Fordham Law Review

Volume 34 | Issue 1 Article 3

1965

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Cover Page Footnote
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DOMBROWSKI v. PFISTER: FEDERAL INJUNCTIONS AGAINST STATE PROSECUTIONS IN CIVIL RIGHTS CASES—A NEW TREND IN FEDERAL-STATE JUDICIAL RELATIONS

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I. INTRODUCTION

"UNLESS local efforts are made more effective the federal government will have to assume primary responsibility for solving civil rights problems."[1] The preceding statement was made by a Professor of Law at the University of Texas with reference to the relationship between federal and state civil rights agencies. But it serves equally well to summarize a major problem which presently confronts the entire federal judiciary and one which is particularly acute in the federal courts of the South supervised by the Court of Appeals for the Fifth Circuit.

The general problem is that of achieving uniformity of practice among federal and state courts in the handling of questions involving the basic constitutional rights of individual litigants. This problem has been dramatized and enlarged during the past few years by the great number of cases which have arisen out of civil rights activities.

So long as the handling of their cases by state courts causes civil rights defendants and their counsel to believe that their rights will be better protected by federal judges, every effort will be made to get their cases before the federal courts.[2] The result will be, as it has been in the past, that federal courts, and particularly those in the Fifth Circuit, will find their calendars increasingly burdened with cases involving civil rights workers and demonstrators. Ideally, all state and federal judges would arrive at identical conclusions as to the nature and limits of the fundamental rights set forth in the Constitution and in the Supreme Court

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1. Witherspoon, Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process, 74 Yale L.J. 1171, 1173 (1965). (Footnote omitted.)

2. There are essentially three ways that a state court case involving civil rights can be brought into the federal courts: (1) removal of the case to the federal court pursuant to 28 U.S.C. § 1443 (1964); (2) petition for a federal writ of habeas corpus under 28 U.S.C. § 2241 (1964); and (3) a separate federal court action under the appropriate federal civil rights statutes, as in Rev. Stat. § 2007 (1875), 42 U.S.C. § 1971(d) (1964), to enjoin the action. The case upon which this article focuses, Dombrowski v. Pfister, 380 U.S. 479 (1965), falls within the third category. For a full discussion of categories (1) and (2), see 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, 842-912 (1965).

cases interpreting it. Unfortunately, without agreement on certain fundamental principles, this ideal cannot be achieved in our dual system of federal and state courts. And it never has been achieved.

First among these fundamental principles is the concept that the Supreme Court's interpretation of the Constitution is binding upon all courts of the land, federal or state. Unless there is acceptance of what the Supreme Court has written, there can be no unity of law under the Constitution.

Since the earliest days of the United States, a unified system of federal courts has co-existed with a separate and essentially independent court system in each of the states. Although the states are free, within the limits set by the Constitution, to have utterly disparate legal rules, the state courts have a duty to apply faithfully the constitutional principles set forth by the Supreme Court. The state courts, both trial and appellate, have seemingly failed to perform this duty in many of the numerous and varied civil rights cases which have come before them in recent years.

Although it is the proper function of appellate courts to resolve cases involving truly debatable constitutional issues, cases which are clear-cut as to the proper application of constitutional principles should be decided correctly at the trial level, or, at the very least, at the first level of appeal.

Because *Dombrowski v. Pfister*[3] required (1) a federal court injunction striking down three state criminal prosecutions, and (2) a full federal trial on the question of whether or not certain other prosecutions, threatened but not commenced, should also be enjoined, this recent Supreme Court decision threatens to place the jurisdictional relationship between federal and state courts upon a new footing, one designed to encourage state judges to see eye-to-eye with their federal counterparts on civil rights issues. Indeed, even under a narrow reading of the case, *Dombrowski* may substantially alter federal-state judicial relationships in civil rights cases. It will definitely require some new thinking on the part of both federal and state judges, for it imposes a duty upon the lower federal courts, in certain cases, either (1) to rule upon constitutional issues in state prosecutions before the state courts have made a ruling, or (2) to overturn state court decisions on such issues where the federal court's view of the law conflicts with that adopted by the state court.

Moreover, *Dombrowski* underscores the necessity for serious reconsideration of the doctrine of comity under which federal courts have traditionally declined to interfere with state judicial proceedings. Much

3. 380 U.S. 479 (1965). See note 2 supra.

of the vitality has been removed from *Douglas v. City of Jeannette*,[4] the leading case on federal-state judicial comity. And the reasoning of the majority in *Dombrowski* sheds new and important light upon the question of whether or not the federal courts have authority under the Civil Rights Act[5] to enjoin the continuation of unconstitutional state court proceedings.[6]

In the main, *Dombrowski* involves nothing more complex than a recognition that Congress meant what it said when it passed a statute which authorizes and requires the federal courts to protect "any citizen . . . or other person" from being deprived, under color of state law, "of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[7] However, since it is the first case in which the Supreme Court has held a federal civil rights statute to authorize federal court injunctions against state criminal proceedings, *Dombrowski* represents, in effect, a substantial delegation by the Supreme Court of its traditional function as the final and virtually the only federal arbiter of constitutional questions raised by state proceedings.[8] Whereas, in the past, practically all constitutional issues raised in state courts were ruled upon first by the state trial courts, then by the state appellate courts, and finally, if review was taken, by the United States Supreme Court, it now appears that, in certain cases involving actual or threatened state prosecutions challenged as violative of certain fundamental constitutional rights, constitutional challenge may be made in the federal courts by means of an action, brought under the federal civil rights statutes, seeking an injunction against the state prosecution.[9]

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4. 319 U.S. 157 (1943).

5. Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964). For the full text of this statute, see p. 97 infra.

6. See generally Note, 74 Harv. L. Rev. 726 (1961).

7. Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).

8. Removal cases, habeas corpus cases, cases involving other extraordinary writs such as mandamus and prohibition (which go to questions of jurisdiction), and injunction cases are the only ones in which constitutional questions raised by state proceedings can come before the lower federal courts. See note 2 supra.

9. Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1964); Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964); Rev. Stat. § 1980 (1875), 42 U.S.C. § 1985 (1964).

Section 1981 provides: "Equal rights under the law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Section 1985 reads as follows: "Conspiracy to interfere with civil rights. (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation,

II. Facts of the Case and Its Procedural Background

Southern Conference Educational Fund (SCEF) is an organization "active in fostering civil rights for Negroes in Louisiana and other States of the South."[10] From its main office in New Orleans, it conducted a program designed to promote civil rights for Negroes and to establish communication and understanding between Negro and white citizens. This program involved the sponsoring of public speakers, correspondence, and the publication and distribution of pamphlets, books, and a newspaper.[11] SCEF was a membership organization; as such, it derived a substantial portion of its funds from the contributions of members.

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or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to include by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

10. 380 U.S. at 482.

11. Brief for Appellants and Appellants-Intervenors, pp. 5-6, Dombrowski v. Pfister, 380 U.S. 479 (1965).

James Dombrowski was SCEF's Executive Director. Benjamin Smith and Bruce Waltzer, New Orleans attorneys, were very active as law partners in the field of civil rights, as part of a wide-ranging general practice.[12] Smith was Treasurer of SCEF. Both Smith and Waltzer were members of the National Lawyer's Guild, an association of lawyers which, among other things, was deeply concerned with and involved in the problem of civil rights for Southern Negroes.

On October 4, 1963, police officers arrested Dombrowski, Smith, and Waltzer under two Louisiana statutes commonly referred to as "anti-subversion laws." One was entitled "Subversive Activities and Communist Control Law";[13] the other was entitled "Communist Propaganda Control Law."[14] They were criminal statutes which, among other things, made it a felony for anyone remaining in the state longer than five days to fail to register as a member of a "communist front organization." The possible punishments for failure to register included a fine of 10,000 dollars and 10 years imprisonment. "Communist Front Organization" was defined by section 359(3) to include, *inter alia*, a "communist front organization."[15] That section also provided that "the fact that an organization has been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any Committee or Subcommittee of the United States Congress as a . . . communist front organization . . . or has been in any other way officially cited or identified . . . [by the named authorities] as a communist controlled organization, shall be considered presumptive evidence of the factual status of any such organization."[16] Section 390.6 authorized seizure and destruction on summary process of "all communist propaganda discovered in the state of Louisiana" in violation of the act.[17]

During the first week of October 1963, an interracial lawyers' conference was held in New Orleans, the first in the twentieth century. Smith and Waltzer were arrested during one of the sessions of the conference. Other official activities related to the arrests were described by Judge Wisdom of the Fifth Circuit as follows:

> At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files,

12. Id. at 6. Smith and Waltzer are, in fact, among the small handful of white lawyers in Mississippi and Louisiana who will handle civil rights cases.

13. La. Rev. Stat. Ann. §§ 14:358-374 (Supp. 1964).

14. La. Rev. Stat. Ann. §§ 14:390-390.8 (Supp. 1964).

15. La. Rev. Stat. Ann. § 14:359(3) (Supp. 1964).

16. Ibid.

17. La. Rev. Stat. Ann. § 14:390.6 (Supp. 1964).

membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from "racial agitation". An able, experienced, and independent-minded district judge of the Criminal District Court for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests.[18]

Thereafter, the warrants were summarily vacated upon the ground that " 'there are no facts whatsoever to justify this Court binding these three defendants over for trial . . .' "[19] and a motion to suppress the seized evidence was granted.

Despite the judicial action thus taken, Representative Pfister, Chairman of the Louisiana Joint Legislative Committee on Un-American Activities, publicly demanded enforcement of the anti-subversion laws against Dombrowski, Smith, Waltzer, and SCEF. One of the Joint Committee's functions is that of supervising enforcement of the Louisiana anti-subversion laws.

At this point, counsel for Dombrowski and SCEF hastened (very wisely, as it later turned out) to file a complaint and other papers in the local federal district court seeking, in essence, protection against what they alleged to be malicious, groundless, and unconstitutional harassment under color of statutes extraordinarily vague and unconstitutional on their face. The complaint was filed on November 12, 1963.

