NOTES

CONSTITUTIONAL LAW: LIMITATIONS IMPOSED ON TRADITIONAL USE OF DOCTRINE OF FEDERAL JUDICIAL ABSTENTION

The Supreme Court held that federal judicial abstention may be inappropriate where violation of first amendment rights results from threatened state criminal proceedings brought under vague statutes or where bad faith prosecutions give rise to a claim under the Civil Rights Act. In order to provide immediate federal court protection in either of these situations, the Court has had to further erode the traditional policy bases underlying the doctrine of abstention.

UNDER THE traditional doctrine of abstention, federal courts have refused to enjoin the enforcement of state criminal statutes, even where the alleged violation of a federal constitutional right is involved, unless there is a clear "showing of danger of irreparable injury 'both great and immediate.' "[1] In the recent decision of *Dombrowski v. Pfister*,[2] the Supreme Court has limited the use of abstention[3] by expanding the meaning of "irreparable injury" in order to make available immediate federal court protection in two situations. Thus, abstention may be improper where first amendment rights are subjected to the "chilling effects" of vague state statutes, or where activities are protected from the harassment of threatened or actual state prosecutions instituted in bad faith giving rise to a claim under the Civil Rights Act.[4]

Dombrowski and other members of the Southern Conference Educational Fund (SCEF), a civil rights organization, had been threatened with state prosecution for violating several Louisiana statutes which imposed penalties for participating in the formation, management, or support of a subversive organization[5] and for fail-

[1] Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943).

[2] 380 U.S. 479 (1965) (five to two decision).

[3] The specific strictures imposed on the use of abstention do not clearly emerge from the opinion. Disagreement over the interpretation of the decision is illustrated in a subsequent Supreme Court case, Cameron v. Johnson, 381 U.S. 741, 742, 754 (1965) (per curiam) (dissenting opinions). See notes 53-54 *infra* and accompanying text.

[4] REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

[5] "It shall be a felony for any person knowingly and wilfully to . . . assist in the

ing to register as an official of a "Communist-front organization."[6] They applied to the federal district court for declaratory relief and an injunction to restrain state officials from prosecuting or threatening to prosecute under these and other statutes.[7]

The Supreme Court reversed the decision of the district court to abstain and dismiss.[8] The Court reasoned that where a petitioner interposes a nonfrivolous allegation that a state statute is so vague that it is void on its face, the restraint upon the exercise of first amendment rights that ensues from the application of the statute constitutes sufficient irreparable injury to waive application of the

formation or participate in the management or to contribute to the support of any subversive organization . . . ." LA. REV. STAT. § 14:364(4) (Supp. 1962), quoted in 380 U.S. at 493 n.9. This section incorporates therein the definition of subversive organization found in LA. REV. STAT. § 14:359(5) (Supp. 1962), where the term is defined as "any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, . . . by revolution, force, violence or other unlawful means . . . ." 380 U.S. at 493-94 n.10.

[6] LA. REV. STAT. § 14:364(7) (Supp. 1962), quoted in 380 U.S. at 492 n.7 imposed a penalty for failure to register as a member of a communist-front organization as defined by LA. REV. STAT. § 14:359(3) (Supp. 1962), quoted in 380 U.S. at 494-95 n.11.

[7] The SCEF officers alleged that the statutes were void on their face as violative of their first and fourteenth amendment rights of freedom of expression. They also invoked the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964), by alleging that the threats to enforce the subversion statutes were not made for the purpose of securing valid convictions, but rather were made in bad faith as part of a plan to harass and discourage the civil rights activities of the organization. 380 U.S. at 482.

In October, 1963, the individual appellants had been arrested and charged with violation of the statutes, and "at gunpoint their homes and offices were raided and ransacked by police officers . . . . A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function." Dombrowski v. Pfister, 227 F. Supp. 556, 573 (E.D. La. 1964) (dissenting opinion). A state court judge quashed the arrest warrants because they were not based on probable cause and granted a motion to suppress the seized evidence on the grounds that the raid was illegal. The action in the Federal District Court was filed in November, 1963, after threats by state officials to enforce the statutes continued. In fact, after the District Court had dismissed SCEF's action, a state grand jury returned indictments against the individual officers and their prosecution awaited the outcome of the appeal to the United States Supreme Court from the District Court decision to abstain. 380 U.S. at 488 & n.5.

