emergency Price Control Act of 1942;159 the Fair Labor Standards Act;160 the National Labor

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150 Id. at 516.
155 11 U.S.C. § 29(a) (1970); see note 152 supra.
156 11 U.S.C. § 203(s) (2) (1970); see note 152 supra.

Although the Supreme Court has not approved all of these holdings, both the Court and the lower courts have occasionally indicated a tendency toward a certain “flexibility” that has allowed some analysis of the relative importance of the federal and state interests involved to creep into the construction problem in particular cases. This tendency, among other things, has enabled some lower courts to hold that 42 U.S.C. § 1983 (of the Civil Rights Act of 1871) is an express exception to section 2283. Other courts, however, have held to the contrary, and the Supreme Court has left the question open on several occasions. It is a little surprising that the Court has failed to pass

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186 42 U.S.C. §§ 200a to 200h-6 (1970); see DiIorio v. Riner, 343 F.2d 226, 230 (5th Cir. 1965).
188 Lynch v. Household Fin. Corp., 92 S. Ct. 1113, 1124 (1972); Younger v. Harris,
on this question in view of its obvious importance to the problem of balance between the values of adequate protection of civil liberties and minimal interference with state functions. 169

(4) "Where Necessary in Aid of Its Jurisdiction, or To Protect or Effectuate Its Judgments." This phraseology was also added in the revision of 1948. 170 Clearly the purpose of the change was to codify the earlier judicially created "res" and "relitigation" exceptions. 171 The former exception was one of manifest necessity and allowed a federal court that had attached the res in an in rem or quasi in rem case to enjoin a state court from interfering with the res and, hence, federal jurisdiction. 172 The relitigation exception had allowed a federal court to enjoin the relitigation in state court of a matter already decided in federal court. 173 As applied in Dombrowski v. Pfister, the "necessary in aid of its jurisdiction" exception would have allowed the federal trial court to preserve the status quo pendente lite on the basis of a properly drawn complaint. 174 The "protect or effectuate its judgments" provision clearly permits injunctive relief against state court proceedings upon the rendering of a declaratory or other judgment; provided, however, that no state court proceedings were pending prior to the time that federal jurisdiction attached. 175 The strictures of section 2283 may not be circumvented by first simply interfering with a pending state court proceeding via declaratory relief, and then issuing appropriate injunctive relief to "effectuate" the declaratory judgment. 176

II. FEDERALISM'S DELICATE BALANCE—THE PENDULUM SWINGS

A. The Younger Sextet

Younger v. Harris, 401 U.S. 37 (1971) (Brennan, White, Marshall, Stewart, and Harlan, JJ., concurring; Douglas, J., dissenting). After being charged with a violation of the California Criminal Syndicalism Act, 177 the plaintiff Harris sought injunctive relief in federal court to enjoin state officials from prosecuting him under the Act. Intervenors Dan and Hirsch also alleged that the Act "inhibited" their peaceful advocacy of the program of the Progressive

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169 See notes 413-20 infra, and accompanying text for post-Younger developments.
171 See id.; Reaves & Golden, supra note 90, at 303-04. However, this view on relitigation cases was rejected by the majority opinion of Justice Frankfurter in Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955). See D. CURRIE, FEDERAL COURTS 559-62 (1968).
174 See notes 111-12 supra, and accompanying text.
Labor Party. Intervenor Broslawsky, a history instructor, alleged that the Act and Harris' prosecution made him "uncertain" about whether he could present material on Karl Marx or read from the *Communist Manifesto*. A three-judge court was convened, and the defendants were enjoined from further prosecution of Harris under the Act, which was held to be unconstitutionally vague and overbroad.\(^\text{174}\)

The Supreme Court, Justice Black writing the majority opinion, reversed the judgment "as a violation of the national policy forbidding federal courts to stay or enjoin pending state proceedings except under special circumstances."\(^\text{175}\)

First, the Court held that the intervenors did not have an "acute, live controversy with the State and its prosecutor."\(^\text{180}\) The Court said that the intervenors would have had standing if they could have alleged that they would have been prosecuted for a certain planned course of conduct, but that an allegation that they "feel inhibited" was insufficient to invoke the equitable jurisdiction of the federal courts. The Court explained: "A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases."\(^\text{181}\) Because Harris was actually being prosecuted by the defendant, the Court deemed him a proper party to invoke federal equitable jurisdiction.

Part II of the Court's opinion contains a lengthy discussion of the role of the notion of comity, or "Our Federalism,"\(^\text{182}\) and general principles of equity jurisprudence as forces of restraint on the exercise of federal equitable jurisdiction. In addition, the anti-injunction statute was cited as a manifestation of a general congressional policy of federal nonintervention in the business of state courts. The Court then turned to an analysis of the effect of *Dombrowski v. Pfister*. Justice Black, not a participant in *Dombrowski*, recognized that that opinion gave some credence to the position of the three-judge court below that "the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment."\(^\text{183}\) Justice Black noted that a criminal prosecution under a statute regulating expression may indeed "chill" the exercise of first amendment freedoms; nevertheless, such a "chill" or inhibition alone will not justify federal intervention—and any statements supporting such a contention in *Dombrowski* simply were "unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards."\(^\text{184}\)

Harris, then, having failed to allege bad faith or harassment, simply did


\(^{175}\) 401 U.S. at 41.

\(^{180}\) Id.

\(^{181}\) Id. at 42.

\(^{182}\) Id. at 44.

\(^{183}\) Id. at 50.

\(^{184}\) Id.
not state a case for equitable relief against a pending state criminal prosecution. Harris' remedy at law, the opportunity in the state proceeding to raise constitutional objections and defenses, with ultimate federal review by certiorari or habeas corpus, was thus deemed adequate even though not completely free of cost, anxiety, and inconvenience. Having based its holding on considerations of comity and equity, the Court did not reach issues raised by the anti-injunction statute.  

Interestingly, Justice Black at the end of the opinion pointed out that "extraordinary circumstances" might possibly exist in the absence of bad faith or harassment. Quoting from *Watson v. Buck*, he explained: "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." The Justice then added cryptically that "[o]ther unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be."  

The concurring opinion of Justices Stewart and Harlan attempted to clarify the limits of the *Younger* holding. The Justices noted that the Court did not reach any questions relating to the independent operation of the anti-injunction statute. Thus, notwithstanding the holding in *Samuels v. Mackell*, the Court did not decide whether "injunction" in section 2283 should be interpreted to include a declaratory judgment; nor did the Court reach the question whether the Civil Rights Act of 1871 constitutes an express exception to section 2283.

Additionally, the Court, having dealt exclusively with state criminal proceedings, did not necessarily discuss relevant considerations for determining federal court intervention with state civil proceedings. Justices Stewart and Harlan pointed out that the intrusion upon state interests is probably milder in the latter situation: "A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute." Finally, the Court did not purport to speak to situations in which federal declaratory and injunctive relief from future state criminal prosecutions is sought.

Justice Douglas dissented, arguing that the need for a broad reading of *Dombrowski* was never greater than today "when enormous extrajudicial sanctions are imposed on those who assert First Amendment rights in un-

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188 *Id.* at 54. See also *Younger v. Harris*, 401 U.S. 37, 55 (1971) (Stewart & Harlan, J.J., concurring).
189 313 U.S. 387, 402 (1941).
187 401 U.S. at 53-54.
186 *Id.* at 54.
185 *Id.* at 54-56.
184 *Id.* at 55.
183 401 U.S. 66 (1971); see notes 199-208 infra.
182 401 U.S. at 55 n.2. The Justices, however, further commented: "These considerations would not, to be sure, support any distinction between civil and criminal proceedings should the ban of 28 U.S.C. § 2283, which makes no such distinction, be held unaffected by 42 U.S.C. § 1983." *Id.*
181 *Id.* at 55-56. See also *id.* at 41.
180 *Id.* at 58-65.
popular causes." He was not only of the opinion that extraordinary circumstances necessitating federal injunctive relief exist anytime a facially unconstitutional state statute is being enforced (even in good faith), but that the injury to federal rights is greater when a criminal prosecution is pending under such a statute than when the prosecution is merely threatened. He would, therefore, grant injunctive relief against the enforcement of a facially unconstitutional state statute regardless of whether bad faith, harassment, or other extraordinary circumstances were proved, or whether a state criminal proceeding was pending or merely threatened.

Justice Douglas would also hold that the anti-injunction statute is not a bar to injunctive relief sought under the Civil Rights Act of 1871:

Whatever the balance of the pressures of localism and nationalism prior to the Civil War, they were fundamentally altered by the war. The Civil War Amendments made civil rights a national concern. Those Amendments, especially § 5 of the Fourteenth Amendment, cemented the change in American federalism brought on by the war. Congress immediately commenced to use its new powers to pass legislation. Just as the first Judiciary Act . . . and the 'anti-injunction' statute represented the early views of American federalism, the Reconstruction statutes, including the enlargement of federal jurisdiction, represent a later view of American federalism. 196

Samuels v. Mackell, 401 U.S. 66 (1971) (Douglas, Brennan, White, Marshall, and Harlan, JJ., concurring). The plaintiffs were charged with violations of the New York criminal anarchy laws. Subsequently they sought federal declaratory and injunctive relief on the grounds that, inter alia, the New York laws were void for vagueness. The three-judge court held the laws constitutional and dismissed the plaintiffs' complaints. The Supreme Court affirmed, but with slightly different reasoning, which did not purport to reach the constitutionality of the statute.

The Court held that Younger controlled the injunction facet of the case as well as the declaratory judgment question. On the basis of the considerations of comity and equity discussed in Younger and the Court's 1943 opinion in Great Lakes Dredge & Dock Co. v. Huffman, the Court held that when state criminal proceedings are pending prior to the filing of the federal complaint, the same equitable considerations relevant to the propriety of an injunction must be weighed in determining whether to grant declaratory relief—and that when injunctive relief would be improper, declaratory relief should also ordinarily be denied. Justice Black explained the italicized qualification, saying:

We do not mean to suggest that a declaratory judgment should never be issued in cases of this type if it has been concluded that injunctive relief would

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195 Id. at 58.
196 Id. at 59.
197 Id. at 65.
198 Id. at 61.
199 NEW YORK PENAL LAW §§ 160-61, 163, 580(1), as amended, NEW YORK PENAL LAW §§ 204.15, 105.00, 105.05, 105.10, 105.15 (McKinney 1967).
201 319 U.S. 293 (1943).
202 401 U.S. at 73.
be improper. There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief. Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction.203

The Great Lakes case concerned the question whether the Tax Injunction Act of 1937, which in certain circumstances denied federal courts the power to enjoin the "assessment, levy or collection of any [state] tax,"204 also prohibited federal declaratory relief. The Great Lakes Court noted that the issuance of a declaratory judgment, though not prohibited by the terms of the Act, "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended."205 Relying on this reasoning, and with the added distinction that a declaratory judgment followed by an injunction "to protect or effectuate" that judgment might be used as a method of circumventing the anti-injunction statute, the opinion of Justice Black effectively wedded the two remedies. This opinion thus shows an intent, at least in pending-prosecution situations,206 to severely undermine the distinctions of Zwickler v. Koota.207 The majority opinion affirmed the dismissal of the plaintiffs' complaints, but made the important distinction that dismissal should not have been upon the merits—but rather upon the ground that plaintiffs failed to state a case for equitable intervention.208

Justice Douglas concurred209 on the basis that the plaintiffs apparently committed certain overt acts beyond the protection of the first amendment, and that, therefore, "[i]t . . . cannot be said that the cases against [them] are palpably unconstitutional."210

Justices Brennan, White, and Marshall concurred in the result,211 relying on Younger since there were pending criminal prosecutions against the plaintiffs, and because they did not allege bad faith harassment. For them, declaratory as well as injunctive relief was properly denied in such a situation.212

Boyle v. Landry, 401 U.S. 77 (1971) (Brennan, White, Marshall, JJ., concurring; Douglas, J., dissenting). Seven groups of Negro residents of Chicago, Illinois, sought declaratory and injunctive relief against the enforcement of certain Chicago ordinances and Illinois statutes alleged to be unconstitutional. The plaintiffs alleged: (1) that some of them were being prosecuted under some of the statutes; (2) that the prosecutions under the statutes, including

203 Id.
205 319 U.S. at 299.
206 The Court expressed no view on the propriety of declaratory relief when no state proceeding is pending. 401 U.S. at 73-74.
207 389 U.S. 241 (1967); see text accompanying notes 121-22 supra.
208 401 U.S. at 73.
209 Id. at 74-75.
210 Id. at 75.
211 Id. at 75-76.
212 See notes 225-30 infra, and accompanying text.
arrests without probable cause and the setting of exorbitant bail, intimidated Negroes in the exercise of first amendment rights; and (3) that the defendants had threatened to enforce all the statutes for only one reason—to harass and intimidate the plaintiffs. The three-judge court upheld the constitutionality of all but two of the statutes. The court enjoined the defendants from enforcing the two statutes in any manner against anyone. The defendants appealed only as to one of the two statutes, the criminal intimidation statute.

After closely scrutinizing the plaintiffs' complaint, the Supreme Court reversed and remanded on the authority of Younger and Samuels. Although some of the plaintiffs were being prosecuted under the other statutes, none were being prosecuted or actually threatened with prosecution under the intimidation statute. The Court noted: "[T]he complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times." Piercing the allegations in the complaint, the Court commented that it appeared that the plaintiffs had searched the statutes and city ordinances in order to select those most likely to be enforced in bad faith against them. The Court characterized the plaintiffs' allegations as "flimsy" and "speculation about the future," and concluded that none of the plaintiffs would be likely to incur irreparable injury if the state were left free to enforce the intimidation statute.

Justice Douglas repeated his view that when a facially unconstitutional statute is involved, no bad faith, harassment, or other irreparable injury is necessary to justify federal intervention, and that the anti-injunction statute is no bar to relief. He also took issue with the majority's reading of the plaintiffs' complaint. Justice Douglas found the plaintiffs' allegations sufficient to create a case or controversy and invoke federal equitable powers, since the plaintiffs claimed that the intimidation statute was one of many statutes being used to harass their group.