In this complaint, Dombrowski and SCEF sought: (1) a declaratory judgment; (2) an interlocutory injunction preventing further prosecution; and (3) a permanent injunction to the same effect—all upon the ground that (a) the anti-subversion laws were unconstitutional on their face and as applied to plaintiffs, and (b) those laws were also superseded by federal legislation covering the same subject matter.[20] Plaintiffs also stated a claim for permanent and interlocutory relief under the Federal Civil Rights Act,[21] by alleging, essentially, that the prosecutions commenced and threatened against them were undertaken not in good faith in the honest expectation of obtaining valid convictions, but maliciously and without probable cause as part of a conspiracy[22] engaged in for the

18. Dombrowski v. Pfister, 227 F. Supp. 556, 573 (E.D. La. 1964) (dissenting opinion). Judge Wisdom sat as a member of the three-judge district court.

19. Brief for Appellants and Appellants-Intervenors, p. 7, Dombrowski v. Pfister, 380 U.S. 479 (1965) (quoting Judge J. Bernard Cocke of the Criminal Court for the Parish of Orleans).

20. See Complaint No. 14019, Dombrowski v. Pfister, E.D. La. 1963.

21. Rev. Stat. §§ 1979-80 (1875), 42 U.S.C. §§ 1983, 1985 (1964).

22. An allegation of conspiracy is required by § 1985, but not by § 1983.

purpose of using the machinery of state criminal law administration to harass the plaintiffs, to prevent them from engaging in their occupations and conducting other activities, to prevent SCEF from doing business (for lack of its business records), and, generally, to discourage civil rights activity and association with the plaintiffs.[23]

Attached to the complaint were affidavits and a written offer of proof. The affidavits asserted the good character of the plaintiffs, the nature of their involvement in civil rights activities, and their freedom from any control by, or connection with, communism.[24] The offer of proof stated plaintiffs' willingness and ability to prove by witnesses and affidavits that the charges made and threatened against them were wholly without basis in fact, that the warrants were based upon willfully inaccurate affidavits, that the materials seized bore no possible relationship to any charge under the anti-subversion laws, that the defendants had publicly threatened plaintiffs with prosecution as subversives, that the purpose of the threatened prosecutions was to suppress civil rights activity, and that the sole and exclusive purpose of the Louisiana legislature in enacting the anti-subversion laws was to have them applied to individuals and organizations active on behalf of civil rights.[25]

On December 9, 1963, a three-judge district court was convened by the Chief Judge of the Fifth Circuit pursuant to 28 U.S.C. § 2281.[26] The panel consisted of Circuit Judge John Minor Wisdom and District Judges Frank Ellis and E. Gordon West. On November 18, 1963, Judge Wisdom

23. See Complaint No. 14019, Dombrowski v. Pfister, E.D. La. 1963.

24. Brief for Appellants and Appellants-Intervenors, p. 9 n.4, Dombrowski v. Pfister, 380 U.S. 479 (1965).

25. Id. p. 9 & n.4.

26. 28 U.S.C. § 2281 (1964) provides: "Injunction against enforcement of State statute; three-judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." By enacting this statute, Congress sought to insure that federal interference with the enforcement of state statutes by injunction would only be allowed after a full and adequate hearing. See Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930). Before the three-judge court can be convened, there must be a substantial question raised as to the constitutionality of the state statute or order. See Phillips v. United States, 312 U.S. 246 (1941). A district court judge may, however, grant a temporary restraining order which would be in force until the three-judge court has made its final determination. Cumberland Tel. & Tel. v. Louisiana Pub. Serv. Comm'n, 260 U.S. 212, 216 (1922).

It is further provided in 28 U.S.C. § 1253 (1964) that any order, granting or denying an injunction in a civil action required by any act of Congress to be heard and determined by a district court of three judges, may be appealed directly to the Supreme Court.

previously had issued a temporary restraining order against enforcement of the anti-subversion laws pending a ruling by the panel on the complaint and on plaintiffs' motion for an interlocutory injunction forbidding prosecution until trial on the merits. This order, entered immediately after a state grand jury was summoned in New Orleans to hear charges against the plaintiffs, was kept in effect by the panel.

The panel heard argument on December 9, 1963, as to the unconstitutionality on their face of the anti-subversion laws. Shortly thereafter, it ordered a hearing on the question of whether or not evidence should be admitted with respect to the constitutionality of the statutes as applied to plaintiffs. At the end of the hearing, a majority of the court, consisting of the two district judges, made an oral ruling to the effect that (a) the statutes were constitutional on their face and that, (b) assuming the facts alleged to be true, the complaint failed to state a claim for which relief could be be granted. The court set aside the restraining order, dismissed the complaint, and denied a motion for a stay of prosecution pending appeal from its rulings. Judge Wisdom dissented from each of these rulings.[27]

Thereafter, the panel filed written opinions. In the majority opinion by Judge Ellis, the two district judges abandoned their earlier ruling that the statutes were constitutional on their face and refused to decide the question.[28] This opinion is described as follows in the opinion of Justice Brennan, speaking for five members of the Court:

> The majority were of the view that the allegations, conceded to raise serious constitutional issues, did not present a case of threatened irreparable injury to federal rights which warranted cutting short the normal adjudication of constitutional defenses in the course of state criminal prosecutions; rather, the majority held, this was an appropriate case for abstention, since a possible narrowing construction by the state courts would avoid unnecessary decision of constitutional questions. In accordance with this view the court withdrew its initial determination that the statutes were not unconstitutional on their face. 227 F. Supp., at 562-563. Postponement of consideration of the federal issues until state prosecution and possible review here of adverse state determination was thought to be especially appropriate since the statutes concerned the State's "basic right of self-preservation" and the threatened prosecution was "imbued . . . with an aura of sedition or treason or acts designed to substitute a different form of local government by other than lawful means . . ."; federal court interference with enforcement of such statutes "truly . . . would be a massive emasculation of the last vestige of the dignity of soveriegnty." 227 F. Supp., at 559, 560.[29]

In his dissenting opinion below, Judge Wisdom characterized the ma-

27. Brief for Appellants and Appellants-Intervenors, p. 4, Dombrowski v. Pfister, 380 U.S. 479 (1965).

28. Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964).

29. 380 U.S. at 482-83. Justices Harlan and Clark dissented. Justices Black and Stewart took no part in the decision.

jority opinion as based upon "a sort of visceral feeling that somehow, if relief were granted, the Court would be impinging on States' Rights."[30]

Central to the reasoning of the district court majority, was the conclusion that, as the Supreme Court stated in *Douglas v. City of Jeannette*,[31] plaintiffs had failed to allege that they were

> threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.[32]

Soon after the district court vacated the restraining order issued by Judge Wisdom, the state grand jury in New Orleans, the activities of which had been held in abeyance by the order, returned a set of indictments against the individual plaintiffs.[33]

Although a state trial court had ordered the seized records suppressed as evidence, the records had not been returned at the time of argument in the Supreme Court because of an appeal taken by the state from the order of suppression. From the time of the seizure during the first week of October 1963 until February 16, 1965, SCEF was seriously hampered by the lack of virtually all of its records, and the firm of Smith and Waltzer apparently got along as best it could in the circumstances. Of course, the privacy of all of the seized papers was lost forever, for, even though the seizure was ruled illegal, there had been more than ample opportunity for copies to be made of them.

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30. Dombrowski v. Pfister, 227 F. Supp. 556, 570 (E.D. La. 1964) (dissenting opinion).

31. 319 U.S. 157 (1943).

32. Id. at 164.

33. These indictments were described by Justice Brennan as follows: "Each of the individual appellants was indicted for violating § 364(7) of the Subversive Activities and Communist Control Law by failing to register as a member of a Communist-front organization. Smith and Waltzer were indicted for failing to register as members 'of a Communist front organization known as the National Lawyers Guild, which said organization has been cited by committees and sub-committees of the United States Congress as a Communist front organization . . . .' Dombrowski and Smith were indicted for failing to register as members of 'a Communist front organization known as the Southern Conference Educational Fund, which said organization is essentially the same as the Southern Conference for Human Welfare, which said Southern Conference for Human Welfare [has] . . . been cited by the committees of the United States Congress as a Communist front organization . . . .' Dombrowski and Smith were also indicted for violating § 364(4), by acting as Executive Director and Treasurer respectively 'of a subversive organization, to wit, the Southern Conference Educational Fund, said organization being essentially the same as the Southern Conference for Human Welfare, which said organization has been cited by committees of the United States Congress as a Communist front organization . . . .'" 380 U.S. at 492-93. (Footnotes omitted.)

III. The Supreme Court Ruling: The Reasoning of Majority and Dissent

When the case came before the Supreme Court on appeal, it was by no means technically ripe for adjudication on the merits or for final disposition of any aspect other than the question of the adequacy of the complaint. The only ruling below was a simple dismissal for failure to state a claim, and all the Court *had* to decide was (1) whether or not a claim was stated, and (2) whether or not the claim, if stated, was of sufficient substance to warrant issuance of the interlocutory relief sought, *i.e.*, a temporary injunction forbidding prosecution until final determination of the federal litigation. The complaint presented two possible bases for the relief sought—one under the request for declaratory judgment as to the constitutionality of the statutes on their face and as applied, and another under the Civil Rights Act theory.[34] There was no absolute need to rule upon both, and the declaratory judgment path was by far the easier way out, since not only were the statutes extremely vague and broad, but also the Court had previously held unconstitutional a statute of the State of Washington under which the imposition of penalties upon public employees turned on an almost identically broad definition of "subversive organization."[35] However, the Court did not take the easy way out and simply conclude that a claim was stated in the complaint because it raised serious questions about the constitutionality of the statutes on their face and/or as applied.

The Court concluded that such a claim was stated *and* that the claim was not only substantial but also *valid* without further consideration or proof being necessary, at least, so far as the excessive vagueness of certain provisions was concerned.[36] Mr. Justice Brennan stated that "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes . . . ."[37] The Court found that the statute was too broad and vague in its definition of "subversive organization" and in its creation of a presumption as to the existence of a material factual element

34. In order to reverse the ruling below, the Court could have found a substantial claim stated either as to the unconstitutionality (on their face, or as applied, or both) of the statutes, or as to the existence of a conspiracy, as alleged, to deprive plaintiffs of their constitutional rights by instituting or threatening groundless prosecutions in bad faith.