[8] The District Court had dismissed the complaint, one judge dissenting, "for failure to state a claim upon which relief can be granted." 227 F. Supp. at 564. The court found no irreparable injury warranting interference with imminent state criminal proceedings. Abstention was deemed appropriate because possible narrowing construction of the statutes in question by the state courts would avoid unnecessary adjudication of constitutional questions. To enjoin enforcement of statutes involving the state's "basic right of self-preservation . . . would be a massive emasculation of the last vestige of the diguity of sovereignty." *Id.* at 559.

[9] Where prosecutions are threatened under a statute challenged as an unduly

abstention doctrine.[9] The Court apparently reasoned that abstention is equally inappropriate where the complaint alleges bad faith prosecutions by state officials in violation of the Civil Rights Act. Thus, the Supreme Court remanded to the district court, holding the statutory provisions to be void on their face[10] and ordering the lower court to fashion appropriate injunctive and declaratory relief.[11]

Abstention was first applied by the Supreme Court[12] in order

vague regulation of expression, "this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity." 380 U.S. at 490.

[10] LA. REV. STAT. § 14:364(7) (Supp. 1962), which required registration of members in communist-front organizations, was held void on its face since the procedure for classification of a group as a communist-front organization, LA. REV. STAT. § 14:359(3) (Supp. 1962), did not afford them the safeguards of procedural due process demanded by the Court in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). 380 U.S. at 495-96.

LA. REV. STAT. § 14:364(4) (Supp. 1962), which makes it a felony to form, manage or support a subversive organization, was also held invalid, as it incorporated a definition of "subversive organization" (found in LA. REV. STAT. § 14:359(5) (Supp. 1962)) which was substantially identical to the definition declared invalid in Baggett v. Bullitt, 377 U.S. 360, 362, 363 n.1 (1964). 380 U.S. at 494. The Court in *Baggett* held that the definition was so vague as to transgress the due process requirement and further found that the unconstitutional vagueness operated to inhibit the exercise of first amendment rights. Baggett v. Bullitt, *supra* at 372.

[11] 380 U.S. at 497. "In addition, appellants are entitled to expeditious determination, without abstention, of the remaining issues raised in the complaint." *Id.* at 498.

The members of SCEF also alleged that their files and records had been illegally seized under color of the Communist Propaganda Control Law, LA. REV. STAT. §§ 14:390-14:390.8 (Supp. 1962). The Court decided that "in light of the uncertain state of the record, however, we believe that the appellants' attacks upon the constitutionality, on its face and as applied, of the Communist Propaganda Control Law should await determination by the District Court after considering the sufficiency of threats to enforce the law." *Id.* at 496 n.13.

The Supreme Court also remanded to the District Court the issue of the claim stated under the Civil Rights Act, abstention being deemed as inappropriate to that claim "as on the issues we here decide." *Id.* at 497.

[12] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

The doctrine apparently arose in response to the ramifications of the landmark case of *Ex parte Young*, 209 U.S. 123 (1908). See Note, 108 U. PA. L. REV. 226 n.1 (1959). The Supreme Court there held that a federal injunction of state prosecutions would be proper where state officials "threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Ex parte* Young, *supra* at 156.

In order to avoid the possible federal interference with state administration of its law suggested by the *Ex parte Young* decision, the federal court will defer action on a suit properly before it until the state court has been given a reasonable opportunity to pass upon state enactments. Such use of the federal court's equitable power "is a contribution of the courts in furthering the harmonious relation between state and federal authority." Railroad Comm'n v. Pullman Co., *supra* at 501.

See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (1960); Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention*

to avoid premature or unnecessary constitutional adjudication[13] and to further the principle of judicial comity.[14] Congress has, in fact, sought to give limited statutory effect to the doctrine by providing that a federal court may not enjoin a criminal proceeding already commenced in a state court.[15] Where no state criminal proceeding has commenced, however, the federal courts will exercise their discretion and refrain from intervening unless exceptional circumstances require adjudication to prevent irreparable injury "both great and immediate."[16] To avert abstention, the petitioner

Doctrine, 24 F.R.D. 481 (1960); Wright, *The Abstention Doctrine Reconsidered,* 37 TEXAS L. REV. 815 (1959); Note, 59 COLUM. L. REV. 749 (1959); Comment, 1965 DUKE L.J. 102; Note, 108 U. PA. L. REV. 226 (1959).

[13] Resolution of a state law issue might eliminate the necessity of federal constitutional adjudication which "touches a sensitive area of social policy." Railroad Comm'n v. Pullman Co., *supra* note 12, at 498. See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring), for a discussion of the policy of avoiding constitutional adjudication. The policy has generally been applied, however, without an inquiry into whether the constitutional adjudication would have touched a "sensitive area of social policy" in the particular case involved. See, *e.g.,* Martin v. Creasy, 360 U.S. 219 (1959); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942).