Perez v. Ledesma, 401 U.S. 82 (1971) (Stewart and Blackmun, JJ., concurring; Brennan, White, and Marshall, JJ., concurring and dissenting; Douglas, J., dissenting in part). Ledesma and the other plaintiffs, operators of allegedly "obscene" newsstands, were charged with two violations of a Louisiana statute and two violations of a St. Bernard Parish ordinance. The plaintiffs then sought federal declaratory and injunctive relief against the state statute and also sought a declaratory judgment that the parish ordinance was unconstitutional. A three-judge court held the statute constitutional, but concluding that the arrests and seizures in the case were unlawful, the court entered an order prohibiting the state's use of any materials so obtained and further ordered that all such material be returned to the plaintiffs. In addition, even though the

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215 401 U.S. at 81.
216 Id.
217 Id. at 63-65.
219 St. Bernard Parish, La., Ordinances 21-60 (1971).
three-judge court had no jurisdiction over the ordinance question, the court voiced an opinion that the ordinance was unconstitutional, and that opinion was incorporated by reference in the single judge's judgment. 280

On direct appeal the Supreme Court relied on Stefanelli v. Minard, 281 a 1951 case, to reverse the judgment enjoining the state officials from using any unlawfully seized materials in the state prosecution and requiring their return. The court emphasized that absent proven harassment or bad faith by state officials or other extraordinary circumstances, the plaintiffs' rights were adequately protected by raising constitutional objections or defenses in the state proceedings, with "review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus" should the state courts fail to resolve constitutional issues correctly.

As to the declaratory judgment invalidating the parish ordinance, the Court was of the opinion that it had no jurisdiction on direct appeal to review the judgment of the single district judge. But in dictum the Court said: "There is considerable question concerning the propriety of issuing a declaratory judgment against a criminal law in the circumstances of this case." 282 The Court explained that Samuels would dictate the nonissuance of a declaratory judgment, because "[a]t the time the instant federal court suit was filed, there was pending in Louisiana state court a criminal prosecution under the parish ordinance.

In his dissent 283 Justice Brennan viewed the ordinance questions differently and took issue with the Court on two points. He would have held: (1) that the Court had jurisdiction over the direct appeal from the judgment declaring the parish ordinance unconstitutional; 284 and (2) that when the defendants entered a nolle prosequi in the state court on the ordinance counts, no prosecution under the ordinance was "pending" under the Younger holding. 285

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281 342 U.S. 117 (1951). In Stefanelli the Court refused to enjoin the use of illegally obtained evidence in a state criminal prosecution. The majority opinion, written by Justice Frankfurter, expressed a particular aversion to this type of federal intervention:

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.

Id. at 123-24.
282 401 U.S. at 85.
283 Id. at 85-86.
284 Id. at 86 n.2.
285 Id. at 93-130.
286 Id. at 98-102.
287 Id. at 103-04:

The key predicate to answering the question whether a federal court should stay its hand is whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined.
Thus, Justice Brennan reached the question left unanswered in Younger: Is federal intervention appropriate when no state prosecution is pending, but the plaintiff cannot prove bad faith enforcement or harassment or other extraordinary circumstances? After tracing the history and purposes of the Declaratory Judgment Act\(^\text{228}\) and noting that declaratory relief is a much milder intrusion upon the state than injunctive relief,\(^\text{229}\) Justice Brennan concluded that as long as the requirements of standing are satisfied and the case otherwise is proper for such relief, declaratory relief should be accorded to persons if there are no pending state proceedings, even in the absence of bad faith, harassment, or other great and immediate irreparable injury. Therefore, the "chill" necessary to elicit declaratory relief is much less than that required for injunctive relief, and since Samuels spoke only to situations in which state proceedings are pending, this lesser chill will sanction federal intervention in the form of a declaratory judgment.\(^\text{230}\)

Justice Douglas agreed with the majority that the Court had no jurisdiction to review the ordinance questions, but he dissented from the reversal of the suppression order for the same reasons stated in his Younger dissent.\(^\text{231}\)

Dyson v. Stein, 401 U.S. 200 (1971) (per curiam) (Brennan, Marshall, White, JJ., concurring; Douglas, J., dissenting). In probably the most extreme reversal in the Younger sextet, the Supreme Court reached out to overturn the decision of a Texas three-judge court. The plaintiff Stein, a publisher of a Dallas underground newspaper, was arrested and charged under the Texas obscenity law\(^\text{232}\) with the possession of obscene materials. Stein then sought federal declaratory and injunctive relief. In addition, he alleged that the Dallas police had unconstitutionally searched his offices and seized certain materials without prior judicial determination that the materials were obscene.

Ordinarily, that question may be answered merely by examining the dates upon which the federal and state actions were filed. If the state prosecution was first filed and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene. When, however, as here, at the time of the federal hearing there is no state prosecution to which the federal court plaintiff may be relegated for the assertion of his constitutional defense, the primary reason for refusing intervention is absent. Here, there was no other forum for the adjudication of appellees' constitutional objections to the ordinance.

\(^{229}\) Justice Brennan quoted from a House committee report on the proposed operation of the Act: "The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief, a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." 401 U.S. at 111-12, quoting H.R. REP. NO. 1264, 73d Cong., 2d Sess. 2 (1934).

\(^{230}\) This history compels rejection of the Court's suggestion \ldots that although no informations were pending at the time of the hearing, declaratory relief was inappropriate in the absence of a showing 'that appellees would suffer irreparable injury of the kind necessary to justify federal injunctive interference with the state criminal processes.' Congress expressly rejected that limitation and to engratify it upon the availability of the congressionally provided declaratory remedy is simply judicial defiance of the congressional mandate. It is nothing short of judicial repeal of the statute. If the statute is to be repealed or rewritten, it must be done by Congress, not this Court.

\(^{231}\) Id. at 115-16. See notes 194-98 supra, and accompanying text.

judge court declined to pass on this particular contention, because it was not
an attack upon the constitutionality of a statute. The court considered only the
question whether the statute was unconstitutional on its face. Finding the
statute's definition of obscenity constitutionally inadequate, the court declared
the statute unconstitutional and issued appropriate injunctive relief. The Su-
preme Court reversed and remanded in light of Younger and Samuels for a
determination of whether there was bad faith or harassment on the part of the
prosecution as a precondition to equitable relief. Justices Brennan and Marshall
concurred, but stressed that if the plaintiff's allegations of bad faith and harass-
ment were proved, federal intervention would be justified.

In dissenting, Justice Douglas argued that because the Court may deal with
plain error, it should have invalidated the statute and thus "put an end to the
lawless raids under it." Additionally, the Justice stated that the Texas ob-
scenity statute was "flagrantly and patently unconstitutional" under the Younger example of "extraordinary circumstances" other than bad faith or harass-
ment. Also, Justice Douglas noted that the plaintiff sought injunctive relief
against future prosecutions only, and that the anti-injunction statute did not
bar relief. The Justice added that "[i]f Zwickler v. Koota... means anything, it means that [declaratory] relief can also be granted.

Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam) (Stewart and Harlan,
JJ., concurring; Brennan, White, and Marshall, JJ., dissenting; Douglas, J.,
took no part in the decision). The plaintiffs, owners and operators of a motion
picture theater, were charged with violating a Massachusetts law prohibiting
the possession of obscene films for the purpose of exhibition. They sought
federal declaratory and injunctive relief. On the request for a preliminary
injunction the three-judge district court found: (1) that the plaintiffs had a
probability of success on the merits; (2) that abstention was improper; and
(3) that because the defendant would likely be immune from any award of
money damages, because the plaintiffs were likely to sustain a loss in box
office receipts, and because other persons would probably be inhibited by the
prosecution of the plaintiffs, imminent irreparable injury had been established.
Accordingly, the court preliminarily enjoined the imposition of sentence in
the pending proceeding and all future prosecutions under the statute. The
Supreme Court vacated and remanded in the light of Younger and Samuels.
The Court pointed out that the three-judge court made no finding that the
threat to the plaintiffs' first amendment rights is "one that cannot be eliminated
by [their] defense against a single criminal prosecution."

Justices Brennan, White, and Marshall dissented, arguing that the district

234 401 U.S. 200, 204 (1971).
235 Id. at 204-15.
236 Id. at 207.
237 See note 187 supra.
238 401 U.S. at 211.
239 Id.
242 401 U.S. at 220.
The court decision should be reversed. The Justices effectively distinguished their concurring positions to remand in Dyson on the basis that here the plaintiffs failed to show any evidence of bad faith, harassment, or other extraordinary circumstances, whereas in Dyson the plaintiff had alleged bad faith and harassment but the three-judge court thought it irrelevant. They noted that under Freedman v. Maryland a federal court should preserve the status quo only for the shortest, fixed period compatible with sound judicial resolution of a film's alleged obscenity. In Byrne the defendant had agreed to refrain from any seizures of the film or interference with its exhibition pending the outcome of the trial. Since under Freedman a federal injunction to preserve the status quo could extend no further than the state trial court's decision of the obscene character of the film, the injunction issued by the three-judge court prohibiting the defendant from interfering with future showings of the film was improper.

B. The Sextet's Limiting Construction of Dombrowski

The message from the Supreme Court's February sextet is clear: After Dombrowski the pendulum of federal intervention in state court proceedings swung too far; it is time for a new balance to be struck. The new balance finds a substantially restricted Dombrowski doctrine operating in an atmosphere designed to encourage the most friction-free federal-state relationship. Although many questions remain for the lower courts after the Younger series concerning the precise future of Dombrowski and other theories of equitable relief in the federal courts, the sextet itself settled beyond dispute certain ambiguities of Dombrowski.

1. The Dombrowski doctrine does not permit federal injunctive relief against pending state proceedings brought to enforce an unconstitutionally vague or overbroad statute regulating expression in the absence of a showing of bad faith prosecution, harassment, or other extraordinary circumstances.

2. The Dombrowski doctrine does not confer standing to challenge a state statute regulating expression upon those whose only injury or threat of injury is a general feeling of inhibition derived from the mere presence of an unconstitutional law on the books.

3. Notwithstanding any implication from Zwickler v. Koota, if state court proceedings are pending and federal injunctive relief would not be warranted because of a lack of extraordinary circumstances, declaratory relief is also improper.

III. THE YOUNGER SEXTET AND THE LOWER COURTS

A. Standing

The Younger series of cases left no doubt that plaintiffs' allegations of standing to attack state statutes are to be closely examined. In Boyle in particular the Court effectively pierced the plaintiffs' allegations of harassment, which

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433 Id. at 220-21.
435 380 U.S. at 221.
436 See note 433 infra, and accompanying text.
though facially adequate, were found to be fatally conclusionary. In Younger the Court denied standing to the intervenors, neither of whom had been threatened with prosecution or had shown that their planned course of conduct clearly came within the ambit of the state statute. In both Boyle and Younger the Court has impliedly ordered the lower courts to apply the skepticism of common-law pleading in reading complaints. This skepticism applies not only when injunctive relief is sought against pending state criminal proceedings, but includes threatened action as well.\textsuperscript{547} The dilemma thus posed by the Court is a difficult one for the aspiring plaintiff. Assuming he has a choice, he can opt for the "pending-prosecution" route, which assures standing but imposes the burden of showing bad faith prosecution, harassment, or other extraordinary circumstances and may ultimately impale him on section 2283; or he can choose the "threatened prosecution" route, which risks a "no standing" ruling, but may avoid some of the Younger prerequisites for injunctive relief and gain him declaratory relief.\textsuperscript{548} Despite this forced venture on a treacherous and somewhat uncharted sea, some plaintiffs have successfully "passed between Scylla and Charybdis.\textsuperscript{549}

In Park 'N Fly of Texas, Inc. v. City of Houston\textsuperscript{550} the plaintiff successfully challenged the constitutionality of an ordinance regulating the access of commercial and other vehicles to the intercontinental airport area. The ordinance provided for certain penal sanctions as well as the possible loss of a permit to operate upon its violation. Because the ordinance proscribed particular activity and the plaintiffs clearly intended to pursue that activity,\textsuperscript{551} the single-judge district court was satisfied that standing existed on the simple inference that "it is . . . unlikely that the City Council would not take action to penalize a violator of the ordinance in question."\textsuperscript{552}

\textsuperscript{547} In a Younger footnote Justice Black made some interesting standing observations with respect to cases in which injunctive relief is sought against proceedings for the enforcement of state statutes regulating expression that are alleged to be facially unconstitutional. The Justice noted that in first amendment vagueness or overbreadth cases standing requirements had been relaxed to allow constitutional challenges in the absence of any showing that the defendant's conduct could not be regulated by some properly drawn statute. Baggett v. Bullitt, 377 U.S. 360 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940). Justice Black distinguished the standing problem from the issue of the propriety of injunctive relief: Injunctive relief has been granted not when the statute was merely facially vague or overbroad, but only when "the statute was held to be vague or overly broad as construed and applied to a particular case. If the statute had been too vague as written, but sufficiently narrow as applied, prosecutions and convictions under it would ordinarily have been permissible." Younger v. Harris, 401 U.S. 37, 48 n.4 (1971), citing Dombrowski. Thus, a plaintiff may have standing to challenge a vague or overbroad statute, but if his conduct is "hardcore," he is not eligible to receive injunctive relief. Also, abstention may be warranted. See notes 49, 52 supra.

\textsuperscript{548} Whether the stringent Younger standard will be applied to cases in which the prosecution is merely threatened—a question expressly reserved by the Supreme Court—is, of course, unclear. The issue has been squarely faced by the First and Fifth Circuits with diametrically opposite results. See notes 392-401 infra, and accompanying text. Still, it would seem that a plaintiff's odds for federal injunctive relief are better if his prosecution is merely imminent, not pending.


\textsuperscript{550} 327 F. Supp. 910 (S.D. Tex. 1971).

\textsuperscript{551} See Gall v. Lawler, 322 F. Supp. 1223 (E.D. Wis. 1971), in which a previous prosecution of a similarly situated individual clearly indicated the applicability of the statute to and the likelihood of enforcement against the defendant.

\textsuperscript{552} 327 F. Supp. at 919 n.3. Noting that there appeared to be no adequate state court
An easier case was *Mitchell Family Planning, Inc. v. City of Royal Oak*. In this case, the plaintiffs placed information concerning free abortion clinics on a billboard in violation of an ordinance prohibiting the advertisement of such information. They were notified by city authorities that they would be prosecuted unless the advertising was removed, and the plaintiffs won the race to the courthouse.