35. Baggett v. Bullitt, 377 U.S. 360 (1964).

36. Thus, Dombrowski can perhaps be said to stand as authority for the proposition that federal courts may decide, on appropriate interlocutory review, any question on the merits of the case as to which all pertinent facts are contained in the record. Here, the court ruled that certain provisions in the statutes involved were incorrigibly vague and, in effect, that further proof beyond the text of the statutes was unnecessary.

37. 380 U.S. at 491.

of a crime[38] without the presumption being arrived at according to the minimum procedural safeguards established in *Joint Anti-Fascist Refugee Comm. v. McGrath*.[39] And the constitutionality of other provisions of the two statutes under which prosecution was threatened would have to be decided by the court below, without delay prompted by deference to the state courts under the doctrine of "abstention."

Furthermore, the Court did not limit its consideration or that of the court below to the constitutionality of the state statutes. Justice Brennan's opinion went, from the beginning, straight to the problem of whether or not a claim was stated under 42 U.S.C. § 1983[40] which would warrant both a temporary injunction against the state prosecution and a hearing on the merits of the conspiracy charges. On this question, the Court concluded that a substantial claim had been stated and that "special circumstances" existed in the allegations of the complaint and in the facts of the case which constituted a sufficient demonstration of threatened irreparable injury (to fundamental constitutional rights) "to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution."[41] Therefore, this case was regarded as falling within an exception to the general rule of comity, stated in *Douglas v. City of Jeannette*,[42] against federal court interference with

38. The statutes made it a felony for anyone belonging to a "communist front organization" to remain in Louisiana for longer than five days without registering as a member of such an organization. Thus, one element of this felony was membership in one of certain organizations and another element was the identity of such organizations as "communist front organizations." The statutes created a presumption that an organization was, in fact, a proscribed organization for purposes of conviction under the statute if it "has been in any . . . way officially cited or identified . . . as a communist controlled organization" by (1) the Attorney General of the United States, (2) the Subversive Activities Control Board of the United States, or (3) any committee or subcommittee of the United States Congress. La. Rev. Stat. Ann. § 14:390.1(2) (Supp. 1964).

39. 341 U.S. 123 (1951). The Court held that any finding by an administrative agency of the federal government of disloyalty or of subversiveness cannot be arbitrary or contrary to known facts. Id. at 136. In considering due process requirements, Mr. Justice Frankfurter, in his concurring opinion, noted that such findings must meet the fundamental requirements of due process, i.e., those charged must be given appropriate notice and an opportunity to be heard. Id. at 161. Mr. Justice Jackson, also concurring, stated: "To promulgate with force of law a conclusive finding of disloyalty, without a hearing at some stage before such finding becomes final, is a denial of due process of law." Id. at 186. (Emphasis omitted.)

40. Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964). For the text of this statute and a detailed discussion of it, see pp. 97-103 infra.

41. 380 U.S. at 485. (Footnote omitted.)

42. 319 U.S. 157 (1943). In that case, the plaintiffs, members of the Jehovah's Witness sect, sought to restrain the city from prosecuting them for violating a city ordinance which prohibited Sunday solicitation. The plaintiffs claimed that the ordinance violated the constitutional guarantees of free speech, press, and religion. The Supreme Court held that, while the federal district court had jurisdiction to hear and decide the question of the constitu-

state court proceedings.[43] But how great an exception? How much of the general rule is left after the exception established in this case is taken out?

Whether the Supreme Court had chosen the statutory route or the Civil Rights Act conspiracy route to its decision, instead of dealing with both, it would have had to come to grips with the basic question of judicial federalism which the district court's lifting of the temporary stay made inevitable, *i.e.*, whether or not a temporary injunction could and should be issued, on the facts of this case, enjoining the state prosecutions commenced and threatened, pending final determination of the claims stated in the federal complaint. When this case was brought up for interlocutory review, the court had to consider the circumstances under which a federal court may permanently enjoin a state prosecution, since a temporary injunction could not be issued unless a permanent injunction was at least a reasonable possibility. As has been stated, Justice Brennan's opinion went directly to this question at the outset, giving it a place of prominence in the reasoning behind the Court's ruling.

Since the ruling below involved dismissal of the complaint and since, for purposes of such a ruling, all allegations must be regarded as true, the charges in the complaint, as the Court chose to characterize them, become extremely important as the sole "factual" basis for issuance or denial of the injunctive relief requested. In the first paragraph of the majority opinion, Justice Brennan described the alleged conspiracy in violation of section 1983 as follows:

> Supported by affidavits and a written offer of proof, the complaint . . . alleges that the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana.[44]

In Section I of the opinion, which focused specifically on the question

tionality of the ordinance, an injunction could not be issued since the plaintiffs had failed to state a claim in equity, because there was no showing that they would suffer irreparable harm. "[T]he arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' " Id. at 163-64. The Court, in refusing to grant injunctive relief in this case, noted that "no person is immune from prosecution *in good faith* for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, 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. (Emphasis added.)

43. 380 U.S. at 485-86.

