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ABSTENTION—THE JUDICIARY'S SELF-INFLICTED WOUND*

JAMES B. McMILLAN†

Abstention, legal style, is not an attitude toward sex or alcohol. It is, nevertheless, confusing, unrealistic and frustrating. Abstention, a judge-created¹ and fluctuating set of doctrines, requires a federal trial court to dismiss or postpone decision of a controversy clearly within its jurisdiction, in deference to a possible decision by a state court.² Although theoretically founded on considerations of equity and comity, and although asserted by some to be imperative to the successful functioning of the federal system,³

* This paper (with citations but without footnotes) was delivered at a joint conference of the United States Courts of Appeals for the Eighth and Tenth Circuits at Hot Springs, Arkansas, June 29, 1976. Basic research was done by me and by my then law clerk, Jeffrey J. Davis, now a Charlotte, North Carolina lawyer. Further research for publication was done by Ms. Andrea Timko, a third-year law student at the University of North Carolina. I am grateful to Mr. Davis and Ms. Timko for their painstaking and useful assistance.

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1. See, e.g., *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415 (1964) (abstention characterized as "a judge-fashioned vehicle"); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (abstention described as "a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers"). Some statutorily mandated abstention does exist, however. See 28 U.S.C. § 1341 (1970) (relating to the assessment, levy or collection of state tax); *id.* § 1342 (dealing with rate orders of state agencies); *id.* § 2254 (pertaining to exhaustion of state remedies by persons in state custody); *id.* § 2283 (anti-injunction statute); see text accompanying notes 6-9 *infra*.

2. Abstention is a broad term encompassing multiple situations. The abstention doctrine, perhaps more properly the abstention doctrines, has been invoked in at least four distinguishable situations: (1) to avoid decision of a federal constitutional question when the case may be disposed of by resolution of state law questions, see, e.g., *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), discussed in text accompanying notes 23-27 *infra*; (2) to avoid needless conflict with the administration by a state of its own affairs, see, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); (3) to leave to the states the resolution of unsettled questions of state law, see, e.g., *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir.) (en banc), cert. denied, 377 U.S. 393 (1964). But see *Meredith v. Winter Haven*, 320 U.S. 228 (1943); and (4) to ease the congestion of the federal court docket, see, e.g., *P. Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951). Application of the abstention doctrine in the fourth situation has been the subject of much recent criticism. See, e.g., *Ashman, Alfini & Shapiro, Federal Abstention: New Perspectives on its Current Vitality*, 46 Miss. L.J. 629 (1975). See generally C. WRIGHT, *LAW OF FEDERAL COURTS* § 52 (3d ed. 1976).

3. The Supreme Court has repeatedly emphasized that abstention responds to the need for "a proper respect for state functions" in a federal system. *Younger v. Harris*, 401 U.S. 37,

abstention in fact frustrates the federal judiciary's most important role under the Constitution—that of safeguarding human rights against encroachment by all forms of government.

The role of federal courts in American government is based on the United States Constitution.⁴ It has been shaped and developed in part by acts of Congress and in part by judicial decisions over a span of nearly two centuries, during which period the federal courts have attempted to define their own jurisdiction within the federal system. Abstention, roundly debated by writers and judges,⁵ is an essentially latter-day variant of those efforts.

In 1793, shortly after the adoption of the Constitution, Congress passed the Anti-Injunction Act,⁶ the ancestor of present 28 U.S.C. § 2283,⁷ which barred the federal courts from enjoining the prosecution of state court proceedings.⁸ This statute has not met with very respectful treatment. Courts

44 (1971). The Court in *Younger* explained that abstention represents a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their state functions in their separate ways.

Id. The doctrine also finds support in the traditional judicial practice of avoiding premature decision of federal constitutional questions. *See, e.g.*, *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

Historically, the doctrine derives from the chancellor's discretion to refuse to entertain equitable suits on grounds of public policy although jurisdiction was admittedly established. *See id.*

4. Article III of the United States Constitution, the judicial article, provides in § 1 that [T]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. CONST. art. III, § 1. Article III, § 2 says in part that [T]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, . . . to Controversies . . . between a State and Citizens of another State, — between Citizens of different States, . . .

Id. § 2. Article VI, the supremacy clause, provides that [T]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. art. VI.

5. *E.g.*, Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 317 (1969) (abstention gives a "Bleak House aspect that . . . is too high a price to pay for the gains in avoiding error, friction, and constitutional questions"). *But see, e.g.*, Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 824-26 (1959) (abstention is justified and necessary whenever it serves the purposes of federalistic cooperation).

6. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335.

7. Section 2283 in entirety presently reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970).

8. Legislative history is silent on the original rationale underlying the passage of the Act. For possible theories, see *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 130-32 (1941). The Supreme Court has stated that the statute "in part rests on the fundamental constitutional independence of the States and their courts," *Atlantic Coast Line R.R. v. Brotherhood of*

have historically treated it like a skunk at a picnic; they have observed it only from afar. The federal judiciary has never squarely recognized the statute as a limitation on its power, as opposed to its discretion, and has carved out numerous exceptions and qualifications.⁹

The anti-injunction statute did not inhibit John Marshall's efforts to develop and define the jurisdiction of federal courts. The case of *Marbury v. Madison*,¹⁰ Marshall's left-handed work of genius, laid the groundwork for the Court's self-determination of its own power, including the power to say both what the law "is" and what the law must not be.¹¹ State laws and state action in time came under the umbrella of federal court protection of human rights, including property rights, against the inevitable unlawful uses of the powers of government.¹² Three decades after passage of the Anti-Injunction Act,¹³ in *Cohens v. Virginia*,¹⁴ Marshall, no shrinking violet, declared the duty of federal courts to exercise their jurisdiction: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."¹⁵ Marshall, I think, was right.

Locomotive Eng'rs of Am., 398 U.S. 281, 287 (1970), and exists "to prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940). *But see* Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 613, 619 (1971) (to the effect that the statute reflects (1) fundamental congressional approval of federal court stays of state court proceedings by means other than injunction, and (2) an intention to allow federal courts to structure the situations in which stays will issue).

9. Until the decision of *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), severely curtailed the scope of judicially established exceptions, the effect of the statute was substantially diminished by restrictive judicial construction and numerous judge-made qualifications. *See generally* Durfee & Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932).

Recently, the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), was excluded from coverage under the statute. In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Supreme Court held that the Civil Rights Act came within the first statutory exception to the prohibition against injunctions, *see note 7 supra*. The operative test, which the Civil Rights Act met, was stated as being "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U.S. at 238.

See generally P. BAXTOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL COURT SYSTEM* 1234-39 (2d ed. 1973).

10. 5 U.S. 137, 1 Cranch 137 (1803).

11. Otherwise stated, this is the power to uphold laws as "constitutional" or to strike them down as "unconstitutional" and to interpret them in the process.

12. *See, e.g.*, *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

13. *See* text accompanying notes 6-8 *infra*.

14. 19 U.S. 120, 6 Wheat. 264 (1821).