In *Anderson v. Vaughn*, the plaintiff apparently wanted to make some expressive use of a Viet Cong flag. He sought declaratory and injunctive relief against the enforcement of a Connecticut statute making it a criminal offense to carry or display "a red flag or any other emblem as a symbol calculated to, or which may, incite people to disorders or breaches of the law." Although the plaintiff was unable to show that he had actually been threatened with prosecution under the statute, the court noted that there had been several recent arrests under the statute and that "[v]arious defendants and other law enforcement officials have otherwise indicated their intention to enforce the statute so long as it remains in force." Relying heavily on Justice Brennan’s dissent in *Perez*, the court refused to force the plaintiff to violate the statute, and held that there existed the requisite case or controversy.

A large number of post-*Younger* cases, however, were dismissed in whole or in part for lack of standing after an analysis of the standing discussions in the *sixtet*. Most of these decisions were not surprising, although some of the dismissals are difficult to distinguish from the grant of relief in the Viet Cong flag case, *Anderson v. Vaughn*. Usually the plaintiffs simply failed to prove the threat of prosecution beyond a "fear of reprisals" or other inhibitions. Attempted class actions often failed because the primary plaintiff, who had standing, could not prove the requisite extraordinary circumstances, and the remedy and that the plaintiffs would likely suffer both great and immediate irreparable harm, the court enjoined enforcement of the ordinance. *Id.* at 918, 927.

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256 327 F. Supp. at 102.
257 In another Connecticut case, Thoms v. Smith, 334 F. Supp. 1203 (D. Conn. 1971), the plaintiff and his class of 37 persons alleged that they intended to "misuse" the American flag as a means of expressing their opposition to certain aspects of the foreign policy of the United States. Indicating that his counsel was aware of possible standing problems in the challenge of the Connecticut "misuse-of-the-flag" statute, the plaintiff wrote letters to the ultimate defendants in the case in which he advised them of his plan to wear a vest made from an American flag. He asked them to give him a prior indication of their prosecutorial stance with regard to such conduct. Three of the defendants did not answer the plaintiff’s letters, one stated his intent to enforce the statute, but expressed some doubt about whether the plaintiff’s conduct would violate the statute, and the fifth responded: "[G]o ahead and do it, and... if you’re in violation of the statute we’ll lock you up." *Id.* at 1207. Again relying on Justice Brennan’s concurring and dissenting opinion in *Perez*, the court held that the plaintiffs had standing.

259 See, e.g., Musick v. Jonsson, 449 F.2d 201 (5th Cir. 1971) (per curiam).
class of unprosecuted persons was not sufficiently threatened to give rise to an actual case or controversy. Two cases involving challenges to state abortion laws stand in contrast to the relief granted to abortion advertisers in **Mitchell Family Planning, Inc. v. City of Royal Oak.** In **Planned Parenthood Ass'n v. Nelson** the association, a doctor, and a married couple alleged that they were prevented from performing certain acts for fear of prosecution under Arizona abortion statutes. They did not allege the performance of any acts prohibited by the statutes, nor did they allege that they intended to perform any such acts. Thus, as opposed to the plaintiffs in **Mitchell,** who risked prosecution by advertising in violation of an ordinance, the *Nelson* plaintiffs attacked only the "bare wording of the statutes rather than ... any attempt or threat of enforcement of statutes which plaintiffs express no intention of violating."

The second case, **Landreth v. Hopkins,** may be even more indicative of the uses to which the *Younger* series will be put on standing issues. The Florida plaintiffs in **Landreth** were active participants in abortion counseling and referred counselees who desired abortions to an abortion clinic in New York. The defendant district attorney had investigated the plaintiffs' activities to determine if there were any violations of Florida law and had turned his information over to the grand jury for their judgment. At the time of the federal court hearing the grand jury had not acted, and although the defendant could have charged the plaintiffs via an information, he did not do so. The court cited **Younger** and **Watson v. Buck** and concluded that the threat of prosecution was not sufficiently imminent to constitute a concrete case ripe for decision.

The **Landreth** decision, which relied heavily upon *Younger*'s standing emphasis, indicates that sometimes, and perhaps often, a plaintiff will not have standing until there is also a prosecution pending against him. Thus, because an indictment is usually deemed to be a state court proceeding within **Younger** and section 2283, it appears that the **Landreth** court has required the plaintiffs to impale themselves upon the "pending prosecution" horn of the standing dilemma. The only apparent difference between **Mitchell** and **Landreth** is that in **Mitchell** the prosecutor was zealous and in **Landreth** relatively timid.

### B. Pending Prosecutions

*Younger* and its companion cases spoke only to the propriety of federal injunctive relief against pending state criminal prosecutions. But the Court's broad reliance upon the concept of American federalism has given some lower courts the green light to extend the sextet's principles to situations not necessarily controlled by the actual holdings of the cases. Several questions can be raised. For example: What type of state proceeding is "a state criminal prosecution"? Does a suit which is technically a civil suit qualify? If the pending...
state proceeding involves different parties from the federal court plaintiffs, do the same restraints apply? If the state proceeding is begun after the federal suit is filed, are the considerations the same?

A trilogy of cases decided by a Wisconsin single-judge court may fore-shadow a civil-criminal approach to the determination of what type of pending state proceeding triggers the application of the principles of the February sextet. All three cases represented official attempts to eliminate "topless" dancing in Wisconsin nightclubs. In Pederson v. Brier\footnote{327 F. Supp. 1382 (E.D. Wis. 1971).} state officials placed criminal charges against certain entertainers and proprietors of nightclubs for violations of the state disorderly conduct statute. However, in Marseo v. Cannon\footnote{326 F. Supp. 1315 (E.D. Wis. 1971).} state’s attorneys instituted civil proceedings against similarly situated defendants to abate the alleged topless violations under state statutes declaring “Bawdyhouses” and “Disorderly houses” to be nuisances. And in McCue v. City of Racine and Ruetz v. Huck\footnote{330 F. Supp. 466 (E.D. Wis. 1971).}, consolidated cases, city officials sought to enjoin “nude and semi-nude” dancing under city ordinances prohibiting disorderly conduct and establishing a “dress code” for dancers. The defendants in these cases sought federal declaratory and injunctive relief.

Pederson was disposed of summarily; there state officials brought suits in state court under state criminal statutes. The court dismissed when it found none of Younger’s strictures extended to all situations in which civil proceedings were pending. However, because the state abatement statutes provided for the action to be brought in the name of the state, and because the proceeding was a kind of equitable remedy against criminal conduct, the court held that the civil proceeding was within “the intended reach and scope of the policy announced in the Younger cases.”\footnote{326 F. Supp. at 1317.} In the third set of cases, McCue and Ruetz, city officials sought to enforce city ordinances through civil injunction proceedings in city courts. The federal court distinguished Pederson and Marseo as being state criminal and quasi-criminal proceedings respectively, and then issued temporary restraining orders against the city officials.\footnote{It is not clear from the opinion whether the civil actions were pending or merely threatened, but the court did not indicate that any such distinctions would be made.}

In Berryhill v. Gibson\footnote{331 F. Supp. 122 (M.D. Ala. 1971) (hearing before Alabama State Board of Optometry enjoined).} an Alabama three-judge federal court purported to apply the principles of Younger in determining the propriety of interfering with State Board of Optometry proceedings to revoke licenses. The court did so realizing that the Younger opinions themselves indicated their possible nonapplicability in civil cases, and that the prohibition of section 2283 does not apply to pending state administrative proceedings.\footnote{See note 137 supra.} Nevertheless, the court found the requisite extraordinary circumstances under Younger sufficient to justify federal intervention.

Two cases, however, flatly rejected any interpretation of the sextet that would extend the rule that courts of equity have a “great reluctance” to interfere with state criminal proceedings to situations involving state civil pro-
ceedings.\textsuperscript{273} Both *Duke v. Texas*,\textsuperscript{274} which struck down a state court injunction prohibiting campus demonstrations, and *Hobbs v. Thompson*,\textsuperscript{275} which invalidated a city ordinance prohibiting political activity of firemen, cited the concurring opinion of Justices Stewart and Harlan in *Younger*. Those concurrences pointed out that for various reasons the delicate balance of federalism might be struck differently when a federal court is asked to intervene in state civil proceedings.\textsuperscript{276} Thus, *Duke* concluded that the applicable standards for determining the propriety of injunctive relief when state civil proceedings are pending are simply the traditional restraints of equity—ineffective remedy at law and irreparable injury.\textsuperscript{277} However, a recent dissent by Justice White, in which Chief Justice Burger and Justice Blackmun concurred, indicated that the principles of *Younger* are applicable when state civil suits are pending.\textsuperscript{278}

When there is a pending state criminal proceeding against one defendant, but a different plaintiff brings the federal injunction suit, do the *Younger* restraints apply? The ancestor of this issue was first raised and partially answered in the 1943 decision, *Douglas v. City of Jeannette*.\textsuperscript{279} The federal plaintiffs in *Douglas* were Jehovah's Witnesses who brought a class action challenging the constitutionality of an anti-solicitation ordinance. A criminal prosecution under the ordinance was pending against other Jehovah's Witnesses, and the Court in dictum indicated that those in privity with the state defendants (the federal court plaintiffs) should not be allowed to collaterally challenge the ordinance.\textsuperscript{280} Thus, this dictum might seem to require, at least in some circumstances, that the rights of those similarly situated with the state defendant be protected by him in a kind of representative capacity in the pending criminal proceeding—even though many situations suggest themselves in which this protection would be illusory. However, by not basing its decision in *Douglas* on this ground, the Court left open the possibility that the rights of those similarly situated with the state defendant can be used as a basis for federal court intervention. Thus, lawyers representing groups of people would be able to escape the "pending prosecution" bar to federal injunctive relief under *Younger*.

The court in *Wulp v. Corcoran*\textsuperscript{281} acknowledged the problem, but would not attempt an answer: "We express no opinion on the propriety of federal relief when there is no state proceeding pending against any of the plaintiffs bringing the action in federal court, but a state prosecution under the challenged statute has begun against an unrelated third party."\textsuperscript{282}

\textsuperscript{273} Other cases have held that *Younger*’s principles apply to pending juvenile proceedings. *North v. Greene*, Civil No. 413-71 (D.C. Cir. 1972); *Kinney v. Lenon*, 447 F.2d 596 (9th Cir. 1971). The former case also held that the courts of the District of Columbia are, for the purposes of federal injunctive relief against state proceedings, analogous to state courts.

\textsuperscript{274} 327 F. Supp. 1218 (E.D. Tex. 1971).

\textsuperscript{275} 448 F.2d 456 (5th Cir. 1971).

\textsuperscript{276} See note 192 supra.

\textsuperscript{277} 327 F. Supp. at 1234. But because the court found "great and immediate irreparable harm" under *Younger*’s test, this is technically dictum.

\textsuperscript{278} Lynch v. Household Fin. Corp., 92 S. Ct. 1113, 1124 (1972) (dissenting opinion).

\textsuperscript{279} 319 U.S. 157 (1943). In such a situation the anti-injunction statute has been held inapplicable. *Hale v. Bimco Trading, Inc.*, 306 U.S. 373 (1939).

\textsuperscript{280} 319 U.S. at 164-65.

\textsuperscript{281} 454 F.2d 826 (1st Cir. 1972).

\textsuperscript{282} Id. at 832 n.8.
Of the four courts hinting at an answer to this question two demonstrated an overriding concern for the complete protection of the federal plaintiffs, and two seemed to be more concerned with the effect federal declaratory or injunctive relief might have on the pending state prosecutions. In Scott v. Frey when the unprosecuted owner of seized, allegedly obscene films sought a federal order for their return, relief was denied since "[t]o order a return of the films seized while state criminal prosecutions are pending against two of plaintiffs' employees would . . . be a most unwarranted interference with the orderly procedure and operation of the state criminal process." In Karp v. Collins several plaintiffs challenged a statute while one of them was being prosecuted under it in state court. Although the court doubted the standing of the unprosecuted plaintiffs, it added: "Moreover, since the prosecution of Tomashevsky under the statutes is pending, the effect of a judgment in this proceeding invalidating the statute would be no less an interference with that prosecution because granted at the behest of co-plaintiffs rather than Tomashevsky himself."

On the other hand, a different emphasis, if not authority, is found in Lewis v. Kugler. In Lewis ten plaintiffs, who had been charged with violations on the basis of allegedly unlawful searches and seizures, and seventeen plaintiffs, who had not been charged, joined in a federal injunction suit. Their suit claimed it was unconstitutional for New Jersey troopers to stop cars for searches without probable cause. The plaintiffs asserted that often the troopers stopped cars simply because "long hairs" were driving. On the basis of Stefanelli v. Minard the court refused to enter suppression orders with respect to the fruits of the allegedly illegal seizures. But as to the seventeen unprosecuted plaintiffs, the court was of the opinion that Younger and Samuels did not preclude declaratory and injunctive relief upon a proper showing that a substantial threat of constitutional violations existed.

The case most closely analogous to Douglas v. City of Jeannette is Thoms v. Smith. The plaintiff and his class in Thoms had been subjected to threatened prosecution under the Connecticut "misuse-of-the-flag" statute. Contemporaneously with the federal suit, the state intermediate appellate court affirmed the conviction of one Van Camp under the statute. A petition for certification to the state supreme court had been filed. The court in Thoms held that "[b]ecause there is no prosecution pending against Thoms or the class he represents, Younger is inapplicable and imposes no bar to our consideration of the merits." The court reasoned that Van Camp was neither the plaintiff nor a member of plaintiff's class. Plaintiff represents those

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285 Id. at 17.
286 466 F.2d 1343 (3d Cir. 1971).
288 A distinction has been made between injunctive relief that indirectly interferes with a pending state court proceeding and that which directly interferes. See G.I. Distr., Inc. v. Murphy, 336 F. Supp. 1036 (S.D.N.Y. 1972); Pugh v. Rainwater, 332 F. Supp. 1107 (S.D. Fla. 1971); notes 362-63 infra.
290 Id. at 1206.
DECLARATORY AND INJUNCTIVE RELIEF

with similar sentiments whose desire to express those sentiments in the manner
described is chilled by threatened prosecution under the statute. The very fact
of Van Camp's arrest and prosecution precludes him from being similarly
situated.