44. Id. at 482.

of the injunctive relief, Mr. Justice Brennan provided the following characterizations:

> [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination.[45]

Further, the opinion referred to the fact that "appellants' allegations and offers of proof outline the chilling effect on free expression of prosecutions initiated and threatened in this case"[46] and to the allegation that potential members of and contributors to SCEF were frightened off by the prosecutions.[47] The paralytic effect upon SCEF of the seizure of its records was considered an important allegation of actual and threatened injury.[48] Also regarded as significant was the allegation that, in the circumstances, adjudication of the state prosecutions through state criminal procedures would not adequately or completely protect all of the federal rights which the prosecutions threatened, since long delays in adjudication, limiting state court rulings, and the threat of other prosecutions under sections of the anti-subversion laws not yet invoked would (or could) create the effect of putting SCEF out of business locally and severely punishing the individual defendants regardless of the ultimate outcome of the case.[49] But considered most important, for purposes of the claim based on the Civil Rights Act, was the charge that the prosecutions threatened and commenced were utterly groundless and brought in bad faith for the purpose of punishing plaintiffs for their advocacy of equal civil rights for Negroes.[50]

Since the principle of *Douglas v. City of Jeannette*[51] formed the basis

45. Id. at 485-86.

46. Id. at 487.

47. Id. at 488.

48. Id. at 488-89.

49. Id. at 485-87.

50. "First, appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities. 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. For an interpretation rendering the statute inapplicable to SCEF would merely mean that appellants might ultimately prevail in the state courts. It would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities, as appellees allegedly are doing and plan to continue to do." 380 U.S. at 490. (Citations omitted.) See Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

51. 319 U.S. 157 (1943).

of the decision below, the specific language used by Justice Brennan in bringing *Dombrowski* within a "special circumstances" exception is essential to an understanding of the new concept of judicial federalism upon which the Court based its treatment of the broad problem involved in the case: Under what circumstances should federal courts enjoin state prosecutions?

Mr. Justice Brennan's brief discussion of "federal injunctions against state criminal prosecutions"[52] is extremely interesting, for, under the familiar guise of providing nothing more than a statement of the law established by earlier cases, the majority opinion appears, in reality, to state at least the beginnings of a dramatic new synthesis which, if followed, will undoubtedly have a profound effect upon the relationship between the federal and state judicial systems and, ultimately, upon the understanding and application of constitutional principles by lower state courts throughout America.

It begins with *Ex parte Young*,[53] "the fountainhead of federal injunctions against state prosecutions,"[54] in which the Court stated that the federal courts would be justified in exercising their power to enjoin state proceedings 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 . . . ."[55] Clearly, strict application of the principle thus stated would permit federal court adjudication of the constitutionality of *any* questionable state statute at the instance of anyone threatened with its application. Perhaps the spectre of that possibility is what led the Supreme Court after *Ex parte Young*, as Mr. Justice Brennan pointed out, to temper "the exercise of equitable power" in light of "considerations of federalism" and recognition "that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework."[56] The important thing about the words last quoted is that they can be taken to imply that it is *not* "inconsistent with our federal framework" for the federal courts to interfere with *bad*-faith misuse of state criminal laws and the machinery of their administration. Indeed, if it is assumed, as, of course, it must be, that the Court still has a healthy respect for "considerations of federalism," then the ruling in *Dombrowski* clearly indicates that the Court does not regard a federal temporary injunction against an allegedly groundless and malicious state prosecution as being inconsistent with such considerations.

52. 380 U.S. at 483.
53. 209 U.S. 123 (1908).
54. 380 U.S. at 483.
55. 209 U.S. at 156.
56. 380 U.S. at 484.

The discussion then turned to the *Douglas* case and the familiar judicial assumption "that state courts and prosecutors will observe constitutional limitations as expounded by this Court . . . ."[57] The Court's language in presenting this common doctrine is quite interesting, for it qualifies the usual statement by stating, side-by-side with it, a related concept which considerably modifies the first, *i.e.*, "that the *mere possibility* of erroneous initial application of constitutional standards will *usually* not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."[58] It is quite possible that the language just quoted was very carefully drafted and very consciously inserted in the opinion for the purpose of underscoring the fact that the assumption of state court ability and willingness to study, understand and apply constitutional principles in the spirit of the opinions establishing them is not an absolute rule to be applied blindly by the lower federal courts without regard to the circumstances in which the assumption is invoked. It would appear from the Court's language that, where there is more than a "mere possibility" of failure on the part of the state courts to follow the Constitution and where there are facts alleged and "special circumstances" involved which make the case, like *Dombrowski*, an "unusual" one, the assumption must be put aside in the interest of making certain that clear constitutional principles relating to fundamental personal rights are applied at the outset of state action rather than years later.