[14] Judicial comity is a principle "which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950).

The principle of comity is peculiarly apposite where an imminent state criminal proceeding is enjoined, since a clash between coordinate political as well as judicial authorities is readily apparent. Stefanelli v. Minard, 342 U.S. 117, 120 (1951) (improper to enjoin state criminal prosecution using unconstitutionally obtained evidence). Moreover, if the state proceeding has commenced, the practical effect of intervention is to "expose every State criminal prosecution to insupportable disruption" for "every question of procedural due process of law . . . would invite a flanking movement against the system of State courts by resort to the federal forum." *Id.* at 123.

[15] "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 (1964).

The Supreme Court has granted injunctions against *threatened* prosecutions, but prosecutions actually pending in the state courts are distinguished on the ground that comity does not permit interference once another court has acquired jurisdiction over the matter. See, *e.g.,* Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927); *Ex parte* Young, 209 U.S. 123, 161-62 (1908). This distinction has been criticized as specious, since the threatened proceeding may differ only formally in that the state prosecutor has not yet filed suit. See Note, 4 STAN. L. REV. 381, 386 (1952). However, an injunction does not interfere with "proceedings" within the meaning of § 2283 unless a suit has been instituted in the state court. See Note, 74 HARV. L. REV. 726, 728-29 (1961).

[16] Beal v. Missouri Pac. R.R., 312 U.S. 45, 49-50 (1941); Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935).

The federal courts should not iuterfere with threatened proceedings in state courts "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." Douglas v. City of

must demonstrate that he would not receive the same protection in a state court trial, with ultimate appeal to the United States Supreme Court, as he would by proceeding under the equity jurisdiction of the federal courts.[17] The fact that a state statute *as applied* may be repugnant to the Constitution will not ordinarily constitute such sufficient injury.[18]

Harrison v. NAACP[19] is illustrative of the traditional Supreme Court approach in a situation where a federal court has been asked to enjoin enforcement of a state statute alleged to be repugnant to the United States Constitution. A federal district court in *Harrison* had refused to abstain and enjoined enforcement of Virginia "barratry" and "registration" statutes,[20] reasoning that the statutes were designed to limit the legal representation and lobbying activities of the NAACP in Virginia in violation of the fourteenth amendment.[21] The Supreme Court reversed, holding abstention proper

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Jeannette, 319 U.S. 157, 163 (1943). In *Douglas* there was no threat of immediate irreparable injury because the challenged ordinance had been invalidated by the Court in another case, Murdock v. Pennsylvania, 319 U.S. 105 (1943), decided the same day as *Douglas*. Although the situation here was unique, the decision has often been cited as justifying federal abstention in the interests of comity. See, *e.g.*, Stefanelli v. Minard, 342 U.S. 117, 122 (1951); Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).

Originally a court of equity had no jurisdiction over actions to stay criminal proceedings. *In re* Sawyer, 124 U.S. 200 (1888). Prior to clear articulation of the doctrine of abstention, however, this restriction was relaxed in a few cases where state prosecutions threatened property rights or personal freedoms. See, *e.g.*, Hague v. CIO, 307 U.S. 496 (1939); Terrace v. Thompson, 263 U.S. 197, 214 (1923) (dictum); *Ex parte* Young, 209 U.S. 123 (1908).

[17] Douglas v. City of Jeannette, 319 U.S. at 164.

[18] The enforcement of a statute, "even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." *Id.* at 163.

The decisions also indicate that the threat of injury must be more than that "incidental to every criminal proceeding brought lawfully and in *good faith*." *Id.* at 164. (Emphasis added.) This standard is reiterated by the Court in *Dombrowski*, 380 U.S. at 485.

[19] 360 U.S. 167 (1959).

[20] The barratry statute punished "the offense of stirring up litigation." VA. CODE ANN. §§ 18.1-388 to -393 (1960). The registration statutes required detailed annual disclosures to be filed with the state by persons or organizations rendering financial assistance in litigation or conducting activities related to the passage of racial legislation or advocacy of "racial integration or segregation." VA. CODE ANN. §§ 18.1-372 to .387 (1960).