The prosecutions which the Court in Younger held sufficient to preclude
federal intervention were those pending against the federal plaintiff himself.
Indeed, an underlying basis for the Court's decision was that the federal plain-
tiff had a present state forum 'affording [him] an opportunity to raise his
constitutional claims.' . . . Mr. Justice Brennan, in his separate opinion in
Perez made it abundantly clear that it was the present federal plaintiff who
must have the available state forum provided by a pending prosecution. . . .

The prosecution pending against Van Camp cannot provide an 'existent,
concrete opportunity to secure vindication of [Thoms'] constitutional claims.'
. . . It cannot, therefore, serve as a basis for invoking the doctrine of Younger
and its companions.99

The dissenting judge in Thoms argued that Younger's stricter standard of
irreparable injury applied, and that under that standard relief was not justi-
fied. He explained:

During this litigation, there was an appeal pending by a different litigant in
the Connecticut Supreme Court by reason of a conviction under the same Con-
necticut flag desecration statute. The latter appeal raised the same first amend-
ment arguments as were presented by plaintiffs here. While this parallel state
litigation did not involve the same parties, it is submitted that the rationale
of Younger is nonetheless dispositive. A declaratory judgment by this Court
to the effect that the Connecticut statute unconstitutionally infringes upon
first amendment freedoms, effectively 'stops' the orderly adjudication of these
very same claims in the pending state appellate proceeding.

The 'vital consideration' of comity . . . is emasculated in this decision where
a federal court, with no showing of the kind of 'great and immediate' irrepara-
ble injury enunciated by the Supreme Court in Younger decides the very issue
being litigated, at the time of the argument of this suit, in the State Supreme
Court. Absent a showing of irreparable injury, it is submitted that a balance
between the comity considerations articulated by the Supreme Court in Younger
and the notion that this particular plaintiff should be entitled to be heard
in a judicial forum without subjecting himself to criminal liability in order
to do so, must be struck here in favor of allowing the state appellate court to
adjudicate the pending constitutional issues free from federal court inter-
ference.98

Significantly, the petition for certification of the state defendant, Van Camp,
was denied by the state supreme court after the Thomas hearing.98 Although
certiorari to the United States Supreme Court was still a theoretical possibility
for Van Camp,98 the plaintiff in Thoms was not put through such burdens
and prevailed in the federal district court on merits, which if presented to the
Supreme Court through the discretionary writ of certiorari, might not have
moved that Court to grant relief.

As the above cases indicate, an attempt to define the reach of Younger's
principles raises at least two issues: What types of state proceedings are pro-

99 Id. n.4 (emphasis added).
98 Id. at 1215-16 (emphasis added).
98 A shorter alternative route possibly available would be a writ of habeas corpus
from a federal district court.
ected? What relationship must the federal plaintiff bear to the state defendant? Another issue is also emerging: Does Younger's standard of irreparable injury apply even though at the time federal jurisdiction attaches no state proceeding has as yet been commenced, but nevertheless a state proceeding is pending at the time of the federal hearing? Of course, in all six of the Younger series of cases there actually were state proceedings in progress before federal relief was sought. But, as stated previously, the rationale of the sextet has a potential for broader application. Also, in Askew v. Hargrave, the abstention case previously discussed, it was of paramount significance that a state proceeding was subsequently filed challenging the same statute under attack in the pending federal suit.

Although there apparently is no case as yet attempting to answer this precise question (in Thorns the state prosecution was already pending when federal jurisdiction was invoked), Judge Goldberg of the Fifth Circuit took note of the issue in LeFlore v. Robinson. He pointed out that Dombrowski merely decided that subsequently filed state proceedings were not "pending" proceedings under the anti-injunction statute. Thus, Younger's standards could certainly apply in "subsequently filed" situations even though section 2283 does not, since Younger was based upon separate and somewhat distinct considerations of equity and federalism.

C. Bad Faith, Harassment

Before the Younger sextet was decided some commentators thought that they had discerned a diminished reliance by the Court upon the existence of bad faith enforcement or harassment as a basis for justifying federal intervention in Dombrowski-type cases. Indeed, many lower courts had been of the opinion that one need only be "chilled" by the existence of a vague or overbroad statute to qualify for federal injunctive relief. However, Younger and its companion cases firmly reestablished the importance of bad faith or harassment as evidence of "both great and immediate" irreparable injury. Although the Court did not rule out the proof of extraordinary circumstances justifying injunctive relief upon a showing of other facts, it is apparent that most successful federal plaintiffs will be forced to build their cases upon bad faith or harassment.

The two terms, though almost always used in tandem, do not seem to be perfect synonyms. "Harassment" connotes a more continuing interference with civil rights over time than does "bad faith." Harassment usually takes the

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296 See notes 60-70 supra, and accompanying text.
297 446 F.2d 715 (5th Cir. 1971) (concurring opinion).
298 Id. at 718 n.7.
299 Justice Brennan in his Perez concurring and dissenting opinion recognized, but avoided, this issue: "I put to one side the question not presented in Ex partee Young, or in this case, whether federal court relief would be proper when a state prosecution pending at the time of federal hearing was begun after the federal suit was filed." 401 U.S. at 117 n.9.
300 See, e.g., Marais, supra note 7, at 585-87.
301 See note 120 supra.
302 Younger v. Harris, 401 U.S. 37, 53-54 (1971); see notes 186-87 supra, and accompanying text.
form of repeated unlawful searches and seizures,\textsuperscript{304} multiple arrests or prosecutions,\textsuperscript{305} or other actual physical intrusions\textsuperscript{306} upon the person or property of the victim of such "official lawlessness."\textsuperscript{307} "Bad faith" enforcement as to the specific proceeding may perhaps be shown upon milder facts. Since the Supreme Court in \textit{Samuels v. Mackell} clearly made some finding of bad faith or harassment (or other extraordinary circumstance) a prerequisite to a consideration of the merits of a complaint seeking either declaratory or injunctive relief,\textsuperscript{308} the evidentiary facts become all-important. Thus, in the consolidated cases of \textit{Movies, Inc. v. Conlisk} and \textit{Weintraub v. Scott}\textsuperscript{314} the three-judge court was compelled to find allegations of bad faith plus "some factual basis for belief that bad faith existed"\textsuperscript{319} before declaring the challenged obscenity statute constitutional. If the lower federal courts take this task of finding the facts seriously, such a potentially time-consuming, threshold inquiry into police and prosecution practices may in itself have a "chilling effect" upon the pending state prosecution. The Supreme Court has in theory sanctioned this limited interference with the state proceeding, but this consideration may cause some federal judges to deny evidentiary hearings on bad faith allegations unless the complaint speaks with some particularity and seems to have merit.\textsuperscript{311}

Generally, actions brought under section 1983 have not required proof of a specific intent to deny constitutional rights on the part of the defendant.\textsuperscript{218} In contrast, when bad faith is alleged as an extraordinary circumstance justifying federal intervention, it means a "deliberate willful perversion of the law to gain an improper purpose," which must be directly shown and not merely inferred.\textsuperscript{218} The Supreme Court in \textit{Cameron v. Johnson}\textsuperscript{4} noted that a state prosecution brought without a reasonable expectation of success would constitute bad faith enforcement, but the Court added that this could only be found when there is absolutely no evidence of the accused's guilt.\textsuperscript{218} Therefore, all legitimate motives must be absent; the sole motive for bringing the prosecution must be to discourage the exercise of civil rights.\textsuperscript{218} Thus, the federal plaintiff has a great burden to overcome. However, once he has proved a prima facie case of bad faith enforcement, the burden shifts to the state to come forward with rebuttal testimony.\textsuperscript{217}

Despite the odds, several plaintiffs have successfully proved bad faith enforcement. On the basis of the following allegations bad faith either has been

\textsuperscript{304} See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965).
\textsuperscript{306} Hague v. CIO, 307 U.S. 496 (1939).
\textsuperscript{307} Younger v. Harris, 401 U.S. 54, 56 (1971) (Stewart, J., concurring).
\textsuperscript{308} 401 U.S. at 73; see note 202 supra.
\textsuperscript{309} Civil Nos. 70-c-2051, 70-c-1235 (N.D. Ill., July 7, 1971).
\textsuperscript{310} The court found such a factual basis by relying greatly upon the fact that the single district judge had granted plaintiffs a temporary restraining order. Id.
\textsuperscript{312} See, e.g., Turco v. Allen, 334 F. Supp. 209 (D. Md. 1971); notes 336-41 infra.
\textsuperscript{314} Hammond v. Brown, 450 F.2d 480, 481 (6th Cir. 1971).
\textsuperscript{315} 390 U.S. 611 (1968).
\textsuperscript{316} Id. at 621-22.
\textsuperscript{317} Boyle v. Landry, 422 F.2d 631, 633 (7th Cir. 1970).
found or the plaintiff merely failed to convince the court that his allegations, though apparently sufficient, were true: a series of unlawful raids and entries into the plaintiff's residence without arrest warrants or probable cause;\textsuperscript{318} stopping cars on the highway without probable cause and in a discriminatory fashion;\textsuperscript{319} enforcement of a statute long ago held unconstitutional by the Supreme Court;\textsuperscript{320} a series of prior actions by state authorities indicating animosity to the defendant;\textsuperscript{321} the prosecution or reprosecution of a defendant when it serves no legitimate state interest;\textsuperscript{322} and attempts of state prosecutors to use their influence to prejudice appellate judges.\textsuperscript{323}

Often subjective bad faith is divined from a view of the totality of the circumstances. Without revealing the specific bases for its findings, a three-judge court in \textit{Taylor v. City of Selma}\textsuperscript{24} enjoined present and future prosecutions under the Alabama antiriot statute, which was found to be vague and overbroad. The court found that the statute had been used to harass and intimidate the plaintiffs in an effort to prevent the plaintiffs from participating in a local political campaign.\textsuperscript{325}

The plaintiff in \textit{Duncan v. Perez}\textsuperscript{228} had been the successful petitioner in the landmark trial-by-jury case of \textit{Duncan v. Louisiana}.\textsuperscript{327} Duncan, a nineteen-year-old Negro, had been convicted of battery, even though the facts indicated that he had merely attempted to break up a fight between his relatives and four white boys and that his "victim" displayed no bruises immediately after the incident. After the Supreme Court's reversal Louisiana sought to retry Duncan.\textsuperscript{321} The state apparently had tried to make the original prosecution as burdensome as possible to Duncan. He was subjected to multiple arrests and repeated resettings of unusually high preconviction bail; he received an unusually severe sentence; the state unlawfully demanded a double appeal bond; the state trial judge and the prosecutor made unprofessional comments; and Duncan's chief defense counsel was baselessly charged with the unlawful practice of law.\textsuperscript{329} The court enjoined the state from reprosecuting Duncan, holding that Louisiana had no legitimate interest in such a reprosecution\textsuperscript{320} and that a

\textsuperscript{318} Wheeler v. Goodman, 238 F.2d 779 (W.D.N.C. 1971) (per curiam).
\textsuperscript{319} Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971).
\textsuperscript{320} Wells v. Hand, 288 F. Supp. 779, 784 (M.D. Ga.), 
\textsuperscript{321} Cambist Films, Inc. v. Illinois, 292 F. Supp. 185, 190 (N.D. Ill. 1968).
\textsuperscript{322} Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971).
\textsuperscript{324} 327 F. Supp. 1191 (S.D. Ala. 1971) (per curiam).
\textsuperscript{325} \textit{Id.} at 1193.
\textsuperscript{326} 445 F.2d 557 (5th Cir. 1971).
\textsuperscript{327} 391 U.S. 145 (1968). The Court held that the fourteenth amendment requires that a defendant be given a right of trial by jury in any prosecution in a state court if he would have such a right under the sixth amendment were he tried in a federal court.
\textsuperscript{328} Interestingly, after the Supreme Court's decision the Louisiana Legislature had reduced the maximum sentence for simple battery from two years to six months. Thus, Duncan would have been retried without a jury if the federal courts not intervened.
\textsuperscript{329} \textit{Id.} at 559 n.3. His counsel sought and obtained injunctive relief on the basis of showing of bad faith and harassment, Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968).
\textsuperscript{330} The district court below explained:
\[W]hether Duncan slapped or simply touched the white youth on the arm, it is clear beyond dispute that any violation that may have occurred was so slight and technical as to be generally reserved for law school hypotheticals rather than criminal prosecutions. The white boy was not hurt and displayed no bruise minutes after the incident. De minimus 'batteries' of this kind occur
retrial would "cause irreparable injury to the exercise of federally secured rights by Negro residents of Plaquemines Parish."\textsuperscript{321}

A similar holding grew out of the prosecution of Clay Shaw by New Orleans District Attorney Jim Garrison for conspiracy to murder President John F. Kennedy. After Shaw was acquitted on the conspiracy charge, Garrison indicted him on perjury charges based on testimony given by Shaw in the conspiracy trial. On the basis of a totality of the circumstances the court found that Garrison initiated the perjury prosecution with the specific intent to deny Shaw his rights under the first, fifth, and fourteenth amendments, and that sufficiently extraordinary circumstances had been shown to enjoin the prosecution.\textsuperscript{322} The court traced the events leading up to and during the conspiracy trial, which included: (1) an extremely zealous attempt by Garrison, given the tenuous jurisdictional basis, to solve the murder of President Kennedy; (2) the apparent knowing use of perjured testimony; and (3) the use of a group of New Orleans businessmen known as "Truth or Consequences" as financial backers of the investigation of Shaw.\textsuperscript{323} The court then noted that no subsequently acquitted accused who testified in his own behalf had ever been prosecuted for perjury by Garrison, and that Garrison had possibly prosecuted Shaw for perjury to promote Garrison's new book.\textsuperscript{324}

On the other side of the coin, courts have refused to find bad faith or harassment when the totality of the circumstances convinced the court there was subjective good faith and no irreparable injury. In \textit{Sandquist v. Pitchess}\textsuperscript{325} the plaintiffs, two distributors and a proprietor of a theater dealing in "adult" movies, were subjected to multiple arrests, and state officials seized several films without a prior adversary hearing on the question of obscenity as required by California law. Movie patrons were sometimes warned that they too might be arrested, and on one occasion the plaintiffs claimed that state officers made a general search of the premises similar to that in \textit{Dyson v. Stein}, including desks, drawers, and personal correspondence and files. The court said that no useful definitions of bad faith or harassment had been formulated and that it would, therefore, simply compare the facts in \textit{Sandquist} with the facts of \textit{Dombrowski} to determine whether the "official lawlessness" in \textit{Sandquist}, if any, was sufficient to inflict irreparable injury. Thus, analytically the court did not recognize bad faith or harassing enforcement as being of sufficient independent significance to establish per se the extraordinary circumstances of \textit{Younger}. The court first held that the multiple arrests and prosecutions did not establish irreparable injury in view of the fact that the plaintiffs distributed and screened many different adult films several times daily. Although the lack of prior judicial determinations of obscenity clearly made the seizures unlawful, this caused no great and immediate irreparable injury because expert police officers and, sometimes, state's attorneys had previously viewed the seized films.