15. *Id.* at 181, 6 Wheat. at 404. For a more recent expression of Marshall's prohibition, *see* *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). There, Mr. Justice Peckham, speaking for the majority, stated that "when a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . ." *See also* *McClellan v.*

For over a century the states were essentially immune from suit by private citizens. Then, in 1908, *Ex parte Young*,¹⁶ a fictional but necessary *tour de force*, held that although the sovereign per se was still immune from suit, those who acted unlawfully under its aegis could be enjoined personally.¹⁷

Following *Ex parte Young*, courts started issuing injunctions to restrain violations of rights of citizens by state officials. This produced considerable protest and, as a result, the Three-Judge Court Acts¹⁸ were adopted in 1911. Section 2281 required a trial court of three judges to restrain action of a state officer based upon the unconstitutionality of a statewide statute or regulation.¹⁹ Section 1253,²⁰ however, allowed direct appeal from such three-judge court orders to the Supreme Court. The Congress, therefore, with one hand restricted trial court injunctions against state officials but, with the other hand, enlarged access to the Supreme Court in suits challenging the constitutionality of the actions of state officials.

Since the 1908 decision in *Ex parte Young* and the passage of the Three-Judge Court Acts in 1911, there have been few major legislative abridgements of federal court jurisdiction over constitutional issues. However, the courts themselves, though disdaining the anti-injunction statutes, have created an imposing series of barricades and pitfalls (in the form of self-imposed refusals to employ the powers of the court) against the brave souls who seek federal court protection against unlawful use of state governmental power. Among these obstacles are "standing," "ripeness," "jus-

Carland, 217 U.S. 268, 281 (1910); Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945). Although subsequent cases specifically recognize the continued viability of *Willcox*, see, e.g., England v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411, 415 (1964), the rule has never been uniformly applied and has been qualified on numerous occasions. For example, in Massachusetts v. Missouri, 308 U.S. 1 (1939), the Court explained that "the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum." *Id.* at 19. See also Meredith v. Winter Haven, 320 U.S. 228, 236 (1943) (dictum); Rogers v. Guaranty Trust Co., 288 U.S. 123, 131 (1933); Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413, 422-23 (1932).

Marshall's statement has also been criticized as an inaccurate reflection of the common law. The suggestion has been made that the "supposed absolute right" of a litigant to have the benefit of federal jurisdiction that Congress has authorized "originat[ed] in inauspicious dicta" and "gained respectability through repetition." Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 980-81 (1950).

16. 209 U.S. 123 (1908).

17. *Id.* at 155-56.

18. Ch. 231, § 266, 36 Stat. 1162 (1911).

19. In 1948, the statute was reenacted as 28 U.S.C. §§ 1253, 2281, 2282, 2284 (1970). Act of June 25, 1948, ch. 646, 62 Stat. 968. Sections 2281, 2282 and 2284 were repealed in 1976. Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119.

20. 28 U.S.C. § 1253 (1970).

ticiability," "political question," "comity," "judicial restraint," "Our Federalism,"²¹ and "abstention."

With apologies to standing, the greatest of these is abstention.

A few key decisions, seldom unanimous,²² demonstrate the confused and ever-changing judicial landscape of "abstention." Abstention, modern style, is said to have originated in the 1941 decision of the Supreme Court in *Railroad Commission v. Pullman Co.*²³ The Court there held that a three-judge court could not consider the merits of a claim by the Pullman Company and some of its black employees that an order of the Texas Railroad Commission, which in practice obviously prevented black people from manning Pullman cars in Texas, was racially discriminatory. The federal trial court was required to postpone action until such time as a suit might be instituted in a Texas state court and a Texas state court ruling obtained on whether the order of the Texas Railroad Commission might be ultra vires on state grounds.²⁴ Such a ruling, the Court said (though on a constitutionally irrelevant state ground), might avoid the need to decide the racial discrimination question—a question Justice Frankfurter said was a "sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."²⁵ The Court concluded that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies"²⁶ The claim of human beings to the constitutional guarantee of equal treatment under the law was obviously not such a "higher claim."²⁷

Two years later in *Douglas v. City of Jeannette*,²⁸ the Supreme Court created a dismissal rule which was a substantial variation of the original

21. See note 52 *infra*.

22. Substantial controversy over the merits of the abstention doctrine has long existed among members of the judiciary. Leading proponents have included Justices Frankfurter, Harlan and Jackson; principal opponents have included Justices Warren, Douglas, Brennan and White.

23. 312 U.S. 496 (1941) (Frankfurter, J.). See Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974) for in-depth analysis of *Pullman* and its effects.

Several cases decided prior to *Pullman* foreshadowed development of the abstention doctrine. See *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), 311 U.S. 614 (1941); *Hawks v. Hamill*, 288 U.S. 52 (1933); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 211 (1929) (alternate holding). See also *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940); *Prentiss v. Atlantic Coast Line Co.*, 211 U.S. 210, 230 (1908).

24. 312 U.S. at 501-02.

25. *Id.* at 498 (emphasis added).

26. *Id.* at 500.

27. The Court upheld the propriety of federal abstention although it went far beyond the restrictions Congress had imposed. *Id.* at 501. See also note 1 *supra*.

28. 319 U.S. 157 (1943).

abstention theory of *Pullman*. In *Jeannette* the Court upheld a United States District Court's refusal to enjoin a state court prosecution of Jehovah's Witnesses for violation of a city ordinance which was unlawfully restrictive of first amendment rights of free speech.²⁹ The Supreme Court said, however, that the district court did not go far enough; the trial judge had to *dismiss* the suit despite the threat to free speech. Presuming the good faith of the prosecution, the Court felt that plaintiff's constitutional rights could be adequately protected by a state criminal trial, by appeal and by the ultimate hope of resurrection through certiorari.³⁰ Federal relief was said to be permissible, however, in exceptional cases to prevent "irreparable injury" that was "both great and immediate."³¹

Thus, where *Pullman* had required postponement of decision, *Jeannette* required *dismissal* of the suit, in the absence of exceptional circumstances, if a state criminal proceeding had already begun or was about to be commenced.³²

Dombrowski v. Pfister,³³ decided two decades later in 1965, was an apparent second thought on the perils of abstention. A three-judge court had abstained and dismissed a suit seeking a restraining order against threats, prosecutions, raids and seizures by state officials, under a vague and overbroad statute which had "chilled" or invaded plaintiffs' first amendment rights.³⁴ The Supreme Court reversed and ordered the lower court to decide the case on the merits.³⁵ The Court observed:

On this view of the "vagueness" doctrine, it is readily apparent that abstention serves no legitimate purpose where 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*

29. On the same day *Douglas* was decided, the ordinance was held unconstitutional as applied on review of a criminal conviction under it. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

30. See 319 U.S. at 163.

31. *Id.* at 164.

32. *Pullman*, unlike *Douglas*, requires a federal plaintiff to commence a state proceeding that would not have been brought but for the abstention order.

33. 380 U.S. 479 (1965).