Mr. Justice Brennan's explanation of *Douglas* supports the interpretation just suggested. In that case, he explained, the Court refused to enjoin application of a city ordinance to certain religious solicitation because there was no need for an injunction, since such application of that ordinance was declared unconstitutional by another Supreme Court decision on the same day, *Murdock v. Pennsylvania*,[59] and the Court simply could not believe that the responsible state officials would fail to obey this related decision without an injunction being issued.[60] In any case, the plaintiffs in *Douglas* failed to allege that the state officials would not obey the related *Murdock* ruling.[61] In other words, *Douglas* was simply a case in which the circumstances indicated quite clearly to the Court that a federal injunction was not needed to protect fundamental constitutional rights from "irreparable injury." There were "no special circumstances to warrant cutting short the normal adjudication of con-

57. Ibid.
58. Id. at 484-85. (Emphasis added.)
59. 319 U.S. 105 (1943).
60. 380 U.S. at 485.
61. Ibid.

stitutional defenses in the course of a criminal prosecution."[62] And that is all the Court meant when it referred to the fact that plaintiffs had failed to show that they were

"threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court . . . by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."[63]

These words were not intended to foreclose the federal courts from "withdrawing determination of guilt from the state courts" where the necessity for such action has been demonstrated, as in *Dombrowski*, by allegations which "depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights."[64] All of this was far from clear before Mr. Justice Brennan explained it. Most federal courts and counsel for both sides in civil rights litigation tended to regard *Douglas* as a much more formidable obstacle than it now appears to be.[65]

But what kind of "special circumstances" must be alleged to overcome the *Douglas* assumption and to justify both a federal trial on the merits of a Civil Rights Act conspiracy claim and a temporary injunction to preserve federal jurisdiction of the matter? Clearly, the allegations in the *Dombrowski* complaint were sufficient, at least in the procedural

62. Id. at 485. (Footnote omitted.)

63. Id. at 485, quoting from Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943).

64. Id. at 485.

65. See Baines v. City of Danville, 337 F.2d 579, 586-96 (4th Cir. 1964), where the court places heavy reliance in its opinion upon (1) the "principles of comity exemplified by Douglas v. City of Jeannette . . ." (Id. at 593 (Citation omitted.)), and (2) the fact that "in every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance" (Id. at 591. (Footnote omitted.)) in reaching the conclusion that 42 U.S.C. § 1983 does not constitute a statutory exception to 28 U.S.C. § 2283. Because of its emphasis upon the existence of an exception to the policy of Douglas, where fundamental rights are jeopardized, Dombrowski tends to remove the underpinnings from Baines on both points. Cf. Dilworth v. Riner, 343 F.2d 226, 231-32 (5th Cir. 1965), a case under Title II (public accommodations) of the Civil Rights Act of 1964, in which the court refused to apply Douglas, citing Fay v. Noia, 372 U.S. 391, 425 (1963) and United States v. Wood, 295 F.2d 772, 779 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962), for the following statement: "[T]he policy against interference with state criminal proceedings is simply a rule of comity, not of statutory derivation and it is '* * * not a rule distributing power as between the state and federal courts * * *.'"

The Dilworth court further said: "It is a rule to which there may be exceptions based on genuine and irretrievable damage," citing Denton v. City of Carrollton, 235 F.2d 481 (5th Cir. 1956), and Morrison v. Davis, 252 F.2d 102 (5th Cir.), cert. denied, 356 U.S. 968 (1958), as examples of this proposition. Id. at 232.

circumstances. In his dissenting opinion (Mr. Justice Clark, concurring), Mr. Justice Harlan saw the assumption of state court competence in the constitutional area as having been supplanted in this case by an "underlying" and "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."[66] There is no language in the majority opinion to support that conclusion, as Mr. Justice Harlan indicated, justifiable though such a contervailing assumption might be with respect to some states and certain kinds of cases. But there is, as has been shown, language stating quite clearly that, where special circumstances warrant, the normal adjudication of constitutional defenses in the course of a state criminal prosecution may be cut short by federal proceedings under 42 U.S.C. § 1983.[67]

A brief summary of significant elements involved in the *Dombrowski* case should prove useful for purposes of analysis and in predicting the cases in which similar relief can be expected to be granted in the future. Such elements might include the following: (1) a statute alleged, with substantial basis, to be unconstitutional either on its face or as applied; (2) a statute purporting to regulate activities within the general purview of the first amendment and involving serious penalties; (3) prosecution (or other injurious action) strongly threatened against the plaintiffs, the reasonably likely effect of which was to discourage others from associating with plaintiffs and from joining in their cause; (4) seizure of records, the absence of which imposed a serious hardship upon the individual plaintiffs and threatened to put an end to the plaintiff association's activities in the area of speech and association on behalf of certain beliefs and programs; (5) a charge that the prosecutions threatened and commenced were utterly groundless and commenced solely for the purpose of harassing plaintiffs, punishing them for engaging in constitutionally protected activities, and putting an end to their advocacy of locally unpopular views; and (6) federal action commenced after state prosecution was publicly threatened but before prosecutions were actually commenced by indictment.