[21] NAACP v. Patty, 159 F. Supp. 503 (E.D. Va. 1958). The district court recognized that the statutes had not been construed by the state courts but held abstention inappropriate "where the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional . . . ." *Id.* at 523.

since the statutes had not been construed by the state courts and were subject to possible limiting construction[22] which might avoid or materially change the nature of the federal constitutional adjudication. Thus, traditional concepts of abstention as exemplified by *Harrison* require that when the state enactments are "fairly open to interpretation,"[23] federal courts should not determine their constitutionality until the state courts have been afforded an opportunity to construe them in light of the federal constitutional objections.[24] Deference to state authority is not unlimited however. While abstention was deemed proper in *Harrison,* the lower federal court was ordered to retain jurisdiction and exact assurances from the prosecuting authorities that the statutes would not be enforced against any conduct which might be engaged in by the NAACP prior to the termination of the litigation.[25]

In the recent decision of *Baggett v. Bullitt,*[26] however, the Supreme Court limited the use of the abstention doctrine. Rather than requiring abstention whenever the state statute under attack is "fairly open to interpretation" by a state court, the Court determined that abstention is inappropriate wherever a vague statute may be subject to an indefinite number of interpretations by the state courts.[27] The statutes involved in *Baggett* required a loyalty oath as a condition of employment for teachers and state employees.[28]

[22] 360 U.S. at 177. The Supreme Court suggested, for example, that the "advocacy" clause, VA. CODE ANN. § 18.1-381 (1960), "might be construed as reaching only that [conduct] directed at the incitement of violence." 360 U.S. at 178.

[23] *Id.* at 176.

[24] This "serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication." *Id.* at 177.

See, *e.g.,* Government & Civic Employees Organization v. Windsor, 353 U.S. 364 (1957); Albertson v. Millard, 345 U.S. 242 (1953); AFL v. Watson, 327 U.S. 582 (1946); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942).

[25] 360 U.S. at 179. Mr. Justice Harlan, dissenting in *Dombrowski,* cited the *Harrison* case to support his argument that the district court should have abstained while retaining jurisdiction "for the purpose of affording appellants appropriate relief in the event that the state prosecution did not go forward in a prompt and bona fide manner." 380 U.S. at 502.

[26] 377 U.S. 360 (1964).

[27] *Id.* at 378.

[28] Washington law requires teachers to swear, "by precept and example," to "promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, ch. 103, at 296.

Wash. Laws 1931, ch. 377, at 1545, requires a state employee to swear that he is not a "subversive person," meaning one who "commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to over-

In finding that administration of the statutory oath constituted sufficient irreparable injury to permit avoidance of the abstention doctrine, the Court reasoned that the inherent vagueness of the oath prevents the oath-taker from determining what future conduct he may permissibly engage in so as not to violate his oath and expose himself to prosecution for perjury.[29] Since this vagueness could only be eliminated by "extensive adjudications, under the impact of a variety of factual situations,"[30] the Court did not abstain. Moreover, the Court noted that abstention delays adjudication on the merits,[31] "a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment Freedoms."[32]

While the decision in *Baggett* rested primarily on a violation of due process, the *Dombrowski* opinion emphasized the inappropriateness of abstention where unconstitutional vagueness deters the exercise of first amendment freedoms. The inhibiting effect of the statutes on protected expression in *Dombrowski* was held to constitute sufficient irreparable injury. The officers of SCEF could not define the wide range of activities which might have been prohibited by the statutes. They could thus be forced to refrain from engaging in constitutionally protected activity to avert the peril that their conduct might be within the vague terms of the

throw, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government" by revolution, force, or violence. WASH. REV. CODE § 9.81.010 (5) (1951).

[29] The state argued that "the oath does not offend due process because the vagaries are contained in a promise of future conduct, the breach of which would not support a conviction for perjury." 377 U.S. at 374. The Supreme Court reasoned that "even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid. 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 . . . ." *Ibid.*

[30] *Id.* at 378. "[C]onstruction of the challenged terms, such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action . . . without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association" probably could not have eliminated the vagueness from these terms. *Ibid.*

[31] See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964) (concurring opinion). Unpopular minorities will usually seek to escape local prejudice by asserting their rights in the federal district courts. Since that litigation often involves construction of state statutes, city ordinances or state court decisions the litigant is rechanneled to the state courts and "his journey there may be not only weary and expensive but also long and drawn out. There will be no inclination to expedite his case. The whole weight of the *status quo* will be on the side of delay and procrastination." *Id.* at 435. For example, in *Harrison*, judgment on the merits was reached almost seven years after the institution of the litigation.