34. 227 F. Supp. 556 (E.D. La. 1964). The case dealt with prosecution of appellants under Louisiana's Subversive Activities and Communist Control Law, Law of July 7, 1962, Act No. 270, § 1, 1962 La. Laws 546 (current version at LA. REV. STAT. ANN. §§ 14:358-373 (West 1974)), and the Communist Propaganda Control Law, Law of July 7, 1962, Act. No. 245, § 1, 1962 La. Laws 505 (current version at LA. REV. STAT. ANN. §§ 14:390-390.8 (West 1974)). The laws allegedly were being used by appellees in bad faith to deter appellants' civil rights activity, not to secure valid convictions. 380 U.S. at 482.

35. 380 U.S. at 497. The holding seemed surprising because in order to obtain the desired injunction plaintiffs had to effectively surmount three obstacles: (1) the Anti-Injunction Act, 28 U.S.C. § 2283 (1970); see text accompanying notes 6-9 *supra*; (2) the policy against equitable interference with the enforcement of criminal law, see *Younger v. Harris*, 401 U.S.

the result of a single criminal prosecution and is not the sort of "hard-core" conduct that would obviously be prohibited under any construction. In these circumstances, to abstain is to subject those affected to the uncertainties and vagaries of criminal prosecution, whereas the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute. In such cases, abstention is at war with the purposes of the vagueness doctrine, which demands appropriate federal relief regardless of the prospects for expeditious determination of state criminal prosecutions. Although we hold today that appellants' allegations of threats to prosecute, if upheld, dictate appropriate equitable relief without awaiting declaratory judgments in the state courts, the settled rule of our cases is that district courts retain power to modify injunctions in light of changed circumstances. . . . Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of a statute to particular conduct.

*We conclude that on the allegations of the complaint, if true, abstention and the denial of injunctive relief may well result in the denial of any effective safeguards against the loss of protected freedoms of expression, and cannot be justified.*³⁶

Two justices dissented,³⁷ deploring the litigant's "race to the forum of its own choice,"³⁸ and expressed the view that the Court should have abstained, but should have retained jurisdiction for further action in the event the state did not prosecute promptly and in good faith.³⁹

Between the *Dombrowski* decision in 1965 and *Younger v. Harris* and its companion cases in 1971,⁴⁰ the Court did not substantially elaborate on abstention. Only two cases of any significance dealt with the issue. The most important of these was *Zwickler v. Koota*,⁴¹ which reversed a three-judge court that had abstained and dismissed a complaint seeking declaratory relief and an injunction against future prosecution for the distribution of

37, 43-44 (1971); and (3) the then well established abstention doctrines. See C. WRIGHT, *supra* note 2, § 52A, at 230. With respect to the third obstacle, the Court distinguished *Douglas* on the ground that irreparable injury was clearly evident in *Dombrowski*. The Court explained that *Dombrowski* presented a "situation in which defense of the State's criminal prosecution [would] not assure adequate vindication of constitutional rights." 380 U.S. at 485-86.

36. 380 U.S. at 491-92 (emphasis added) (citations omitted).

37. Justices Harlan and Clark dissented, Justice Black took no part in the consideration or the decision of the case, and Justice Stewart took no part in the decision.

38. 380 U.S. at 502 (Harlan & Clark, JJ., dissenting). The dissent charged that to allow such a "race" belied the considerations of federalism to which the Court paid lip-service. *Id.*

39. *Id.*

40. See text accompanying notes 46-55 *infra*.

41. 389 U.S. 241 (1967).

handbills under an overbroad state statute.⁴² Abstention, said the Court, citing *McNeese v. Board of Education*,⁴³ should not be used simply to require litigants to try federal claims in state court before resorting to federal court.⁴⁴

For a brief period it was thought that *Dombrowski* had started a counter-*Pullman* trend.⁴⁵ That thought was short-lived. In 1971, the Supreme Court decided *Younger v. Harris*.⁴⁶ A three-judge court had enjoined a previously instituted state prosecution, under a vague statute which had infringed appellee Harris's first amendment rights.⁴⁷ The Court distinguished *Dombrowski*⁴⁸ and held that the trial court should have abstained from decision because, as the Supreme Court read the record, the alleged danger of irreparable loss was not "both great and immediate,"⁴⁹ plaintiff could vindicate his rights in a single state prosecution⁵⁰ and bad faith had not been demonstrated.⁵¹ The "chilling effect" was not enough to justify federal "intervention" under "Our Federalism."⁵²

42. Law of Mar. 27, 1941, ch. 198, § 1, 1941 N.Y. Laws 789 (formerly codified as N.Y. PENAL LAW § 781-b (McKinney 1944)) (superseded 1965). The district court had dismissed the case for failure to show the "special circumstances" it interpreted *Dombrowski* as requiring to justify the exercise of federal court jurisdiction. *Zwickler v. Koota*, 261 F. Supp. 985, 991-92 (E.D.N.Y. 1966).

43. 373 U.S. 668 (1963). The Court in *McNeese* held that allegations of unconstitutional racial segregation in a public school constituted a federal complaint that could be brought in federal court despite the failure to exhaust all possible state judicial remedies. The Court emphasized that since the right being vindicated was clearly federal in nature and in no way entangled with state law, it was immaterial whether the conduct was legal or illegal as a matter of state law. *Id.* at 674.

44. 389 U.S. at 251. The Court also corrected the district court's misreading of *Dombrowski* by stating that "abstention and injunctive relief are not the same" and that "'abstention . . . is inappropriate for cases . . . where . . . statutes are justifiably attacked on their faces as abridging free expression.'" *Id.* at 254 (quoting *Dombrowski v. Pfister*, 380 U.S. at 489-90).

45. In practice, however, the Supreme Court did nothing to encourage this view. The few decided cases evidence a modest reading of *Dombrowski*. See, e.g., *Cameron v. Johnson*, 390 U.S. 611 (1968). See generally Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970).

46. 401 U.S. 37 (1971).

47. Harris was indicted for violation of the California Criminal Syndicalism Act. 401 U.S. at 38.

48. *Id.* at 47-51.

49. *Id.* at 46 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). Citing *Ex parte Young*, 209 U.S. at 145-47, see text accompanying notes 16 & 17 *supra*, the Court explained that irreparable injury was not established by considering the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution," but rather by showing that "the threat to plaintiff's federally protected rights . . . cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

50. 401 U.S. at 49.

51. *Id.*

52. *Id.* at 50. Justice Black, emphasizing the "highly important place" occupied by "Our Federalism," *id.* at 45, defined the concept as representing a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may

Five companion decisions, of which the most significant are *Samuels v. Mackell*,⁵³ and *Perez v. Ledesma*,⁵⁴ accelerated *Younger's* retreat from *Dombrowski*.⁵⁵ In *Samuels*, the Court held that *declaratory* relief was improper when the *prosecution was pending in state court* at the time the federal action was instituted. In *Perez*, a three-judge court was held in error for entering an order suppressing illegally seized evidence in a previously pending good faith criminal prosecution for sale of obscene literature.