\textsuperscript{322} Id. at 185.
\textsuperscript{324} Id. at 393-99.
\textsuperscript{325} Id. at 399-400.
\textsuperscript{326} 332 F. Supp. 171 (C.D. Cal. 1971).
Nor did the bodily arrests, though tactless and probably unnecessarily harsh, inflict sufficiently great irreparable harm under Younger. Even though the court actually found the enforcement of the obscenity statute to have been in good faith, the court’s logic indicates that anything less severe than the bad faith and harassment found in Dombrowski will not satisfy the Younger requirement of great and immediate irreparable injury.

Another post-Younger case similarly indicates that sometimes Younger’s irreparable injury requirement may not be met, even though there are claims of bad faith and harassment. In Turco v. Allen the primary plaintiff, a Black Panther attorney, was charged, inter alia, with conspiracy to murder. Between mistrial and retrial he claimed that the charges against him had been brought “in bad faith and without reasonable expectation of eventual success in order to have a chilling effect on the exercise by him and his clients, including plaintiff Party, its chapters, affiliates and branches . . . of their fundamental rights of expression . . . .” The plaintiff alleged that the defendants knowingly developed, procured, and later used perjured testimony in an effort to convict the plaintiff. The Turco court refused to hold an evidentiary hearing to inquire into whether there was in fact bad faith enforcement for two reasons: (1) because even if bad faith existed, the plaintiff could eliminate any threat to his rights in his defense in the “single criminal prosecution”; and (2) because a bad faith enforcement of a criminal law not in any way itself directed at first amendment rights does not justify federal interference with a state prosecution.

The first prong of the court’s reasoning is based on Justice Black’s statement in Younger that federal intervention is appropriate only when “the threat to the plaintiff’s federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution.” Thus, the Turco court chose these words out of context to say that even bad faith does not constitute great and immediate irreparable injury. Of course, in Turco the second point of the court’s reasoning, plus the holding in Stefanelli v. Minard refusing to enjoin use of illegal evidence, would possibly have been sufficient to decide the case. However, the analyses in both Sandquist and Turco indicate that Younger’s general principles of restraint may be twisted to override the independent grounds of bad faith or harassment.

Assuming Turco had been prosecuted under a statute regulating expression, if the statute were constitutional on its face, but was being used in bad faith to harass the plaintiff in the exercise of first amendment rights, federal injunctive relief would not properly extend to a wholesale striking down of the statute. However, injunctive relief to prevent continued harassment or to forbid application of the statute to the plaintiff at all would be in order. Thus, depending upon the circumstances and the statute involved, bad faith enforce-

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337 Id. at 210.
338 401 U.S. at 46.
340 Compare Justice Brennan’s concurring and dissenting opinion in Perez, 401 U.S. at 693 n.10, in which he argues that the first amendment should not be held to be the exclusive constitutional provision protected by Dombrowski-type relief, with note 118 supra, and accompanying text.
341 See Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971).
ment or harassment may be: (1) insufficient proof of extraordinary circumstances under Younger; (2) sufficient to establish extraordinary circumstances, but justify relief only as to the particular plaintiff being harassed; or (3) sufficient to establish extraordinary circumstances and justify a holding that the statute in question is unconstitutional on its face.

D. Other Extraordinary Circumstances

At the close of the Younger opinion Justice Black added that there might be other "extraordinary circumstances in which the necessary irreparable injury can be shown." He gave one example, that being a prosecution under a statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Finding such a statute may prove to be as rare as capturing a "no-see-um." At any rate, the "chilling effect" of such a statute would be the same type of inherent irreparable injury that some pre-Younger courts had ascribed to statutes that were facially unconstitutional. Justice Black then added that "[o]ther unusual situations calling for federal intervention might also arise," however, the Justice did not give examples.

In three lower-court cases the plaintiffs sought to establish that the statute under which they were being prosecuted was "flagrantly and patently unconstitutional." In Sandquist v. Pitchess, discussed above, the plaintiffs relied upon the argument rejected by the Supreme Court in United States v. Reidel that Stanley v. Georgia, in invalidating a state law punishing the possession of "obscene material," had also prohibited the punishment of the sale or distribution of such materials. Therefore, the court had no trouble disposing of the argument.

Manns v. Koontz gave the Fourth Circuit a slightly more difficult problem. The plaintiff committed a crime against a juvenile, and under Virginia law the plaintiff would have been tried without a jury in a domestic relations court. However, state law did permit an appeal as of right with a trial by jury de novo. The Supreme Court had long ago held an identical District of Columbia procedure unconstitutional. However, because in Duncan v. Louisiana the Court was deemed to have reserved the question of whether the same procedure would be unconstitutional if employed by a state, the Fourth Circuit held that the Virginia law authorizing the procedure was not flagrantly and patently unconstitutional.

The third case, Brown v. Ceci, involved precisely the same type of "pos-

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401 U.S. at 53.
404 Id. at 54.
408 See note 335 supra, and accompanying text.
411 451 F.2d 1344 (4th Cir. 1971) (per curiam).
session of obscenity” statute struck down in Stanley v. Georgia, but in Brown the plaintiff had already been convicted under the statute. The conviction was effected when the judge denied a motion to dismiss by the prosecutor on the basis of Stanley and entered the judgment on the verdict. The federal district court held that no extraordinary circumstances under Younger were present. The court did, however, feel compelled to treat the complaint as a petition for habeas corpus, and gave the plaintiff sixty days to exhaust his state remedies. Curiously, the court justified this treatment, among other reasons, “in light of the patent invalidity of the state criminal statute in issue . . . .”

It is submitted that Brown could still be considered as authority for the proposition that a Stanley-type statute is flagrantly and patently unconstitutional under Younger. The Brown court simply was of the opinion that “[t]he traditional remedy to challenge the validity of a state court conviction on the ground of the unconstitutionality of the law on which conviction was founded lies in petition for federal habeas corpus.” Since the habeas corpus remedy has the built-in requirement that the petitioner exhaust state remedies, the court effectuated the spirit of Younger, if not the letter, and did not really burden the plaintiff.

Several cases attempted to come within the “other unusual situations” category. Of course, the courts refused to find extraordinary circumstances in the face of allegations that the state courts will likely uphold the challenged law, or that obscenity prosecutions will cause a drop in box office receipts. In Scott v. Hill a convicted murderer came up with an extremely imaginative argument in support of an allegation of extraordinary circumstances. The plaintiff was appealing his conviction on due process grounds to the Kentucky Court of Appeals. He alleged that he would be subjected to irreparable injury if his appeal were to be heard by that court, since its judges were elected from election districts not correctly apportioned under the Supreme Court’s “one-man-one-vote” rule. The Sixth Circuit observed that if the plaintiff failed in the court of appeals, review could be had via certiorari in the United States Supreme Court, and relief was denied.

In three instances the plaintiffs so moved the consciences of the chancellors that the courts found their cases to fall within one of the “other unusual situations” justifying federal intervention in state prosecutions. Two cases involved claims based upon violations of procedural due process, and the other dealt with an overbroad injunction.

The plaintiff in Sweeton v. Sneddon sought federal injunctive relief from his prosecution on a misdemeanor charge without the assistance of counsel. The plaintiff was on parole from two previous convictions, and a conviction on the misdemeanor charge would likely cause the revocation of his parole and his remand to prison for a possible seventeen years. Utah law required

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331 F. Supp. at 720 (emphasis added).
39 Livingston v. Garmire, 442 F.2d 1322 (5th Cir. 1971) (semble).
339 449 F.2d 634 (6th Cir. 1971).
the appointment of counsel to indigents charged with crimes punishable by more than six months in jail. Although the plaintiff was an indigent, the misdemeanor charge carried a penalty of under six months, and the state judge refused to appoint counsel. The federal district court noted that the plaintiff’s request had already been denied in the “single criminal prosecution,” and that the plaintiff probably could not get counsel on appeal either. Even though the constitutional right of the plaintiff to counsel in this situation was certainly less than established by the precedents, the court held that he had such a right and issued an injunction, since if “the prosecution of the misdemeanor action against the petitioner without aid of counsel [is not] enjoined, the petitioner will suffer great, irreparable, immediate injury.”

In Pugh v. Rainwater the plaintiffs brought a class action challenging the validity of a Florida arrest procedure that allowed arrest without a probable cause hearing by a magistrate. Under the procedure the existence of probable cause was determined by a state’s attorney. In granting the plaintiffs’ prayer for injunctive relief the court presented two alternative lines of reasoning. First, the court drew a distinction between an injunction directed against a state substantive statute and one against a state procedural provision. Younger and section 2283 are fully applicable to the first, since an injunction of the substantive statute halts state prosecutions, but not so applicable to the procedural statute, since this is a much milder intrusion on state processes. In the alternative the court argued that even if Younger applied, there was present the likelihood of great and immediate irreparable injury, which could not be eliminated in a single criminal prosecution. According to the court, the irreparable injury lay in imprisonment with no judicial determination of probable cause and the fact that Florida courts had consistently denied the right asserted by the plaintiffs.

Both Sweeton and Pugh seem to be contrary to pre- and post-Younger

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361 Id. at 1104.
363 Id. at 1111. The argument that incidental injunctive relief may be granted if it does not actually halt the state proceeding was thought to be discredited after Stefanelli v. Minard, 342 U.S. 117 (1951). Thus, the result in Scott v. Frey, 330 F. Supp. 365 (E.D. La. 1971), see note 285 supra, and accompanying text, in which injunctive relief was denied the unprosecuted owner of allegedly obscene films seized by the police on the ground that an order for the return of the films would inordinately interfere with the prosecution of the projectionist, has been generally followed. However, in Rialto Theatre Co. v. City of Wilmington, 440 F.2d 1322 (3d Cir. 1971), a lower-court order requiring the return of seized films subject to a right of subpoena by the state upon trial (as opposed to an order prohibiting their introduction into evidence) was not summarily reversed, but rather the case was remanded with the admonition that the order “may have been an improper federal interference with a state prosecution.” Id. at 1327 (emphasis added). Then came the case of G.I. Distribrs., Inc. v. Murphy, 336 F. Supp. 1036 (S.D.N.Y. 1972), in which a single-judge district court ordered the return of allegedly obscene material seized under a warrant, but without a prior adversary hearing, even though a state prosecution against the plaintiffs was pending. This distinction between federal intervention that only indirectly interferes with a state court proceeding could prove to be a viable theory by which to grant declaratory relief to unprosecuted plaintiffs even though relief to their prosecuted co-plaintiffs would be prohibited. See Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); notes 286-88 supra. See also Golden Dawn Shops, Inc. v. Department of Housing & Urban Dev., 333 F. Supp. 874 (E.D. Pa. 1971). An order similar to the one in Murphy was upheld on appeal in Mod Amusement Co. v. Murphy, 335 F. Supp. 1267 (S.D.N.Y. 1972). See also Star Distribrs., Ltd. v. Hogan, 337 F. Supp. 1362 (S.D.N.Y. 1972).
Although the plights of the plaintiffs in these two cases particularly called for preventive relief. Certainly, certiorari to the Supreme Court would not remedy the injury of the plaintiffs in *Pugh*, and the plaintiff in *Sweeton* might not ever get that far without the assistance of counsel.

In *Duke v. Texas* the plaintiffs had been permanently enjoined by a state trial court from going on the campus of North Texas State University or disrupting the normal educational and social activity of the university or urging other persons to do so. The plaintiffs had also been enjoined from addressing any student assembly without first complying with university regulations. The state judge added: "[T]he Court being of the opinion that whereas constitutional questions could be raised on appeal and no emergency existed to necessitate a ruling by the Court on any constitutional question, the Court made no ruling relative thereto . . ."368

The federal court first noted that both the state injunction and the pertinent university regulations were violative of the first amendment. On the issue whether comity barred injunctive relief, the court pointed out that the original temporary restraining order against Duke and others had been issued *ex parte* and not served on Duke until she was already on campus and hence in violation of the order. This latter circumstance prompted the court to deem inapplicable the Supreme Court's decision in *Walker v. Birmingham,* which held that federal plaintiffs may not bypass orderly state judicial review before disobeying injunctions. Although the court purported to find great and immediate irreparable injury, it stressed that the *Younger* line of cases set guidelines for intervention in state criminal prosecutions, not state civil proceedings.

The court found that the state trial judge's total abdication of his constitutional duty to consider federal constitutional questions, critical to the vitality of federalism, amounted to a denial of the right to a full and fair hearing. In language coming close to pre-*Younger* interpretations of *Dombrowski's* "chilling effect," the court found "a wholesale abridgement of [plaintiff's) rights to freedom of speech, press, assembly, and association, which inherently constitutes continuing irreparable injury."369


However, the constitutional right found in *Sweeton* was a new one, since the Supreme Court has not yet extended the right to trial by jury in cases involving maximum penalties of less than six months. Duncan v. Louisiana, 391 U.S. 145 (1968).


368 However, the constitutional right found in *Sweeton* was a new one, since the Supreme Court has not yet extended the right to trial by jury in cases involving maximum penalties of less than six months. Duncan v. Louisiana, 391 U.S. 145 (1968).

369 327 F. Supp. at 1223 n.1.