[32] 377 U.S. at 379.

statutes. Federal intervention was held warranted, even at the expense of enjoining institution of a state criminal proceeding,[33] since the necessity of protecting first amendment rights was deemed to outweigh the traditional considerations underlying abstention.[34]

In *Dombrowski,* as in *Baggett,* the Court found that the vagueness of the statutes could not have been eliminated except by multiple prosecutions.[35] If the possibility of multiple prosecutions is an indispensable factor in the finding of irreparable injury in *Dombrowski,* as it was in *Baggett,* the scope of the *Dombrowski* decision seems limited. Abstention would remain appropriate even though a vague statute inhibits the exercise of protected expression, whenever a *single* state proceeding might provide an interpretation which would eliminate the "chilling effect."[36] On the other hand,

[33] The dissenters argued that under the Court's decision, state prosecutions under statutes challengeable for vagueness on first amendment grounds, "instituted after the commencement of a federal action, must be halted until the prosecuting authorities obtain in some other state proceeding a narrowing construction, which in turn would presumably be subject to further monitoring by the federal courts before the state prosecution would be allowed to proceed." 380 U.S. at 498-99. This result, they asserted, would cause serious interference with state administration of its criminal law.

Further, the dissenters point out that the decision subverts "considerations of federalism" by making standing and criminality depend upon which party reaches the forum of its choice first. In a state criminal prosecution, the defendant cannot avoid a constitutional application of the statute to his conduct simply because the statute may be unconstitutional as applied to others whose conduct is protected. *Id.* at 501-02. See generally Note, 109 U. PA. L. REV. 67, 96-104 (1960). On the other hand, in a federal civil proceeding, a person may attack as void on its face an overly broad statute regulating protected expression and does not have to demonstrate that the statute is unconstitutional as applied to his particular conduct so long as he shows that the statute as construed would be unconstitutional in some possible application. See, *e.g.,* Thornhill v. Alabama, 310 U.S. 88 (1940). Thus, since the officers of SCEF had brought the federal action before the commencement of state criminal proceedings, they immunized themselves "with a federal vaccination from state prosecution" even though their conduct might have been constitutionally prosecuted under a narrow reading of the statute. 380 U.S. at 502.

[34] This conclusion appears consistent with recent decisions of the federal courts in related areas which reflect a growing concern with state court delay in vindicating individual rights. See, *e.g.,* Freedman v. Maryland, 380 U.S. 51 (1965) (motion picture censorship scheme invalidated because not providing prompt judicial remedies); McNeese v. Board of Educ., 373 U.S. 668 (1963) (prior exhaustion of state administrative remedies not required in civil rights suits); Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965) (prosecutorial harassment is ground for removal to federal court); United States *ex rel.* LaNear v. LaVallee, 306 F.2d 417 (2d Cir. 1962) (exhaustion of state remedies before issuance of habeas corpus limited). See also Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793 (1965).

[35] 380 U.S. at 491.

[36] Justices Black and White seem to adopt this view of the *Dombrowski* rationale

the premium which the Court placed on first amendment rights may make abstention inappropriate, even if multiple state prosecutions are unnecessary. Abstention invariably delays the vindication of constitutional rights by forcing the litigant to go to the state court and then, if necessary and desired by the plaintiff,[37] return to the federal court for judgment on the merits of the federal constitutional issue.[38]

Although *Dombrowski* may be cited as following *Baggett* in holding the necessity of multiple prosecutions an indispensable adjunct to the finding of irreparable injury, distinguishing factors exist which suggest that *Dombrowski* has made greater inroads on the abstention doctrine. First, in *Baggett,* unlike *Dombrowski,* the federal court was not asked to enjoin an imminent criminal proceeding.[39] In striking down the oath, the Court did not have to interfere with the normal processes of state criminal law enforcement and, thus, did not irritate a "most sensitive source of friction

in the subsequent case of Cameron v. Johnson, 381 U.S. 741, 742, 754 (1965) (per curiam) (dissenting opinions). See note 56 *infra.*

[37] If the federal issue is not avoided by state court construction of the challenged statute "in light of the constitutional objections presented to the District Court," Government and Civic Employees Organization v. Windsor, 353 U.S. 364, 366 (1957), the litigant may nevertheless return to the federal forum for final adjudication of the federal issue. However, unless he "expressly reserved the right to return to the federal tribunal," he is presumed to have submitted the federal question to the state court for final adjudication. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 428 (1964) (concurring opinion).