Just as the dismissal principle of *Jeannette* was expanded by *Younger*, so was the postponement principle of *Pullman* expanded⁵⁶ in 1971 by *Askew v. Hargrave*.⁵⁷ In *Askew*, a class action suit was brought against the Governor of Florida and others, challenging the constitutionality of a Florida statute⁵⁸ which limited the property tax to ten mills. The statute, as plaintiffs alleged, thereby in practice discriminated against children in poor counties.⁵⁹ After the federal suit was filed, a separate suit was filed in state court⁶⁰ attacking the statute as violating the Florida state constitution. The federal trial court was asked to abstain and declined to do so,⁶¹ relying on *Monroe v. Pape*⁶² and *McNeese v. Board of Education*.⁶³ The Supreme Court, in a per curiam opinion, agreed that the existence of a state proceeding in which a *federal claim may* be asserted is not grounds for requiring abstention, but pointed out that the Florida state case was based on Florida *state* grounds which, if sustained, would obviate the fourteenth amendment issue.⁶⁴ The Court vacated the judgment of the district court, said reliance

be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the State.

Id. at 44.

53. 401 U.S. 66 (1971).

54. 401 U.S. 82 (1971).

55. The other three cases were *Byrne v. Karalexis*, 401 U.S. 216 (1971), *Dyson v. Stein*, 401 U.S. 200 (1971), and *Boyle v. Landry*, 401 U.S. 77 (1971). In *Dyson* and *Byrne* district court injunctions against enforcement of obscenity statutes were vacated and the cases remanded for reconsideration in light of *Younger* and *Samuels*. *Boyle*, also relying on *Younger* and *Samuels*, reversed a district court injunction prohibiting defendant state officials from "intimidation" of Negro residents pursuant to certain Chicago statutes.

56. See note 67 *infra*.

57. 401 U.S. 476 (1971) (per curiam).

58. Law of July 22, 1968, ch. 68-112, § 1, 1968 Fla. Laws. 511 (formerly codified as FLA. STAT. ANN. § 236.251 (West Supp. 1970)) (repealed 1970). The statute is commonly known as the Millage Rollback Law.

59. 401 U.S. at 477; see *Hargrave v. Kirk*, 313 F. Supp. 944, 948-50 (M.D. Fla. 1970).

60. 401 U.S. at 477-78.

61. The district court stated that it "could find no special circumstances . . . that would persuade [it] to apply the doctrine of abstention. The fact that a state remedy is available is not a valid basis for federal court abstention." *Hargrave v. Kirk*, 313 F. Supp. 944, 947 (M.D. Fla. 1970).

62. 365 U.S. 167 (1961) (upholding a federal civil damage suit against a police officer who violated petitioner's fourteenth amendment rights).

63. 373 U.S. 668 (1963); see note 43 *supra*.

64. 401 U.S. at 478.

on *Monroe* and *McNeese* was misplaced,⁶⁵ and remanded the case for consideration of whether the court should abstain under the reasoning of the *Pullman* line of cases.⁶⁶ The *Askew* case, in effect, required state court adjudication under state constitutions of issues initially presented for resolution under the Federal Constitution.⁶⁷

Many circuit and district judges watched the amoebic growth of abstention gladly. Since *Younger* (and its mates, *Samuels* and *Perez*), the battle over constitutional rights *versus* states' "rights," *sub nom.* "abstention," "equitable restraint" and "federalism," has continued apace, with most rounds being won by "states'-righters."⁶⁸

*Lynch v. Snapp*⁶⁹ is illustrative. There a North Carolina state judge⁷⁰ entered a sweeping *ex parte civil* restraining order prohibiting unauthorized visitation at all one hundred and six schools in the Charlotte-Mecklenburg school system, on the stated ground of reported "disorder" without serious injury at *one* of those one hundred and six schools. The order was founded solely on an unsworn two-page memorandum from a state district attorney.⁷¹ No criminal proceeding was pending. Admittedly unlawful for overbreadth and lack of due process under *Carroll v. President of Princess*

65. *Id.* The Court distinguished *Monroe* on the ground that "there 'the state remedy, though adequate in theory, was not available in practice.'" *Id.* (quoting *Monroe v. Pape*, 365 U.S. at 174). The Court's discussion of *McNeese* merely emphasized its holding that "'assertion of a federal claim in a federal court [need not] await an attempt to vindicate the same claim in a state court.'" 401 U.S. at 478 (quoting *McNeese v. Board of Educ.*, 373 U.S. at 672) (emphasis added by the Supreme Court in *Askew*).

66. The Court specifically referred the lower court to its decision in *Reetz v. Bozanic*, 397 U.S. 82 (1970), which mandated federal court abstention when certain Alaska fishing laws and regulations were challenged as violating both the Alaska Constitution and the fourteenth amendment of the United States Constitution. 401 U.S. at 478. *But see* *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

67. *Askew* thereby extends *Pullman*. In *Pullman* and like cases the independent state law ground, whether it arises from common law, statutory law or state constitutional law, is substantively distinct from the federal issue. Resolution under state law obviates the federal question and precludes federal court consideration of the case. By contrast, in *Askew* the federal and state issues are not substantively severable. The state court is specifically given the power to construe the state constitutional guarantee in a manner dissimilar to the federal one. If, however, federal constitutional requirements are violated by the state's construction of its own constitution, the federal courts retain the ability to reject the state's resolution and enforce federal limitations. This type of federal oversight is absent in *Pullman*. Thus, the policy of encouraging state construction of state law that pervades the *Pullman* decision is of much less significance in *Askew* and does not effectively combat the detrimental effects of abstention in this situation. *See* *Bezanson, Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1129-33 (1974).

68. The *Pullman* variety of abstention is applied with virtual unanimity. Statutory enactment of this aspect of the doctrine has been suggested. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c) (Tentative Draft No. 6, 1968).

69. 350 F. Supp. 1134 (W.D.N.C. 1972), *rev'd*, 472 F.2d 769 (4th Cir.), *cert. denied*, 415 U.S. 983 (1973).

70. Judge Frank W. Snapp, resident North Carolina Superior Court Judge.

71. 350 F. Supp. at 1136.

Anne,⁷² the order was also void under North Carolina law because no suit had been instituted before it was entered.⁷³ As district judge, I so held. The overbreadth was conceded by the state judge, who suspended his original order as to seventy-three schools as soon as he learned some of the facts.⁷⁴ The illegality of the order was also conceded by the cognizant circuit court judge, who on motion for a stay dissolved the restraint as to all but *one* of the one hundred and six schools, but reinstated it as to that one.⁷⁵ Free speech at that school remained in suspension for half the school year, until the court of appeals, *presuming* the presence of an adequate state remedy, reversed the district court for "exceed[ing] its equitable discretion in granting injunctive relief" and upheld the state court action.⁷⁶ The court of appeals erroneously assumed that North Carolina courts are as free with mandamus, declaratory judgment and expedited appeals as are federal appellate courts.⁷⁷ In fact, expedited appeals are extremely rare in North Carolina; mandamus is not available to require a local judge to do any positive thing,⁷⁸ and there was no adequate state remedy.⁷⁹

In *Webster v. Perry*,⁸⁰ a later North Carolina abstention case, plaintiffs showed a practice of unconstitutional racial discrimination and denial of due process in the expulsion and suspension of students from public schools. The pertinent statute⁸¹ was attacked as overbroad, discriminatorily applied

72. 393 U.S. 175 (1968). Here the Supreme Court emphasized the heavy presumption against the constitutional validity of prior restraint of first amendment rights and held that *ex parte* restraining orders were prohibited if "no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Id.* at 180.