371 327 F. Supp. at 1234 (emphasis added). But the court purported to distinguish *Duke from Dombrowski*: "In this case there is not merely a speculative 'chilling' threat, . . . but rather the cold reality of inestimable harm." *Id.* There are omens that this new "chilling effect" will become the most common "other extraordinary circumstance" justifying intervention after *Younger*. See G.I. Distribs., Inc. v. Murphy, 336 F. Supp. 1056, 1058-39 (S.D.N.Y. 1972): "Unlike a mere possibility of a 'chilling effect' on First Amendment freedoms, here there was a complete and total restraint upon the operations of a magazine distributor . . ." See also Montgomery County Bd. of Educ. v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971) (state court injunction found to have a present chilling effect; federal injunction granted).
The *Duke* court would not have hurdled past *Walker v. Birmingham* had it not been for the *ex parte* character of the temporary restraining order. Presumably it is *Walker* that prevents more challenges to state injunctions from coming into the lower federal courts. In *Duke* the injunction operated almost as one would expect the "flagrantly and patently unconstitutional" statute of *Younger* to operate. The state court injunction could well be a more severe violation of a plaintiff's first amendment rights than a flagrantly overbroad statute, since the injunction is directed against a specific person and its violations are punishable by the summary contempt power of the court. Although the refusal of a state trial judge to rule on constitutional points at all is probably no worse than a "failure to grasp" or to rule "correctly" on constitutional points, in the *Duke* context it was apparently sufficient to add "greatness and immediacy" to otherwise irreparable injury.

E. *Younger* and Threatened Prosecutions

After *Dombrowski* was decided, the burning issue was whether that holding allowed injunctions in cases where there were pending state prosecutions when the federal suit was filed. The *Younger* sextet in the main said such injunctions are not available. Now the new question to be emphasized is whether the principles of those six cases are applicable when state prosecutions are threatened but not pending. Several aspects of the various sextet opinions provide inferences that *Younger* extends to such cases. First, all prior cases relied upon by the majority to establish the rule of nonintervention were threatened prosecution cases. Particularly limited was *Dombrowski*, the most far-reaching of all the threatened-prosecution cases. Second, a primary basis for the holdings of the *Younger* series, that as a matter of law the *Dombrowski* "chill" can be eliminated by a defense to a single criminal prosecution, could easily apply to cases in which the state prosecution, though not begun prior to the attaching of federal jurisdiction, was nevertheless in being by the time of the federal hearing. But despite this reasoning, both majority and concurring opinions noted that the sextet's principles were not necessarily intended to apply in circumstances other than those involving pending state criminal prosecutions. Further restraint on *Younger* was generated by Justice Brennan's dissent (joined by Justices White and Marshall) in *Perez v. Ledesma*.878

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871 See Gregory v. Gaffney, Civil No. 2657 (W.D.N.C. 1971).
873 Leflore v. Robinson, 446 F.2d 715, 716-19 (5th Cir. 1971) (Goldberg, J., concurring).
875 Of course, this situation would be avoided when the federal complaint has some merit and a temporary restraining order and a preliminary injunction issue to prevent the commencement of state proceedings.
877 *Younger* v. Harris, 401 U.S. 37, 55 (Stewart, J., concurring).
In *Perez* the majority held that it had no jurisdiction over the question of the St. Bernard Parish ordinance. Justice Brennan, finding jurisdiction to review the lower court's holding that the ordinance was unconstitutional, reached the question whether *Younger'*s principles barred equitable relief from the threatened enforcement of an unconstitutional ordinance. The Justice emphasized that the purposes of the Declaratory Judgment Act were to obviate the necessity of violating a state statute to determine its constitutionality and to provide a form of relief milder than an injunction for use when the statute is deemed unconstitutional.

Justice Brennan noted that *Douglas v. City of Jeannette* normally required a defendant in a state criminal prosecution to test his constitutional defenses initially in state rather than federal courts. However, *Dombrowski* taught that in at least two extraordinary situations federal intervention might be justified because the state courts were unable or unwilling adequately to protect the defendant's constitutional rights. The first situation, in which bad-faith enforcement or harassment is involved, clearly justifies federal intervention to save the defendant from a burden he should not have to bear. The second situation is found when a state criminal statute is unconstitutionally vague or overbroad. In this instance the "chilling" or deterrent effect on first amendment rights of merely having the statute on the books justifies federal intervention. However, these principles were based upon the premise that the federal intervention was an interference only with a threatened state prosecution. Justice Brennan then reasoned that the considerations of federalism that come into play when federal relief is sought after the beginning of a state prosecution plainly outweigh the interests served by federal intervention.

When no state prosecution is pending, Justice Brennan would, therefore, hold that in otherwise appropriate circumstances federal intervention may be justified in three instances: (1) when there is bad faith enforcement or harassment; (2) when a vague or overbroad statute is challenged as being violative of the first amendment; or (3) when a statute is attacked as being violative of any provision of the Constitution. The Justice thus underscored the duty of federal courts to give declaratory relief even when injunctive relief would be inappropriate. Citing *Zwickler v. Koota*, Justice Brennan stated that declaratory relief would ordinarily be appropriate "if the declaration will serve a useful purpose in resolving the dispute." The propriety of an injunction should be determined "in the light of the traditional requirements of equity jurisprudence as applied to the protection of constitutional rights."

Thus, the lower federal courts have at least three options in threatened-prosecution situations: (1) to apply *Younger*'s standard, which requires bad faith, harassment, or other extraordinary circumstances; (2) to apply Justice Brennan's approach of favoring declaratory relief even if an injunction is not

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319 U.S. 157 (1943).
320 "[I]n my view the federal court's duty to render a declaratory judgment is not the less whatever may be its res judicata effect as between the parties to the litigation." 401 U.S. at 125 n.16. See notes 403-07 infra.
322 401 U.S. at 121-22.
323 Id. at 122.
324 Justice Brennan's view may really be closer to option number three, but his lengthy
DECLARATORY AND INJUNCTIVE RELIEF

Two district courts have chosen to ignore Younger altogether in threatened-prosecution contexts, thus rewarding plaintiffs who are ingenious enough to time their lawsuits so that standing requirements are satisfied without falling into the pending-prosecution category.\(^7\) The court in *Mitchell Family Planning, Inc. v. City of Royal Oak*,\(^8\) without much discussion, enjoined a threatened prosecution under an ordinance prohibiting the advertising of abortion information upon the showing that the ordinance was unconstitutional. In *Maldonado v. County of Monterey*,\(^9\) the plaintiffs were granted a preliminary injunction against the enforcement of a county ordinance prohibiting amplification of the human voice on all public highways. In so doing, the court noted that if Younger were to apply to threatened-prosecution situations, plaintiffs would be forced to exhaust state judicial remedies before proceeding in federal court under the Civil Rights Act of 1871. The court was unwilling to "make such an unprecedented extension of the Younger decision."

The First Circuit, a three-judge district court, and a single-judge district court have held that Younger's principles do not apply with equal force to threatened-prosecution situations, and have entered declaratory judgments. The two district courts, in *Anderson v. Vaughn*\(^10\) and *Thoms v. Smith*,\(^11\) simply pointed out that the sextet opinions were expressly silent about circumstances that might justify federal intervention when no state prosecutions are pending. Declaratory rather than injunctive relief was granted because there was "no reason to believe that the Connecticut authorities will now continue . . . enforcement."\(^12\)

Of the three courts so holding, the First Circuit has written the most thoughtful opinion in *Wulp v. Corcoran*.\(^13\) The court distinguished pending- from threatened-prosecution situations on three counts. First, when a federal court interferes with a pending prosecution, three consequences are likely—duplication of effort, lost time, and "the clear expression of a lack of confidence by federal courts in the capacity or the willingness of state courts to vindicate federal constitutional rights." These results are not as likely when a federal court hears constitutional claims prior to the initiation of a state court proceeding. Secondly: "When no prosecution is pending, there is no guarantee that prosecution and a chance for ultimate vindication of constitutional claims will quickly follow on the heels of a violation of the state statute."\(^14\) Thirdly, this discussion of the merits of declaratory relief indicates that the Justice sees Younger's impact on threatened-prosecution situations as dictating the very sparing use of injunctive relief.

\(^8\) 330 F. Supp. 1282 (N.D. Cal. 1971).
\(^9\) Id. at 1284. See also *Hobbs v. Thompson*, 448 F.2d 456, 466-67 (5th Cir. 1971): "To apply [Younger] outside its intended sphere—the well-established doctrine of comity restraints against federal interference with pending state criminal proceedings—would be in direct contradiction to the purposes of the Civil Rights Act . . . ."
\(^10\) Id. at 831.
\(^12\) 327 F. Supp. 101 (D. Conn. 1971).
\(^13\) 327 F. Supp. at 104; 334 F. Supp. at 1211.
\(^14\) 454 F.2d 826 (1st Cir. 1972).
danger of a delayed prosecution is compounded when the statute involved is facially unconstitutional. But the question remained: "[D]oes the same rigorous standard of 'great and immediate' harm as defined in Younger apply to a case when no prosecution is pending but there is every reasonable expectation that a violation would be criminally prosecuted?" The court answered that Younger's requirements of bad faith, harassment, or other injury besides that incidental to every criminal prosecution are not necessary; and that a chilling effect from a vague or overbroad law regulating expression or the "minor impact on speech incidental to a law regulating conduct" would justify relief under the Declaratory Judgment Act. The court said that any other answer would be the equivalent of repealing of that Act. Further, following Justice Brennan's Perez dissent, the court granted only declaratory relief, "[s]ince there is no evidence before us that would indicate that defendants will not accept in good faith this final determination of the ordinance's unconstitutionality."  

In Becker v. Thompson a panel of the Fifth Circuit chose option number one and applied Younger's stringent standard in a case involving a threatened prosecution. Judge Tuttle, who concurred in the result, argued that such a decision was not necessary to dispose of the case. The court held that Younger's limitation upon the use of the Declaratory Judgment Act in pending prosecution situations "necessarily applies in preprosecution cases." The court reasoned that the message of Samuels, that the propriety of declaratory and injunctive relief should be judged by essentially the same standards, dictates that courts require bad faith, harassment, or other extraordinary circumstances for the granting of declaratory as well as injunctive relief.

Thus, although deeper considerations of federalism obviously supported the decisions in Wulp and Becker, each court simply chose to draw different conclusions from the fact that the sextet opinions did not speak to threatened-prosecution situations. The Wulp court saw this reservation as an implicit recognition that threatened-prosecution cases might require different treatment. Having so reasoned, the discussions of the differences between injunctive and declaratory relief found in Justice Brennan's concurring and dissenting opinion in Perez and the majority opinion in Zwickler v. Koota seemed clearly applicable. On the other hand, the Becker court noted that the sextet opinions relied upon threatened-prosecution cases as precedent for the strict extraordinary circumstances standard, and that the Supreme Court in Samuels did not
distinguish the threatened prosecution situation in Zwickler. All this indicated to the Becker panel that the Supreme Court would not differentiate between threatened- and pending-prosecution cases.

The *Wulp* approach is attractive in many practical ways. For example, if the heart of the problem is that state judges and prosecutors are reluctant to protect federal constitutional rights because they must stand for election, federal declaratory relief could give them a good opportunity to get off the hook with the excuse: "The federal judge made me do it." From the same perspective, if the ultimate basis of law is its moral, rather than coercive force, the federal declaratory judgment could serve as the leader in pulling local public opinion ahead rather than pushing it from the behind.

However, this approach has its problems. As Justice Stewart said in *Gunn v. University Committee To End the War in Viet Nam*:

>[W]hen a three-judge district court issues an opinion expressing the view that a state statute should be enjoined as unconstitutional—and then fails to follow up with an injunction—the result is unfortunate at best. For when confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it. Yet in the absence of an injunctive order, they are unable to know precisely what the three-judge court intended to enjoin, and unable as well to appeal to this Court. 499

Justice Brennan himself admitted that the res judicata effect of a declaratory judgment is a point "not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system." 500 Indeed, the law appears to be that state courts are not bound by the constitutional holdings of lower federal courts. 501 Thus, in the absence of a different "governing rule" from the Supreme Court, the duty of federal courts to render declaratory judgments may be nothing more than a duty to render advisory opinions, entitled to varying degrees of weight depending upon the particular state, prosecutor, and judge involved. 502

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500 401 U.S. at 125.

The Senate report on the Declaratory Judgment Act stated that "[t]he declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights." S. REP. NO. 1005, 73d Cong., 2d Sess. 5 (1934) (emphasis added).

On the plus side, Justice Brennan hailed the flexibility of the declaratory judgment:

A state statute may be declared unconstitutional *in toto*—that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad—that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed
Further, Justice Brennan does not provide guidance for federal courts that have rendered declaratory judgments which have been ignored by the party-prosecutor. An injunction may be the answer, since apparently section 2283 does not prohibit an injunction against a subsequently initiated state prosecution to protect and effectuate the existing declaratory judgment.406 Thus, even though there is no "great and immediate" irreparable injury present at the time of judgment, a violation of that judgment could justify the issuance of an injunction, although, apparently, it could not justify contempt proceedings.407

The situation is less easily resolved when the prosecutor ignoring the judgment is a nonparty engaged in a prosecution of a nonparty defendant.408 Because the prosecution has already commenced, any equitable relief must be predicated upon a finding of bad faith, harassment, or other extraordinary circumstances. Normally these will not be present in the usual sense, and it would, therefore, appear that the federal court has no choice but to dismiss. However, there is one possible alternative. Even though the previously rendered declaratory judgment is not res judicata as to these nonparties, the prosecutor could be deemed to be in bad faith for prosecuting under a state statute, the constitutionality of which is, at least, in some doubt. However, this result would turn the heretofore "persuasive" declaratory judgment into as "coercive" a measure as an injunction,409 and Justice Brennan's arguments in favor of the device because it is a milder intrusion upon the affairs of the states are somewhat undercut.

The approach of the Becker panel is the one more likely to be in line with the emerging majority on the Burger Court; it would eliminate the race to the courthouses by refusing to distinguish between the effect of federal intervention in threatened- and pending-prosecution cases. Conceptually, the cases on federal injunctive relief, as supplemented by Becker, yield the following analysis:

(1) When the state action challenged involves no state civil or criminal proceeding (or only a threatened civil proceeding), injunctive relief will be proper when the traditional principles of equity, inadequate remedy at law and irreparable injury, are present. In this situation if the state action violates a constitutional right, the equitable prerequisites are probably necessarily satisfied.410

401 U.S. at 124-25.


"Though [a declaratory judgment] may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." Perez v. Ledesma, 401 U.S. 82, 126 (1971) (Brennan, J., concurring and dissenting).