[38] See note 31 *supra.*

[39] Several lower courts in deciding claims under the Civil Rights Act have held state statutes unconstitutional. However, prosecutions in the state courts were not pending under any of these statutes and enforcement thereunder was not imminent as in *Dombrowski.* See, *e.g.,* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La.), *aff'd per curiam sub nom.* Gremillion v. United States, 368 U.S. 11 (1961) (enjoining enforcement of statutes passed to prevent school desegregation); Davis v. Morrison, 2 RACE REL. L. REP. 996 (E.D. La. 1957), *aff'd per curiam,* 252 F.2d 102 (5th Cir.), *cert. denied,* 356 U.S. 968 (1958) (enjoining enforcement of state laws requiring segregated bus transportation); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam,* 352 U.S. 903 (1956) (same as *Davis*); *cf.* Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) (action to enjoin harassment of Negro attorneys by state legislative committee).

[40] Stefanelli v. Minard, 342 U.S. 117, 120 (1951). In *Dombrowski,* state criminal proceedings were imminent. Thus, the resultant potential disrnption of state law enforcement might provide a more justifiable basis for abstention. See Stefanelli v. Minard, *supra.* Section 2283 does not technically prohibit federal injunction in *Dombrowski,* since the federal action in the court below was commenced before the state indictments were filed. However, it is arguable that the injunction violates the spirit of § 2283, since at the time the federal suit was filed a search warrant had been issued and documents subpoenaed to aid a grand jury in its investigation of SCEF and its officers. Brief for Appellees, p. 46. On the other hand, "proceedings" within § 2283 could be construed to refer only to trials actually commenced in the

between State and Nation."[40] Second, in *Baggett* the state statute expressly purported to require teachers to take the oath. Thus, constitutional adjudication could not have been avoided by a saving state court decision construing the statute to be inapplicable to those teachers. The only question concerned the indefinite requirements imposed on the teachers by the vague oath. Abstention was deemed inappropriate since extensive adjudications would have been necessary to define the range of activities falling within its terms. In *Dombrowski,* however, constitutional adjudication might have been avoided if the Supreme Court had upheld abstention so as to allow state court construction of the statute in such a manner that it could not in any circumstances apply to SCEF.[41] Such a ruling by the state courts would have given SCEF no grounds for otherwise challenging the statute.[42] Failure to give state courts this opportunity indicates further erosion of the traditional bases for abstention determinative in *Harrison.*

However, while the scope of *Baggett* has arguably been expanded, the deleterious effects on federal-state relations caused by increasing the situations where federal injunctive relief is immediately available may have been ameliorated by the Court's unique use of the "void on its face" doctrine. Normally, the effect of declaring a statute void on its face is to render it void from its inception, thus barring all further action under it.[43] While

state courts. The mere filing of the indictments by the state would not foreclose the opportunity to bring federal proceedings. This position is supported on the grounds that immediate vindication of first amendment rights should not depend on the fortuitous circumstance of which party wins the race to the forum of his choice and that interference with state judicial processes, unless the trial has commenced, is not substantial enough to require abstention. See Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations,* 34 FORDHAM L. REV. 71, 92-93 (1965).

[41] State court determination that the statutes were void as applied to certain conduct of SCEF would not have been sufficient to avoid federal constitutional adjudication. Normally, a finding that a statute is void as applied will not affect its enforceability in other situations. See, *e.g.,* Noto v. United States, 367 U.S. 290 (1961). Therefore, such finding may not afford the basis for adequate relief from the continued bad faith application of the statute in other contexts. In order to afford the appropriate relief, a court might find it necessary to enjoin enforcement of the statute in all situations, thus in effect holding the statute void on its face. Arguably, this is the result reached by the Court in *Dombrowski* by holding the challenged statutes void on their face *until* an acceptable limiting construction by the state courts is rendered.

[42] The dissenters in *Dombrowski* asserted that such a limiting construction was possible. They concluded from this that *Dombrowski* is indistinguishable from *Harrison* and the bulk of the abstention cases. 380 U.S. at 500-01 n.3.

[43] See, *e.g.,* United States v. Petrillo, 332 U.S. 1, 6 (1947) (dictum); Hague v. CIO, 307 U.S. 496, 518 (1939) (opinion of Roberts, J.).

Dombrowski declares some statutory provisions void on their face,[44] it indicates that the district court is to retain the power to modify the injunction and "to permit prosecutions in light of subsequent state court interpretation clarifying the application of a statute to particular conduct."[45] The Court states that this might be accomplished only by means of a state "noncriminal proceeding."[46] Thus, a void on its face interpretation in the abstention context appears to mean that the statutes are void until they are constitutionally construed. In enabling state courts to construe state statutes found void on their face, the Supreme Court thus ignores the normal preclusive effect of such a holding, apparently in an effort to mitigate federal interference with legal administration.