73. N.C. GEN. STAT. § 1-485 (Cum. Supp. 1977) and N.C.R. Civ. P. 3, 65(b) indicate that an injunction is a remedy that must exist in conjunction with a pending suit. The filing of a complaint or the issuance of a summons is a condition precedent to the ordering of an injunction. *Carolina Freight Carriers Corp. v. Local 61, Int'l Bhd. of Teamsters*, 11 N.C. App. 159, 180 S.E.2d 461, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971).

74. 350 F. Supp. at 1136-37.

75. 472 F.2d at 772.

76. *Id.* at 775-76. The state judge later dissolved the restraint as moot.

77. The court of appeals said that in the absence of an "allegation or showing that what overbreadth . . . exists in the superior court orders cannot be cured by an immediate appeal to the state appellate courts, the use of prerogative writs by those courts, or even by defending at the final trial on the merits," irreparable harm sufficient to justify federal intervention was not present. *Id.*

78. *See Wilkinson v. Board of Educ.*, 199 N.C. 669, 155 S.E. 562 (1930).

79. The court of appeals' application of *Younger* principles in a civil context was particularly significant in view of the United States Supreme Court's express refusal to reach that decision a year earlier. *See Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (Burger, C.J., concurring). *See also* note 87 *infra*. The Supreme Court did address the issue in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *see* text accompanying notes 87-96 *infra*.

80. 367 F. Supp. 666 (M.D.N.C. 1973).

81. N.C. GEN. STAT. § 115-147 (1975) in pertinent part provides that "[t]he principal of a school shall have authority to suspend or dismiss any pupil who willfully and persistently violates the rules of the school, or who may be guilty of immoral or disreputable conduct, or who may be a menace to the school"

and violative of due process rights.⁸² Two members of a three-judge court abstained from dealing with the constitutional issues until the North Carolina courts were given an opportunity to decide those issues under North Carolina law,⁸³ despite the absence of any pending state action.⁸⁴ The majority ignored the facts that no state court action was pending and that a North Carolina remedy for plaintiffs was nonexistent because under the appeals statute, North Carolina General Statutes section 143-309,⁸⁵ the only possible review of the challenged action was by special petition to the Superior Court of Wake County in Raleigh, the state capital, which is hundreds of miles from many North Carolina school children. Furthermore, such a petition could not even be filed after thirty days from notice of the school board's decision, except for "good cause" shown and *in the discretion of the Superior Court judge*.⁸⁶

In 1975 the Supreme Court further barred the doors of the federal courthouse by extending *Younger* to protect state civil as well as criminal proceedings.⁸⁷ In *Huffman v. Pursue, Ltd.*⁸⁸ an Ohio prosecutor obtained a state civil court order, pursuant to a state nuisance statute, to padlock a theater for one year and to seize personal property used for the display of obscene films. Pursue, Ltd., the theater owner, without appealing the state judgment, sued the state authorities in federal court, charging first amendment and due process deprivations. The three-judge federal court, without considering *Younger*, enjoined that part of the state court order which closed the theater to films not previously judged obscene.⁸⁹ The Supreme Court, in a six to three decision, held *Younger* applicable to civil proceedings.⁹⁰ The Court explained that in order to attack state proceedings in

82. 367 F. Supp. at 667.

83. *Id.* at 668-70.

84. The federal court did not dismiss the suit, but expressly retained jurisdiction pending litigation under North Carolina law. *Id.* at 668.

85. Law of Apr. 28, 1953, ch. 1094, § 4, 1953 N.C. Sess. Laws 1006 (formerly codified as N.C. GEN. STAT. § 143-309 (1974)) (repealed 1974).

86. Abstention in effect deferred "to a theory rather than to an alternative right" since plaintiffs, if they failed to meet the rigorous requirements of former N.C. GEN. STAT. § 143-309, could not require the state courts to consider their plea. 367 F. Supp. at 671 (McMillan, J., concurring in part and dissenting in part).

87. Between 1971 and 1975 the Supreme Court on three occasions had expressly declined to rule on the applicability of *Younger* in the civil arena. See *Speight v. Slaton*, 415 U.S. 333, 334-51 (1974) (per curiam); *Gibson v. Berryhill*, 411 U.S. 564, 575-77 (1973); *Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (Burger, C.J., concurring).

88. 420 U.S. 592 (1975).

89. *Id.* at 598-99.

90. The Court, although specifically stating that *Younger* can apply to civil litigation, *id.* at 604, refused to make a general pronouncement as to its applicability to all civil actions. *Id.* at 607. Also noteworthy are the critical similarities between criminal prosecution and Ohio nuisance proceedings, the latter being more akin to a criminal action than are most other civil causes of action. *Id.* at 604.

federal court a litigant must first exhaust state appellate remedies⁹¹ unless he can meet the *Younger* "bad faith," "great and immediate" and "irreparable" injury standards.⁹² Pursue, said the Court, "should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings."⁹³ The Court expressly reserved the question whether the state court decision would be binding should appellee lose in the state court and ask the federal court to take up, finally, his federal constitutional claim.⁹⁴ Although the holding of *Huffman* was initially received as limited to the particular facts of the case,⁹⁵ the opinion contains sweeping language inviting broad expansion.⁹⁶

*Hicks v. Miranda*⁹⁷ takes *Younger* to its seemingly *ultima thule*. Police in Orange County, California, raided the Pussycat Theater and seized copies of the film "Deep Throat." Criminal misdemeanor charges under the state's obscenity statute⁹⁸ were filed in Orange County Municipal Court against two employees of the theater. A *civil* show cause proceeding to declare the film obscene was also instituted against appellees, the theater and the theater employees.⁹⁹ Appellees refused to participate and reserved

91. State appellate remedies include, by implication, certiorari or appeal to the United States Supreme Court.

92. 420 U.S. at 611-12.

93. *Id.* at 604 (emphasis added). Justice Rehnquist's majority opinion was supported by two basic arguments: (1) the applicability of federalistic principles whenever States initiate judicial proceedings, whether civil or criminal, in state courts; and (2) the traditional reluctance of courts of equity, even within a unitary system, to enjoin criminal prosecutions or civil proceedings in which the State is a party and which are in aid of and closely associated with criminal laws. *Id.* at 604-05.

94. *Id.* at 606.