See note 404 supra, and accompanying text.

This approach would also be tantamount to a holding that state courts and prosecutors are bound by the constitutional holdings of lower federal courts.

See, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964) (state conditioning employment upon the taking of a loyalty oath). In a Younger footnote Justice Black explained the ease with which the Court decided Baggett:

Apart from the fact that any plaintiff discharged for exercising his constitutional right to refuse to take the oath would have had no adequate remedy at
(2) When the state action challenged involves a pending state civil proceeding, the prohibition of the anti-injunction statute may dictate a denial of injunctive relief; but if the statute can be avoided, relief will be proper on the satisfaction of the standard in paragraph (1) above.

(3) When the state action challenged involves a threatened or pending state criminal proceeding, relief can be granted only if bad faith, harassment, or other extraordinary circumstances are present, and if the anti-injunction statute can be avoided.

In Wulp the First Circuit would set up a separate standard for threatened-prosecution cases. In those cases relief (declaratory at least) would be proper upon a showing of inadequate remedy at law and irreparable injury, as limited by the traditional reluctance of equity to interfere with the administration of a state's criminal laws. For instance, in a threatened-prosecution case pre-Younger case law would apparently control, thus making relief appropriate if a plaintiff's rights are "chilled" by an overbroad law regulating expression.

IV. The Post-Younger Status of the Anti-Injunction Statute

Two months after the Younger sextet opinions were handed down, the Supreme Court noted probable jurisdiction in Mitchum v. Foster. One question argued and briefed in Mitchum was whether section 1983 is an express exception to section 2283. It, therefore, seems likely that the Court will complement the Younger series with a long-awaited determination of the applicability of the anti-injunction statute when federal jurisdiction is based upon the Civil Rights Act of 1871.

Mitchum is strikingly similar to Marseo v. Cannon, which held that a pending state proceeding to abate a nuisance, being a quasi-criminal proceeding, called for the application of Younger's principles, and that on the facts no extraordinary circumstances were present to justify injunctive relief. In Mitchum the federal plaintiff owned a bookstore, and the defendants secured

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At least one court in a civil case has relied upon Samuels (implicitly rejecting the emphasis of Zwickler) in holding that if an injunction would violate the anti-injunction statute, a declaratory judgment is also barred. Golden Dawn Shops, Inc. v. Department of Housing & Urban Dev., 333 F. Supp. 874 (E.D. Pa. 1971).


326 F. Supp. 1315 (E.D. Wis. 1971); see notes 267-70 supra, and accompanying text.
state interlocutory relief under statutes providing for the abatement of nuisances after the state court determined that the plaintiff had offered for sale certain books found to be obscene. The plaintiff appealed and then sought and obtained temporary restraining orders from federal court enjoining further proceedings in state court. However, on the basis of *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*\(^{46}\) the three-judge court dissolved the temporary restraining orders and denied permanent injunctive relief.

One approach that the Supreme Court might take in deciding *Mitchum* was indicated in a decision of the Court rendered in March 1972, *Lynch v. Household Finance Corp.*\(^{47}\) In *Lynch* the Court held that a pre-suit garnishment, even though made for the purpose of making a future judgment effective,\(^{48}\) was not a state court proceeding under section 2283. Although the Court relied heavily on quirks of Connecticut procedure, there are omens in the opinion that point to restricting the prohibition of section 2283 by constricting the definition of "proceeding." The Court took note of Connecticut's pre-suit garnishment procedure, which allows the attorney of a plaintiff-creditor to attach a debtor's property unilaterally and without court order or supervision, and the fact that Connecticut courts have held that they have no authority to enjoin such a garnishment on constitutional grounds. The Court added: "One assumption underlying § 2283 is that state courts will vindicate constitutional claims as fairly and efficiently as federal courts. But this assumption cannot obtain when the doors of the state courts are effectively closed to a person seeking to enjoin a garnishment on constitutional grounds."\(^{49}\)

Although Justices White, Burger, and Blackmun dissented vigorously,\(^{50}\) the *Lynch* decision will have important effect if it is extended. In *Lynch* there was a full-fledged state court proceeding in being before the filing of the federal complaint; that is, the garnishment process had been completed and the suit on the debt was in progress. More significantly, the Court's rationale—that the anti-injunction statute applies only when state courts will vindicate constitutional claims as fairly and efficiently as federal courts—is potentially very broad. This judicial gloss on the apparently rigid terms of the anti-injunction statute may set the stage for holding in *Mitchum* that section 1983 is an exception to section 2283. Such a holding at first blush seems unpredictable from the Burger Court. However, a majority clearly supports the proposition that the anti-injunction statute does not bar injunctive relief when the pending state proceeding is totally inadequate for the protection of the plaintiff's federal constitutional rights. This reasoning would fit nicely into the *Younger* framework, whose dictum allows injunctive relief against pending state proceedings in extraordinary circumstances—*i.e.*, when the pending proceeding is unable to protect the plaintiff's constitutional rights. Indeed, the Court might hold that whenever *Younger's* extraordinary circumstances are found, section 2283 is no bar to declaratory or injunctive relief under the theory that the state court is necessarily unable fairly and efficiently to protect federal constitutional rights.

\(^{46}\) 398 U.S. 281 (1970); see notes 124-26 supra, and accompanying text.

\(^{47}\) 92 S. Ct. 1113 (1972).

\(^{48}\) See *Hill v. Martin*, 296 U.S. 393 (1935). See also note 143 supra.

\(^{49}\) 92 S. Ct. at 1124 (emphasis added).

\(^{50}\) Id.
If this route is chosen, a decision that section 1983 is an express exception to section 2283 might be unnecessary. In any event, the Court is likely to find some method of avoiding the absolute prohibition of the anti-injunction statute. The unqualified refusal to do so would not only be unwise, but, given the broad scope of section 2283, such a decision would make no sense in light of the amount of judicial energy expended on the Younger sextet opinions, which emphasized the role of comity restraints on the exercise of federal equity jurisdiction in pending-prosecution cases.*

V. PROCEDURAL IMPACT

Attempts to reconcile the case law from Ex parte Young through Younger will yield elaborate formulae as to what the law is. At minimum, the Younger sextet reveals a goal to restrict the substantive grounds upon which a plaintiff may obtain federal equitable relief against state court proceedings. One result of this substantive restriction will be a ripple effect, bringing a contraction of the plaintiff’s procedural rights to an adequate factual hearing in the federal court, a corresponding expansion in protection to the defendants, and as to the federal court system, a boost in cost-efficiency by eliminating the case earlier with less expenditure of judicial resources.

To illustrate: A plaintiff seeking injunctive relief generally will be under some time pressure, especially if he is engaged in a race to the courthouses encouraged by section 2283. Since he will be faced with varying interpretations of the Younger sextet, the pleader will tend to shotgun past the barriers. First, to avoid the $10,000 limitation in 28 U.S.C. § 1331, he will plead his complaint into one or several of the substantive civil rights sections under title 42, and place jurisdiction under 28 U.S.C. § 1343(3)(4), which has no $10,000 limitation. Pleading these sections will also lay the basis for claiming a statutory exception to section 2283. Second, in order to avoid defenses based upon standing, he may attempt to join as plaintiffs a variety of people with varying shades of interest and impact. Third, in choosing defendants, if the pleader wants to lodge the case in a three-judge court, he will select a state

* Editor’s Note: After this Article was in print, the Supreme Court unanimously decided in Mitchum v. Foster, 40 U.S.L.W. 4737 (U.S. June 19, 1972), that § 1983 is an express exception to § 2283.

28 U.S.C. § 1343(4) (1970) provides: “The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .” 42 U.S.C. § 1983 (1970) provides: “Every person . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” (Emphasis added.)

However, § 1343 and the civil rights sections contain a number of technical limitations not present under § 1331; e.g., who is a “person”? Bennett v. People of State of Cal., 406 F.2d 36 (9th Cir.), cert. denied, 394 U.S. 966 (1969) (California Adult Authority and Department of Corrections are not “persons”); see Lynch v. Household Fin. Corp., 92 S. Ct. 1113 (1972) (rejecting argument that § 1983 excludes cases involving property rights).

418 See notes 166-68, 413-20 supra, and accompanying text.

419 Strategically, however, the plaintiff faces the dilemma of all shotgun pleaders: By making too complex a case out of it, he may lose focus and credibility, or allow the court to abstain on the ground that there are many questions of unsettled state law. He also faces the choice of narrowing his parties to exclude privity with state court defendants. See text accompanying notes 180, 181 supra.

420 Although one reason for creating the three-judge court was to protect state officers
official operating under a statute of statewide application and allege the unconstitutionality of the statute.\footnote{425} Fourth, he will state a claim for relief in terms of the case law and the civil rights statutes: (a) deprivation of a constitutional right through statutes or ordinances unconstitutional on their face, or as they are being applied to the plaintiff, or upon official practices independent of statutes and ordinances; (b) the special circumstances of harassment, bad faith, or other activities of the defendants; (c) irreparable injury to the plaintiffs and inadequate remedy in the state courts; (d) the demand for relief, whether injunctive or declaratory, or some variation of these.

Assuming the plaintiff can hurriedly\footnote{426} put together a complaint that states a claim for relief, and a motion for a temporary restraining order, a bond, a certificate of the attorney, an affidavit of the facts under rule 65,\footnote{427} he can file and serve. The federal court, either in an ex parte proceeding, but more often in a conference with the defendant's lawyer present, will then be faced with applying the substantive law to the plaintiff's request for the temporary restraining order. Here, the plaintiff ought to be aided by the traditional interpretation of rule 8(a)\footnote{428} that his complaint should be construed in a light most favorable to the pleader and should not be dismissed unless it appears to a certainty that plaintiff is entitled to no relief under any state of the facts which could be proved in support of the claim.\footnote{429} Again, the plaintiff should also be aided by the factor that the temporary restraining order issued without notice may extend for a maximum of twenty days,\footnote{430} that its only purpose is to hold the status quo, and the reasonableness of its issuance is to be measured by comparing the harm to the plaintiff if preliminary relief is wrongfully denied and the harm to the defendant if it is wrongfully granted.\footnote{431}

At this point the new Younger sextet will have observable impact. Despite the liberal policy of rule 8(a), the court may now require the pleader to specify in some detail the facts that constitute the bad faith or harassment by the defendants, and the irreparable injury to the plaintiff in order to overcome the assertion that his complaint is conclusionary and does not state a claim for relief.\footnote{432} Similarly, the subtle task of weighing relative hardships to plain-

\footnote{426} The plaintiff will normally be in a hurry unless he has had the luxury of studying the problem over a period of time.
\footnote{427} FED. R. CIV. P. 65.
\footnote{428} Id. 8(a).
\footnote{429} Conley v. Gibson, 355 U.S. 41 (1957); Cooper v. Patc, 324 F.2d 165 (7th Cir. 1963), rev'd, 378 U.S. 546 (1964).
\footnote{430} FED. R. CIV. P. 65(a). The defendant may consent to further extension. The rule is not clear how long a TRO granted with notice may extend, but presumably notice converts the hearing into one for a preliminary injunction.
\footnote{431} Z. CHAFEE & E. RB, supra note 81, at 818-23; Developments in the Law—Injunctions, 73 HARV. L. REV. 994, 1056 (1965).
\footnote{432} Some judges may interpret the Younger sextet, especially Boyle v. Landry and Dyson v. Stein, in such a way that no amount of facts constituting harassment or bad faith can ever satisfy the test, and that consequently the ability to raise defenses in the state court is "an adequate remedy" as a matter of law. See Turco v. Allen, 334 F. Supp. 209 (D. Md. 1971); 146E. M. Inc. v. Crosland, 327 F. Supp. 1264 (M.D. Ala. 1971); notes 335-41 supra, and accompanying text.

A parallel is found in the difficulty of pleading facts that will constitute sufficient "ma-
tiff and defendant during the status quo period against the probability of success, measured under the new Younger standards, results in deflation of plaintiff's injury, inflation of defendant's harm, and reduction in the probability of the plaintiff's victory.\textsuperscript{436} Assuming the judge either grants or denies the temporary restraining order and does not dismiss the case, neither decision is appealable.\textsuperscript{434}

The next sequence is variable, depending upon what motions are made by the plaintiff, what motions are made by the defendants, and the order in which the judge chooses to manage and set these motions down for hearing, if at all.\textsuperscript{435} The plaintiff will move for a preliminary injunction under rule 65, and, more significantly, move for acceleration of various discovery orders with permission of the court.\textsuperscript{436} The defendants meanwhile will submit motions to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief, and perhaps for summary judgment. The grounds of the dismissal motions and supporting briefs will assert the constitutionality of the statutes, and the absence of grounds for equitable relief, and will also raise section 2283, abstention, and exhaustion of state remedies issues.\textsuperscript{437} Under rule 12(a) the defendants have twenty days to answer, and the filing of a motion to dismiss suspends the time for answering until ten days after the court rules on the motion.\textsuperscript{438} Thus, in theory the defendants' burden at this stage is light, since the defendant is not required to admit or deny the allegations of the complaint, or raise affirmative defenses.\textsuperscript{439} However, if the court immediately holds a hearing on the motion
for preliminary injunction, these procedural rules undergo some bending and the defendants may be forced to accelerate their defense. Since the court may later use any evidence taken at the preliminary injunction hearing for the trial on the merits, or may by order accelerate the trial of the action on the merits into the hearing of the temporary injunction, that hearing may constitute the real and only trial of the issues. Yet the hearing may come at a time when the defendant has not answered the complaint and when motions to dismiss and for discovery are still pending. Because the hearing is an equitable proceeding, the judge has great discretion in determining the method of proceeding and taking evidence. For example, by refusing to order acceleration, the trial judge may avoid an oral hearing in spite of rule 43(a). That rule provides that in all trials the testimony of witnesses shall be taken orally in open court. However, rule 43(e) provides that a motion (and presumably a motion for preliminary injunction is a motion) may be heard on affidavits, or wholly or partly on oral testimony or depositions. Under this authority one harassed judge, in an unreported maneuver, took a creative route. He stopped an oral hearing on the ground that his docket was full, ordered discovery to be taken by both sides in ten days, and ordered the parties to submit proposed findings of fact and conclusions of law referenced to the depositions, along with briefs. He then made the decision without further argument or presentation by counsel.