The majority opinion suggests several other plausible interpretations which cast doubt upon its precedential effect. The Court additionally considered a decision on the merits compelled where "statutes are justifiably attacked . . . as applied for the purpose of discouraging protected activity."[47] Broadly interpreted to encompass all federally guaranteed rights, this language would eliminate the requirement of judicial restraint in most cases where abstention has been traditionally applied.[48] However, the Court may limit this approach to the situation where state officials have demonstrated bad faith in enforcing state statutes without any expectation of conviction but rather as part of a plan to discourage the exercise of pro-

[44] See note 10 *supra*.

[45] 380 U.S. at 492. The Court indicated that the statutes could be constitutionally construed to apply to certain "hard-core" conduct. *Id.* at 491-92. Furthermore, "once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction." *Id.* at 491 n.7. This approach might render less cogent the objection raised by the dissenters that the decision permits abuses by persons who, considering state prosecution imminent, file suit for injunctive and declaratory relief in a federal court where the constitutionality of the state statute need not be measured by its application to his individual conduct. See note 33 *supra*. While such action might afford delay in a state prosecution, if the conduct can constitutionally be prohibited the state can resume prosecution after a proper narrowing construction has been rendered in a separate state proceeding.

[46] 380 U.S. at 491.

The Court recognized that Louisiana and thirty-six other states have adopted the Uniform Declaratory Judgments Act. *Id.* at 491 n.6. LA. CIV. PROC. CODE arts. 1871-83 (1960). It apparently was assumed by the Court that this noncriminal procedure would be available for the purpose of a narrowing construction. See generally 1 ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 18 (1951, Supp. 1959). Other states have declaratory judgment statutes which are restricted to litigation of specified issues. See *id.* at § 6.

[47] 380 U.S. at 489-90.

[48] *E.g.*, Harrison v. NAACP, 360 U.S. 167 (1959); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

tected activity, thus stating a claim under section 1983 of the Civil Rights Act.[49] Under these circumstances, any requirement that the state courts be given an initial opportunity to interpret the statutes is immaterial since even if the statutes were found unconstitutional as applied, the harassment by state officials might continue. Therefore, while this good-faith qualification might find support in the language used in prior abstention cases[50] and seemingly provides an alternate rationale for the decision, the contours of its applicability are left unanswered by the Court.

It may also be argued that the decision implies that Congress, in passing the Civil Rights Act, has provided a federal forum to protect certain federal rights against nullification by the states and thereby has made the exercise of federal jurisdiction mandatory in cases which state a claim under the Act.[51] *Dombrowski,* in directing the district court to reach a judgment on the merits of the claim

[49] "If these allegations state a claim under the Civil Rights Act, 42 U.S.C. § 1983, as we believe they do . . . the interpretation ultimately put on the statutes by the state courts is irrelevant." 380 U.S. at 490.

REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964) provides civil relief against "every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."

[50] For example, in Douglas v. City of Jeannette, 319 U.S. 157 (1943), the plaintiffs had not shown that they had "been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in *good faith.*" *Id.* at 164. (Emphasis added.)

The practice by the abstaining federal court of retaining jurisdiction and exacting assurances from state officials that the challenged statutes would not be enforced against the litigants for "activities engaged in during the full pendency of this litigation," 360 U.S. at 179, also may indicate a desire to protect against bad faith proceedings. See note 25 *supra* and accompanying text.

[51] This view was advanced by the dissenters in *Harrison.* 360 U.S. at 179. Mr. Justice Douglas argued that the district court should not have abstained "if the appellees, who invoked that court's jurisdiction under the Civil Rights Act, proved their charge that the appellants, under the color of the Virginia statutes, had deprived them of civil rights secured by the Federal Constitution." *Id.* at 181.

The importance of relating allegations of irreparable injury to violation of the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964) is accentuated when state criminal prosecutions have commenced. Actions brought under the Civil Rights Act may come within the "expressly authorized" exception to the federal anti-injunction statute which prohibits federal court intervention into state prosecutions which have already been instituted. 28 U.S.C. § 2283 (1964). *Compare* Cooper v. Hutchinson, 184 F.2d 119, 124 (3d Cir. 1950), *with* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), 1965 DUKE L.J. 813.