95. See note 90 *supra* & note 96 *infra*.

96. The Supreme Court readily accepted that invitation in the recent case *Judice v. Vail*, 430 U.S. 327 (1977). There, default judgment debtors in New York were held in contempt for failure to satisfy judgments, to attend depositions, and to give relevant information. They brought a class action suit in federal district court, seeking to enjoin any enforcement of the state statutory contempt provisions on federal constitutional grounds. The district court declared the laws unconstitutional and permanently enjoined operation of the statute. *Vail v. Quinlan*, 406 F. Supp. 951 (S.D.N.Y. 1976). The Supreme Court reversed, declaring that the federal court properly should have abstained. The Court specifically repudiated the district court's holding that *Huffman* was applicable only to civil actions akin to criminal proceedings. 430 U.S. at 334. (The Court did, however, acknowledge the plausibility of the district court's interpretation in light of the seemingly restrictive wording in the *Huffman* opinion. *Id.* at 333-34.) In the Court's view, labeling the finding of contempt criminal, quasi-criminal or civil in nature was immaterial. The salient fact was that the importance of the contempt power to the administration of the state judicial system prohibited federal intervention when the parties had an opportunity to present their federal claim at a state proceeding and did not do so. *Id.* at 334. Although the Court again declined to hold *Huffman* applicable to *all* civil litigation, *id.* at 336 n.13, ultimately, that result appears inevitable. See *Trainor v. Hernandez*, 431 U.S. 434 (1977) (holding *Younger* applicable to civil enforcement action brought for return of money fraudulently received through public assistance programs).

97. 422 U.S. 332 (1975).

98. CAL. PENAL CODE §§ 311-312.5 (West 1970 & Cum. Supp. 1977).

99. A substantial confusion in the identification of the parties exists throughout this case.

all federal questions. The state court held the film obscene and entered a corresponding judgment against appellees which was not appealed.¹⁰⁰ Two days later the film owners brought suit in federal court to enjoin further enforcement, to have sections of the statute declared unconstitutional and to recover the film. The district court judge found the demand for injunctive relief unwarranted but convened a three-judge court to consider the constitutionality of the statute.¹⁰¹ While this federal action was pending, the municipal court criminal proceedings were amended to include appellee Miranda as an additional defendant¹⁰² and to add four conspiracy charges.¹⁰³ The three-judge court held the statute unconstitutional,¹⁰⁴ ordered dismissal of the prosecution and found bad faith and harassment by the authorities justifying federal intervention.¹⁰⁵ *Younger* and *Samuels* were specifically held inapplicable.¹⁰⁶ The court also declined to follow *Miller v. California*,¹⁰⁷ which for want of a substantial federal question had summarily dismissed an appeal from a lower court decision upholding the statute.¹⁰⁸

The Supreme Court, despite the district court's findings of fact, held that there was no bad faith or harassment¹⁰⁹ and reversed the district court. The Court held that *Miller* should have been considered¹¹⁰ and that the

The show cause order was issued against Vincent Miranda, d/b/a Pussycat Theater; Walnut Properties, Inc.; and theater employees. Miranda owned the land on which the theater was located and did business as Walnut Properties, Inc. The Pussycat Theater was a California corporation of which Miranda was president and a stockholder. 422 U.S. at 335 n.2.

100. *Id.* at 335-36.

101. *Id.* at 338; see *Miranda v. Hicks*, 388 F. Supp. 350, 356-59 (C.D. Cal. 1974) (per curiam).

102. The amended complaint named as defendants Vincent Miranda and Walnut Properties, Inc., 422 U.S. at 339 n.7; see note 99 *supra*.

103. 422 U.S. at 339.

104. *Miranda v. Hicks*, 388 F. Supp. 350, 356-59 (C.D. Cal. 1974) (per curiam).

105. *Id.* at 360.

106. *Id.* at 356. The district court read *Younger* and *Samuels* as limiting federal court power to issue an injunction or decision only if state prosecution was pending. The court specifically relied on *Steffel v. Thompson*, 415 U.S. 452 (1974). In *Steffel*, the Supreme Court reversed a federal district court's abstention from a suit brought for federal declaratory relief from *threatened* state criminal prosecution. The Court reasoned that a refusal on the part of federal courts to intervene when no state proceeding was actually pending could leave the plaintiff with no forum in which to bring his constitutional claim, unless he chose to "institute" criminal prosecution by violating state law. *Id.* at 462. The Court held that in this situation federal intervention could not "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles," and the interest of the federal court in serving as "primary guardians of constitutional rights" took precedence. *Younger* and *Samuels* were therefore held inapposite, making federal declaratory relief appropriate. *Id.* at 462-63.

107. 418 U.S. 915 (1974) (mem.).

108. The lower court in *Hicks* specifically refused to "attach plenary precedential value to the summary treatment" of the case. 388 F. Supp. at 364.

109. 422 U.S. at 350-51.

110. *Id.* at 343-45. The Court emphasized that summary disposition of an appeal, either by affirmance or dismissal for want of a substantial federal question, is a disposition on the merits by which lower courts are clearly bound. See generally Comment, *The Precedential Weight of a*

district court should have abstained.¹¹¹ The Court further said that “[w]here state criminal proceedings are begun against the federal plaintiffs *after* the federal complaint is filed but before any *proceedings of substance on the merits* have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.”¹¹²

Hicks v. Miranda thus injected another murky concept into this already confused area.¹¹³ The phrase “proceedings of substance on the merits” has no predictable meaning in any particular factual context and will breed further litigation which would be unnecessary if the Court had upheld the trial court in the exercise of its admitted jurisdiction. The theoretical concerns of federalism are once more paramount over the rights of man.

Doran v. Salem Inn, Inc.,¹¹⁴ introduces a further irony resulting from a vigorous application of the reasoning of *Hicks*. Suit was brought in federal court on behalf of three bars seeking an injunction against enforcement of an allegedly unconstitutional topless dancing ordinance. All three bars operated for a time in compliance with the ordinance. However, before the scheduled hearing on the motion for preliminary injunction took place, M & L, one of the three bars, resumed topless dancing and was served with a state criminal summons based on violation of the ordinance. The district court enjoined all three state prosecutions¹¹⁵ and the Second Circuit affirmed.¹¹⁶

On appeal, the Supreme Court held that the two compliant bars were entitled to relief because they proved irreparable harm,¹¹⁷ and were therefore not subject to *Younger*.¹¹⁸ *Younger*, however, was held applicable to M & L because, though the federal suit was begun first, “the federal litigation was in an *embryonic stage* and no *contested matter* had been decided.”¹¹⁹

Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda, 76 COLUM. L. REV. 508 (1976).

111. 422 U.S. at 348-52. The Court corrected the district court's reading of *Steffel v. Thompson*, 415 U.S. 452 (1974); see note 106 *supra*, squarely stating that *Younger* may be applicable even though state criminal proceedings are not pending on the day the federal case is filed. 422 U.S. at 349.

112. 422 U.S. at 349 (emphasis added).

113. The opinion has been subject to a host of other criticism. See generally Recent Developments, *Federal Courts—Abstention—Dismissal of Federal Action Mandated if Plaintiff Is Able to Have Claim Adjudicated in a Parallel State Proceeding or if State Proceeding Is Instituted Against Him While Federal Case Is Still in an Early Stage*, 21 VILL. L. REV. 317 (1976).

114. 422 U.S. 922 (1975).

115. *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478 (E.D.N.Y. 1973).

116. *Salem Inn, Inc. v. Frank*, 501 F.2d 18 (2d Cir. 1974).