A central issue emerges that is not expressly answered in the rules or in precedent: To what extent does the plaintiff have a right to discovery prior to the hearing on the motion for preliminary injunction or to subpoena witnesses to the hearing? The defendant may have pending motions to dismiss for lack of subject matter jurisdiction, to dismiss for failure to state a claim for relief, and motions for summary judgment, while the plaintiff must meet the
burden of showing facts that demonstrate irreparable injury and a likelihood that he will prevail on the merits.\footnote{Developments in the Law—Injunctions, 78 HARV. L. REV. 994 (1965).} If the plaintiff's motions for discovery are subordinated to the defendant's motions, or if his subpoenas are quashed, the plaintiff will have a difficult time coming up with facts to meet the standards, unless he has been able to have the assistance of organized fact gathering about the defendant's practices. Assuming, however, that the judge moves on into some kind of full hearing after "controlled discovery,"\footnote{Fed. R. Civ. P. 52. If the motion is considered as one for summary judgment, however, or as a motion to dismiss, no findings are necessary under rule 52(a). But see note 456 infra.} whether he grants or denies the injunction, he is obliged to set forth his findings of fact and conclusions of law.\footnote{Fed. R. Civ. P. 52(a).} His findings of fact will then be set aside only if "clearly erroneous,"\footnote{7 J. MOORE, supra note 437, § 65.04[2] (2d ed. 1971).} and since the injunction lies within his sound discretion, his decision will not be lightly overturned.\footnote{The analogy of pendent jurisdiction comes to mind. While Hurn v. Oursler, 289 U.S. 238 (1933), posed the issue as an abstract question of law, fully reviewable, the later case of UMW v. Gibbs, 383 U.S. 715 (1966), indicates that pendent jurisdiction is in large part a matter of trial judges' discretion, considering all the various factors of judicial economy and convenience in relation to the course of proceedings in determining the federal claim. 439 U.S. 159 (1970).} Provided that the trial judge now holds some sort of factual hearing and carefully copies the language from Younger, there will probably be a period of benign neglect in which any decision denying relief by the trial judge will be sustained.\footnote{439 U.S. 150 (1970).}

Although under the Younger sextet the lower federal courts will be sorely tempted to dispatch plaintiffs' claims out of the federal courts without time-consuming inquiry into the facts, it is submitted that the Supreme Court's decisions on standing provide precedent for requiring factual hearings. In Barlow v. Collins\footnote{40 U.S.L.W. 4397 (U.S. Apr. 19, 1972). It is noteworthy that in this case Justice Blackmun joined with Justice Douglas in dissent, while Chief Justice Burger, Justices Brennan, White, and Marshall joined in Justice Stewart's majority opinion.} and Association of Data Processing Service Organizations, Inc. v. Camp Justice Brennan emphasized that one reason for moving from the "legal interest" test to "injury in fact" was to get away from the legalisms under which plaintiffs are thrown out on the pleadings without having an opportunity for some factual development before the court. Standing, in other words, is a question of the merits, which should be decided upon development of the law and the facts. Significantly, Justice Blackmun expresses a similar approach in his dissent in Sierra Club v. Morton.\footnote{40 U.S.L.W. 4397 (U.S. Apr. 19, 1972). It is noteworthy that in this case Justice Blackmun joined with Justice Douglas in dissent, while Chief Justice Burger, Justices Brennan, White, and Marshall joined in Justice Stewart's majority opinion.} The majority held that the Sierra Club had not adequately pleaded standing, and affirmed a reversal of a preliminary injunction against the development of the Mineral King Valley. Although the majority indicated that the Sierra Club could amend on remand, Justice Blackmun argued that the amendment should be allowed at the appellate level, and the merits reached, since reversal of the injunction would shift the equities on the question of the propriety of an injunction. Similarly, the principle that the plaintiff must show bad-faith enforcement, harassment, or vagueness and overbreadth in some unknown degree as a matter of substantive
law under the Younger sextet does not mean that he should be thrown out of federal court prior to an opportunity to develop the facts upon which that decision should be made.\textsuperscript{66}

Justice Burger, however, may tend to disagree, because one of his announced preferred goals is sound judicial administration, which easily translates into the objective of cleaning up the federal court dockets, especially the three-judge court cases. An important question in this respect is whether defenses such as the lack of grounds for equitable relief, section 2283, abstention, and exhaustion of state remedies may be used to refuse to impanel three-judge courts, and thus reduce the burden of the direct appeal docket of the Supreme Court. In \textit{Idlewild Bon Voyage Liquor Corp. v. Epstein} the Supreme Court limited the inquiry of a single district judge in such a situation to a determination of whether "the complaint \textit{at least formally} alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."\textsuperscript{67} However, because single district judges may and do consider matters outside the pleadings at this stage, there is a temptation for them to pierce the plaintiff's formal allegations of great and immediate irreparable injury and refuse to convene a three-judge court on the basis that the injunction question "could not possibly go in any manner save one."\textsuperscript{68} Thus, in addition to determining the substantiality of the federal question,\textsuperscript{69} the single district judge now may determine whether any factual basis for equitable relief exists. In several cases single district judges have in this manner refused to impanel three-judge courts\textsuperscript{70} in spite of the fact that the single-judge inquiry "is traditionally limited to the face of the complaint and does not involve the single judge in factual determinations related to the merits of the case."\textsuperscript{71} The judge in \textit{Pederson v. Breier} explained his view that single judges have a duty to determine whether both substantiality and a basis for equitable relief exist:

\begin{quote}
[W]here it clearly appears from the facts and allegations in a record developed up to the point of deciding whether to convene a statutory court that the basis for equitable relief is wholly lacking, I believe I have a duty to refuse to con-
\end{quote}

\textsuperscript{66} See Carter v. Stanton, 40 U.S.L.W. 4378 (U.S. Apr. 3, 1972), reversing per curiam the dismissal of a three-judge court challenge to an Indiana welfare regulation because the lower court improperly required exhaustion of state remedies, failed to appreciate the substantiality of the complaint, and failed to articulate the law and the factual basis for its judgment, if in fact it was a summary judgment.

There is also support for the proposition that the federal court should hold adequate factual hearings in the trend to allow standing to defeated government bidders. See Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). Thus, the fact that defeated bidders are now given standing does not mean that they win relief; it merely means they have a right to a judicial proceeding to determine whether, upon the facts and the law, some sort of relief ought to be accorded them. See Comment, \textit{Judicial Review for Disappointed Bidders on Federal Government Contracts}, p. 384 infra.

\textsuperscript{67} 370 U.S. 713, 715 (1962).


\textsuperscript{69} \textit{Ex parte} Poresky, 290 U.S. 30 (1933).


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Vene a court of three judges. The fact that the plaintiffs have, on the face of their complaints, alleged 'bad faith' and 'irreparable injury' should not, in my view, automatically require the convening of three judges to determine if the allegations have any substance. . . . If there is no reasonable basis for injunctive relief in a case such as this, I believe the single judge should refuse to burden the federal judiciary by convening a three-judge court. . . . I believe that this result in this case comports with the purpose of the three-judge court statute and the oft-stated requirement that, in light of the burden on the federal judiciary imposed by three-judge courts, the statute be narrowly read . . . .

Thus, it appears that a plaintiff may be out of court at an early stage for lack of facts, or for lack of access to the facts, even though his allegations are formally sufficient and he presents a substantial federal question. And it is apparent that refusals to convene three-judge courts on the ground that the plaintiff has made an inadequate showing of his right to equitable relief will become increasingly prevalent—possibly surpassing lack of substantiality as a popular merit-avoidance device in three-judge court cases. But the Younger decisions should not, and were not intended, to deny plaintiffs the right to a hearing on their claims in federal courts; they should only limit the grounds upon which they can obtain various kinds of relief. In other words, the Supreme Court has told the lower federal courts to say "yes" less often—but it has not told them to stop listening.

VI. Conclusion

A number of different conclusions may be drawn about the Younger sextet. Professor Charles A. Wright calls them "the most important development in the law of Federal Courts in many years." Most writers will analyze them within the traditional principles of federalism, while others will use these cases to chart the value matrices of the individual Justices on the variety of substantive constitutional issues that are evoked. Others may see the Younger cases in their specific factual context as a political reaction of the judicial "establishment" against "advocates of social change" and their "movement" lawyers. Under this view even if the federal plaintiffs foresee ultimate denial of relief in federal court, they may still seek it in order to gain the psychology of counterattack against state officials, the possibility of stays pending review, inducement to compromise, and the use of the federal court as a forum for protest. Given this attitude, it is not surprising that the Supreme Court reacted to the plaintiffs' claims as it did in the Younger cases. There is now danger

462 Id.
463 WRIGHT 3 (1972 Supp.).
467 Id. at 7-12, 57, 58.
that this new spirit of denying federal injunctive relief in pending state criminal proceedings will spread to other types of demands for federal relief against state law. The momentum having been set in motion, it may be too much to expect that federal courts will not misuse the related principles of exhaustion of state remedies, abstention, and comity in a variety of cases in which federal relief would otherwise be appropriate.

Grounds for optimism can be found, however, in the discriminating reading that the Younger opinions are being given in the lower courts and the pattern of law that is emerging. Thus, it is hoped that adequate factual inquiry will continue to be made,\(^\text{66}\) that the potential use of the declaratory judgment will be developed,\(^\text{67}\) that the prohibition of section 2283 will be avoided, and that Younger will not become an all-purpose tool for abstention.\(^\text{470}\)

There are also good reasons for limiting the Younger sextet to injunctions of criminal proceedings.\(^\text{471}\) One reason for making the distinction is that state criminal convictions based upon unconstitutional statutes or proceedings can subsequently be challenged in lower federal courts on writs of habeas corpus.\(^\text{472}\) If this were not so, convicted state defendants claiming federal constitutional rights would have only a mirage of protection, since their claims must strenuously compete with other cases in the United States Supreme Court.\(^\text{473}\) Habeas corpus, in other words, creates a lower federal court appellate review system over state supreme courts to consider a number of cases that the Supreme Court might not otherwise handle. So long as this habeas corpus jurisdiction remains intact, the Younger cases have not totally removed an effective federal forum for constitutional rights in ordering the federal courts to withhold injunctive remedies prior to trial.\(^\text{474}\) But the remedies are different in state civil cases. In theory, at least, the remedy for constitutional challenges in civil proceedings in the state court is to appeal up through the state system to the United States Supreme Court. If initiation of the state court proceeding cannot be prevented, later attempts to shift in midstream to the federal court have traditionally been met with pleas of res judicata.\(^\text{475}\) Thus, theoretically there is less federal forum review in state civil proceedings than in criminal proceedings.

In this context an important question arises whether section 1983 can be used in civil cases to attack state supreme court decisions in lower federal courts. Ultimately, a justification for allowing such attacks and review would be that statistically the chances for Supreme Court review of a state court decision are so limited that unless the lower federal courts provide a forum for review through this device the United States Constitution has become effectively meaningless—except to the extent that the state judges choose to comply with

\(^{\text{466}}\) See text accompanying notes 309-11 \textit{supra}.

\(^{\text{467}}\) See text accompanying notes 389-98 \textit{supra}.

\(^{\text{468}}\) See text accompanying notes 413-20 \textit{supra}.

\(^{\text{469}}\) See text accompanying notes 266-78 \textit{supra}.


\(^{\text{472}}\) However, the trend may also be toward narrowing federal habeas corpus by expanding the requirement of exhaustion of state remedies. See Picard v. Connor, 404 U.S. 270 (1971).

it. In Mack v. Florida State Board of Dentistry the plaintiff, Mack, whose dentistry license had been removed by an administrative board, sought and was denied relief by the Florida state courts. Mack then brought an original action under section 1983 in federal district court on the grounds that he was not given a hearing consistent with due process under the fourteenth amendment. The district court, and, ultimately, the Fifth Circuit, ordered the Board to reinstate Mack’s license unless within sixty days the Board conducted a lawful hearing. A petition for certiorari by the Board was denied, but it is noteworthy that Justice White, joined by the Chief Justice, took the trouble to dissent from the denial on the grounds that because Mack first sought relief in the state court, the question was res judicata, and that Mack’s only federal remedy should have been to seek certiorari in the United States Supreme Court to review the state court decision: "Whether § 1983 is to serve as the analogue to habeas corpus in civil cases displacing the usual rules of finality seems an important and timely issue having serious state-federal implications. . . . Accordingly, I dissent from the denial of certiorari in this case."

Commentators on the overall performance of the Burger Court may miss the point if they focus on its substantive constitutional law decisions. Far more important are its decisions like Younger narrowing the jurisdiction of the federal district courts. The "delicate balance of federalism" is the familiar justification, but quietly a new invocation has pushed to the forefront: the need for "sound judicial administration." Philip B. Kurland, as an admirer of Justice Frankfurter, is certainly no flaming advocate of federal judicial power. Nevertheless, Kurland is alarmed that Chief Justice Burger has taken on a roving nonjudicial commission to dry up the court dockets. Certainly, if new demands for federal intervention are perceived as a floodburst, the immediate response is to turn off the valves. Now that the emergency call has gone out and the plumbers are banging around in the pipes, we must trust that the plumbers intend not to shut off the water permanently, but only to restore its regular and orderly flow.

476 Although it would require some amount of statistical study, it might be safe to say that since 1871, realistic access to the Supreme Court for review of state court decisions in terms of statistical probability has been on a decreasing trend line by virtue of constantly increasing caseload. But see Gressman, note 473 supra. If such access has in fact decreased, then to maintain the balance of federalism as it was struck after the Civil War, the lower federal courts should take up the slack and provide an effective forum for the protection of federal constitutional rights denied or ignored by state courts. See H. Hart & H. Wechsler, supra note 16, at 37, 885; The Federalist No. 82, at 609-10 (J. Hamilton ed. 1880) (A. Hamilton). If section 1983 were thus to become an analogue to habeas corpus, the justification for federal intervention prior to initiation of state civil proceedings would be diminished, and Younger’s principles might come to govern both civil and criminal cases.
477 430 F.2d 862 (5th Cir. 1970).
479 Id. at 961-62.