The Court in *Dombrowski* found that no state proceedings were pending within the meaning of § 2283 even though indictments had been returned by a grand jury because SCEF's complaint, erroneously dismissed by the district court, was filed before the state indictments were filed. Thus, the Supreme Court considered it "unnecessary to resolve the question whether suits under 42 U.S.C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283." 380 U.S. at 484 n.2.

stated under section 1983 of the Act, suggests that a federal forum might be immediately available for the trial of any section 1983 claim.[52]

Mr. Justice White rejected this reading of *Dombrowski* by arguing in a subsequent case[53] that *Dombrowski* allows a federal court to enjoin a "planned prosecutorial misuse" of an otherwise valid state statute since in that situation "it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable injury."[54] This interpretation, while explaining the "as applied" language[55] of the majority in *Dombrowski,* limits the availability of immediate federal trial on the merits in the absence of a vagueness challenge[56] to allegations stating a substantial charge of such a groundless prosecution.[57]

[52] On the facts of *Dombrowski,* the federal forum would be immediately available at least where the petitioner attacks the good faith of the state prosecuting officials. In fact, the Court relied on the bad faith factor in finding that no construction of the statute by a state court would insure a cessation of prosecutorial abuses. *Id.* at 490. Thus, the Court may not deem abstention inappropriate in *all* cases where a claim is brought under the Civil Rights Act.

[53] Cameron v. Johnson, 381 U.S. 741, 754 (1965) (per curiam) (dissenting opinion).

[54] *Id.* at 755. The majority in a per curiam opinion had vacated a district court decision which refused to enjoin enforcement of a Mississippi anti-picketing statute. The statute had been challenged both on its face as an unconstitutionally broad regulation of speech and as applied for the purpose of discouraging civil rights activities. The cause was remanded to the district court for a determination of statutory validity in light of the *Dombrowski* decision. The district court had held the statute constitutional on its face, and further determined that it was not being applied to harass the petitioners in the exercise of their constitutional rights. Justice Black, joined by Justices Harlan and Stewart in dissent, interposed the objection that the majority of the Court in remanding the case apparently meant to indicate that *Dombrowski* "created a new rule authorizing federal courts to enjoin state officers from enforcing state laws even though clearly and narrowly drawn" within the state's constitutional power to regulate picketing. *Id.* at 747.

[55] See text accompanying note 47 *supra.*

[56] Mr. Justice White also believes that *Dombrowski* does not make abstention inappropriate in all cases where a statute is attacked as void on its face as violative of the first and fourteenth amendments but only where it is challenged as a vague regulation of freedom of expression and is not subject to "clarifying construction under the impact of one case." 381 U.S. at 756.

[57] In Cox v. Louisiana, 348 F.2d 750 (5th Cir. 1965), the Fifth Circuit relied on *Dombrowski* to support its belief that a "civil complaint asserting such an abuse of the prosecutorial function would state a claim under the Civil Rights Act . . . and justify injunctive relief." *Id.* at 752. Here the state, in order to harass the activities of a civil rights leader, had renewed criminal charges for conduct which the Supreme Court had decided on the merits was not a violation of the state law. The district court recognized that federal courts should not interfere with state court enforcement of local laws. However, if "a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass or punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperiled." *Ibid.*

In the same case, Mr. Justice Black, joined by two other dissenters, argued that *Dombrowski* requires still another interpretation. He reads the case as permitting avoidance of the abstention doctrine *only* where the state statutes are found unconstitutionally vague on their face. This interpretation does not permit the enforcement of a statute to be enjoined for unconstitutionality *as applied.* Rather, Justice Black argues that a showing of bad faith conduct on the part of state law enforcement officers which is aimed at harassment and holds no hope of ultimate success, permits a federal injunction directed only against the continued objectionable acts.[68] Apparently, under this interpretation abstention would prevent the federal courts from enjoining all enforcement of state statutes valid on their face even when state officers act unlawfully in enforcing such statutes.

Despite the ambiguities inherent in the decision, by limiting the traditional use of abstention *Dombrowski* represents a clear attempt to reach an accommodation between the interest of protecting first amendment rights and the interest of avoiding interference with state administration of its criminal law by holding that statutes void on their face are not necessarily void *in perpetuo.* Thus, the federal judgment on the merits will protect free expression from the inhibiting effects of vague statutes or the harassment of state prosecutorial abuses without denying the state courts an opportunity to save the statutes by subsequently rendering a constitutional interpretation of them or to continue good faith enforcement of valid statutes.

[68] Cameron v. Johnson, 381 U.S. 741, 748-49, 752 (1965) (dissenting opinion).