117. The irreparable harm was financial in nature, defined as “substantial loss of business and perhaps even bankruptcy.” 422 U.S. at 932.

118. *Id.* at 930-31.

119. *Id.* at 929 (emphasis added). *Steffel v. Thompson*, 415 U.S. 452 (1974); see notes 106 & 111 *supra*, thus died in infancy.

One is left to wonder whether the various trimesters of the "embryonic" litigation might merit different treatments.

The *Doran* Court also held that the lower court decision could not be sustained on the theory that, with all three companion cases in the federal court, judicial economy would be served by handling them all together. Such concerns, the Court explained, must be subordinated to the concepts of federalism.¹²⁰ *Younger* conquers all.¹²¹

Abstention comes in various costumes.¹²² One of the reasons for the delay required by *Pullman* was to await a state law decision which might obviate a constitutional decision. *Younger* and *Pullman* both require deference to the view of local officials and judges. *Huffman* calls the pursuit of human rights in federal court a "luxury." "Federalism" is another amorphous theory advanced to support abstention. "Equity" and "comity" get big play.

Some of the abstention *results* make good sense,¹²³ if the theory and language, and the inhibition of lower courts, were not so alarming. Normally, a previously pending criminal prosecution, plus certiorari, *does* provide a forum to assert constitutional claims. I almost always postpone a federal decision if a state court already has the identical issue in litigation and no unusual circumstances appear; that is plain economy.¹²⁴

Recent cases, however, show an alarming trend. They exalt "judicial administration" over justice and theory over substance. Moreover, as Mr. Justice Black said in *Younger*, "The precise reasons for this long-standing policy against federal court interference with state court proceedings have never been specifically identified"¹²⁵

The theories, spoken and unspoken, underlying abstention include these: (1) Constitutional rights of man are secondary to theories of "federalism"; (2) "federalism" can survive best if federal courts avoid "sensitive" questions and defer to state and local judges when possible; (3) postponement, avoidance and delay produce better or "riper" decisions of constitutional questions; (4) especially since the work of courts is heavy, the courts

120. 422 U.S. at 928.

121. For critical comment on the Court's application of *Younger* in this case, see *The Supreme Court 1974 Term*, 89 HARV. L. REV. 47, 166-69 (1975).

122. See notes 2 & 3 *supra*.

123. *Wooley v. Maynard*, 430 U.S. 705 (1977), though never mentioning *Dambrowski*, draws upon its principles to uphold, six to three, a lower court injunction against prosecution of a motorist for effacing the "Live Free or Die" motto on his New Hampshire license tag. The result is a good one, but the case amply illustrates a major point of this article—that abstention decisions have created uncertainty and confusion where neither is desired.

124. See, e.g., *Broyhill v. Morris*, 408 F.2d 820 (4th Cir. 1969).

125. 401 U.S. at 43.

should reduce their own load by getting rid of, or postponing, "touchy" cases, rather than deciding them on their merits; and (5) small-time constitutional litigation is not welcome in the federal courts. Do these theories really withstand scrutiny?

The Constitution prescribes rights and liberties of people and limits on the power of government. "States' rights," "federalism," "comity," "abstention," "standing" and "ripeness" are not mentioned in the Constitution; nor is the pleasure of judges or other public officials. Constitutional rights, under our "Supreme Law of the Land,"¹²⁶ are superior to all powers of government. Government is instituted, we are told, "to secure" these rights.¹²⁷

If the Constitution rather than temporary local sentiment is really the "Supreme Law of the Land," why should not constitutional decisions in this shrinking world be the everyday rather than the occasional stuff of judgments?

To postpone, delay or abstain, regardless of the rationale, is the equivalent of a decision on the merits, at least pro tempore, for the party who profits by delay. Abstention subordinates the rights of people, whose rights are guaranteed in the Constitution, to the demands of state governments, to which the Constitution gives not rights but *duties*, and to the demands of *local* governments, which the Constitution does not mention at all.

State and local governments threaten human rights far more than the federal government; they touch our lives more frequently and more personally. In 1974 and 1975, for example, eighty-two civil rights suits were filed in the United States District Court in Charlotte, North Carolina, against state and local officials, compared with only six such suits against federal officials.

State and local governments employed 12 million civilians in 1975¹²⁸ compared with federal employment of 2.75 million in civilian service¹²⁹ and 2.2 million in the military.¹³⁰ Over 4 out of 5 civilian government officials in 1975 were thus state rather than federal. By November 1977, state and local employees had increased in number to 12,677,000, while federal civilian employment had further shrunk to 2,731,000 persons.¹³¹ Between

126. U.S. CONST. art. VI; *see* text accompanying note 4 *supra*.

127. U.S. CONST. preamble.

128. THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS 224 table B-32 (1977).

129. *Id.*

130. *Id.* at 218 table B-27.

131. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC INDICATORS DECEMBER 1977, at 14 table (1977).

1945 and 1975, state and local spending increased over 25-fold, from \$9 billion to \$227.5 billion,¹³² while federal spending for all purposes, military and civilian, increased less than 4-fold, from \$84.6 billion in 1945 to \$357.8 billion in 1975.¹³³

Power tends to corrupt conscientious local and state officials just as much as it tends to corrupt Presidents and judges. Local officials are usually in tune with temporary local sentiment; that is how they get elected. Few people need the Constitution if local officials approve of their views and their deeds. Few people are protected by the Constitution if the courts count the local votes or wet a finger to the local political winds before deciding whether to decide their cases.

No data have been advanced to show that postponement or evasion of judicial decision produces better results, or better reasoned results, or more acceptable results, or more economical results. Abstention *creates* work and expense rather than reducing work, for judges and for lawyers. It leaves lower courts and litigants in limbo until decisions are finally made. For example, abstention to await state law rulings on state law issues cost the litigants six years of delay in the *Spector Motor Services, Inc.*¹³⁴ litigation; five years to ultimate abandonment of the fight in *Government & Civic Employees Organizing Committee v. Windsor*;¹³⁵ nine years in *England v. Louisiana State Board of Medical Examiners*;¹³⁶ twelve years in *United States v. Leiter Minerals*,¹³⁷ to a dismissal for mootness eight years after

132. THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, *supra* note 128, at 270 table B-71.

133. *Id.*

134. See *Spector Motor Servs., Inc. v. McLaughlin*, 47 F. Supp. 671 (D. Conn. 1942), *rev'd sub nom.* *Spector Motor Servs., Inc. v. Walsh*, 139 F.2d 809 (2d Cir. 1943), *vacated sub nom.* *Spector Motor Servs., Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Spector Motor Servs., Inc. v. Walsh*, 135 Conn. 36, 61 A.2d 89 (1948); *Spector Motor Servs., Inc. v. McLaughlin*, 88 F. Supp. 711 (D. Conn. 1949), *rev'd sub nom.* *Spector Motor Servs., Inc. v. O'Connor*, 181 F.2d 150 (2d Cir. 1950), *rev'd*, 340 U.S. 602 (1951).

135. See *Government & Civic Employees Organizing Comm. v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953), *aff'd per curiam*, 347 U.S. 901 (1954); *Government & Civic Employees Organizing Comm. v. Windsor*, 262 Ala. 285, 70 So. 2d 646 (1955); *Government & Civic Employees Organizing Comm. v. Windsor*, 146 F. Supp. 214 (N.D. Ala.) (*per curiam*), *vacated and remanded*, 353 U.S. 364 (1956); *American Fed'n of State, County & Mun. Employees v. Dawkins*, 268 Ala. 13, 104 So. 2d 827 (1958).

136. See *England v. Louisiana State Bd. of Med. Examiners*, 259 F.2d 626 (5th Cir. 1958), *rehearing denied*, 263 F.2d 661 (5th Cir.), *cert. denied*, 359 U.S. 1012 (1959); *England v. Louisiana State Bd. of Med. Examiners*, 180 F. Supp. 121 (E.D. La. 1960); *England v. Louisiana State Bd. of Med. Examiners*, 126 So. 2d 51 (La. Ct. App. 1960), *cert. denied*, 126 So. 2d 51 (La. 1961); *England v. Louisiana State Bd. of Med. Examiners*, 194 F. Supp. 521 (1961), *rev'd*, 375 U.S. 411 (1964); *England v. Louisiana State Bd. of Med. Examiners*, 246 F. Supp. 993 (E.D. La.), *aff'd per curiam*, 384 U.S. 885 (1965).

137. See *United States v. Leiter Minerals, Inc.*, 127 F. Supp. 439 (E.D. La. 1954), *aff'd*, 224 F.2d 381 (5th Cir. 1955), *modified and aff'd*, 352 U.S. 220 (1957); *Leiter Minerals, Inc. v. California Co.*, 239 La. 116, 118 So. 2d 124 (1960); *Leiter Minerals, Inc. v. California Co.*, 126

abstention was ordered; and eight years in *Louisiana Power & Light Co. v. City of Thibodaux*.¹³⁸

Historically, federal judges are freer to follow the Constitution than are state judges. The Supreme Court in *Monroe v. Pape*¹³⁹ noted that federal courts are the forum contemplated by the Civil Rights Acts because they are less likely than state courts to bend to local pressures.¹⁴⁰ Abstention, 1978-style, tends to neutralize the 400 federal trial judges and to deny constitutional litigants the fact-finding services and independence of the judges most free to recognize and protect constitutional rights.

If *res judicata* and estoppel should be held to apply against federal relitigation of "abstained" cases which state courts decide, the Constitution can tend to become the monopoly of state judges.

Appeal and certiorari from state court decisions to the United States Supreme Court are a rugged obstacle course, despite section 1257.¹⁴¹ When we consider the rarity of certiorari and the number of cases disposed of by summary affirmance or on the grounds that certiorari was improvidently granted,¹⁴² the hope or possibility of Supreme Court review is cold comfort to the constitutional litigant when the federal district court has been required to abstain.

Federal courts cost only about one penny out of every \$13.00 or \$14.00 of federal spending.¹⁴³ The federal judiciary should try harder to get more and better judges and support personnel and facilities, rather than try to lighten its own load by refusing to do its primary job—to decide constitutional questions. If abstention is to be required because there *may* be a state remedy, why not use that raw power to deny relief, first to eliminate diversity cases, which almost *always* involve state law? Why not abstain in patent and antitrust and contract suits—the usual sources of the longest trials—rather than eliminate or delay cases involving the "Supreme Law of

So. 2d 76 (La. Ct. App.), *rev'd*, 241 La. 915, 132 So. 2d 845 (1961); *United States v. Leiter Minerals, Inc.*, 204 F. Supp. 560 (E.D. La. 1962), *rev'd*, 329 F.2d 85 (5th Cir. 1964), *dismissed per curiam as moot*, 381 U.S. 413 (1965).

138. See *City of Thibodaux v. Louisiana Power & Light Co.*, 153 F. Supp. 515 (E.D. La. 1957), *rev'd*, 255 F.2d 774 (5th Cir. 1958), *rev'd*, 360 U.S. 25, *rehearing denied*, 360 U.S. 940 (1959); *City of Thibodaux v. Louisiana Power & Light Co.*, 126 So. 2d 24 (La. Ct. App. 1960), *cert. denied*, 126 So. 2d 24 (La. 1961); *City of Thibodaux v. Louisiana Power & Light Co.*, 225 F. Supp. 657 (E.D. La. 1963), *aff'd in part and rev'd in part*, 373 F.2d 870 (5th Cir.), *cert. denied*, 389 U.S. 975 (1967).

139. 365 U.S. 167 (1961).

140. *Id.* at 180.

141. 28 U.S.C. § 1257 (1970) allows appeal from state court judgments upholding the validity of state statutes challenged on federal constitutional grounds.

142. See *The Supreme Court 1974 Term*, *supra* note 121, at 278. See also R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 148 n.4 (4th ed. 1969).

143. Compare Act of July 14, 1976, Pub. L. No. 94-362, Title VI, 90 Stat. 937, with THE

the Land," the Constitution, the repository of our liberties? Our high-level priorities are all mixed up.

Appellate courts take reams of pages and scores of cases to deal with abstention, and other literature on the subject is voluminous.¹⁴⁴ This brief comment can only touch the tips of the icebergs. The power of the leisurely mind to ask questions and to qualify any simple or readily understandable statement is greater than my power to anticipate and answer such questions. As a trial judge, I spend my time grappling with facts rather than with the nuances of judicial theory. But I do claim a deep interest in supporting and living by the Constitution and in preserving and perfecting the judicial process and the people it serves.

With others, I know the fragile nature of the judicial process, and the feeling of trying to catch a whale on an eight-pound line which a judge has when attempting to persuade reluctant litigants to follow the Constitution. I know the wearing strain upon a resident federal judge in a populous district, whose calendar presents an almost unbroken phalanx of cases the decisions of which, if correct, will usually produce criticism and bitterness among neighbors and public officials. Abstention, in that atmosphere, is an inviting sanctuary. But the job of a judge is to decide. In America, the duty to make the Constitution live falls heavily upon the courts.

My message is simple: federal courts should spend less time on theories of nonjurisdiction and the niceties of abstention, and should ordinarily decide on the merits constitutional issues within their jurisdiction whenever they are fairly presented, unless the litigants are already involved in a proceeding in some other court where they are likely to get a fair and timely hearing.

The highest calling of federal courts is to protect people in the exercise of constitutional rights and freedom. Convenience and work load of judges are not concerns of high priority by comparison. Federalism—the optimum distribution and balance of governmental power—is best served when *all* government routinely respects the Constitution and human liberty.

Abstention is a self-inflicted wound; I hope we can stop twisting the knife in that wound before the federal judiciary makes itself a weak bystander in the continuing battle over freedom in America.

ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, *supra* note 128, at 267 table B-68 (derived).

144. In addition to the sources cited throughout this article, see generally Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Pell, *Abstention—A Primrose Path by Any Other Name*, 21 DE PAUL L. REV. 926 (1972); Schoenfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605 (1969); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959).