In connection with the foregoing elements and with the Court's reasoning in finding this case to involve "special circumstances" taking it out of the *Douglas* rule, it is important to note that a threat of "irreparable injury" was found to exist in the circumstances of *Dombrowski* as justification for an injunction against the state proceedings and that this finding was based upon a claim ("not clearly frivolous"[68]) that "a

66. 380 U.S. at 499 (dissenting opinion).
67. Id. at 485.
68. Id. at 490.

substantial loss or impairment of freedoms of expression"[69] was being imposed upon the plaintiffs. Thus, the Court chose to ground its requirement of an injunction squarely upon a strong policy of zealous and scrupulous protection of those fundamental freedoms which it has repeatedly characterized as essential to the maintenance of individual integrity and the free flow of ideas in a democratic society. In line with this policy, Mr. Justice Brennan stated the conclusion of the Court that, in cases involving "criminal prosecution under a statute regulating expression,"[70] where the statute is alleged to have too broad a sweep in its language or to be threatened with unconstitutional application, "the assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . ."[71] This language and the discussion from which it is taken would appear to betoken or to emphasize a substantial shift of policy from the days of *Douglas*, involving immediate rather than delayed protection of fundamental constitutional rights through action by the federal judiciary. The thrust of such a new policy, if it exists, would be in the direction of assertive guarding of fundamental rights by the federal courts and, to the degree necessary, away from the practice of avoiding decision of constitutional questions if such avoidance can possibly be accomplished. Indeed, as the Court stated, "[W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation."[72] It is quite possible that the *Dombrowski* opinion will prove in days to come to be one of a series of opinions involving a mandate of sorts to the lower federal courts in an ever-widening area of constitutional protection. There appears definitely to be operative a new recognition of the fact that serious and irreparable injury is often caused to helpless litigants and to the rights of all by the ponderous and painfully slow operation of the machinery of justice.

It is clear from the dissent that Justices Harlan and Clark view this decision as pointing toward a new policy for the federal courts.

> The basic holding in this case marks a significant departure from a wise procedural principle designed to spare our federal system from premature federal judicial interference with state statutes or proceedings challenged on federal constitutional grounds.[73]

The dissenting opinion by Mr. Justice Harlan rests upon the following conclusions: (1) there is no "incompatibility between the absten-

69. Id. at 486.
70. Ibid.
71. Ibid.
72. Id. at 487.
73. Id. at 498 (dissenting opinion).

tion doctrine and the full vindication of constitutionally protected rights . . .";[74] (2) the establishment of federal court supervision over the commencement of certain state prosecutions will result in "premature federal judicial interference with state statutes or proceedings challenged on federal constitutional grounds,"[75] thereby threatening the continued maintenance of "federal-state court relationships in good working order"[76] and "paralyzing . . . state criminal processes";[77] (3) the holding of the Court establishes that plaintiffs seeking to invoke the *Dombrowski* doctrine "need not allege the particular conduct which they deem to be protected"[78] by the Constitution; (4) the Court should not have struck down the statutory sections it did without permitting them to be narrowly construed by the state courts;[79] and (5) the majority holding requires a preliminary federal court trial of state criminal charges in cases to which it applies.[80]

With respect to point (1), it is clear that Justices Harlan and Clark simply disagreed with the conclusion of the majority that in certain cases delay in final adjudication can result in the destruction of constitutional rights regardless of the ultimate outcome, since the threat or existence of a prosecution imposes a serious stigma and, in some circumstances, a substantial threat to persons other than those accused. On point (3), the dissenting Justices are clearly wrong, since the plaintiffs in *Dombrowski* had stated explicitly the first amendment activities with which the state prosecution had seriously interfered, *i.e.*, publication of a newspaper, solicitation of funds, speech-making, etc. As to point (4), the majority simply concluded that those provisions which it struck down were so hopelessly vague that no room existed for a reasonable narrowing construction.

Points (2) and (5) relate directly to the problem of under what circumstances federal court interference with state prosecutions is justified. The Harlan-Clark position appears to be that the federal courts should never interfere with a state prosecution, because to do so would upset the delicate balance of judicial machinery which presently obtains between federal and state courts and, in so doing, would paralyze the state courts in their administration of criminal laws. The position of the majority, however, seems to be premised upon the notion that the state judicial systems are entitled to operate free from federal interfer-

74. Ibid.
75. Ibid.
76. Ibid.
77. Id. at 499 (dissenting opinion).
78. Id. at 500 (dissenting opinion).
79. Id. at 501 (dissenting opinion).
80. Id. at 502 (dissenting opinion).

ence only so long as they provide adequate protection to constitutional rights in the cases which come before them. If they neglect such rights, then in certain areas the Federal Constitution requires that state court independence be limited. This is so because the policies of the Constitution must always prevail over any presumed state prerogative if the basic framework of our constitutional government is to remain intact.[81] In *Dombrowski*, the Court simply pointed out that some constitutional questions must be ruled upon promptly and that, where there is a substantial charge that a prosecution is threatened maliciously and without probable cause in violation of constitutional rights, section 1983 provides a federal forum for trial of those issues.[82]

The instant Court indicated quite clearly that the state courts do not have an absolute right, in the name of state court independence, to ignore the Constitution or to be less than zealous in enforcing it. And it is unquestionably the proper function of the Supreme Court to define what constitutes appropriately zealous enforcement.[83] The Harlan-Clark position would tend to allow state prosecutors to invoke the prerogative or privilege of basic state court autonomy, at the trial and lower court levels, to the detriment of fundamental constitutional rights. This the Court refused to permit.

So far as the "evil" of federal court interference with state proceedings is concerned, it should be noted that, under the doctrine of *Dombrowski* stated at its broadest, there would be relatively little federal interference with state court proceedings if the state courts, including trial courts, were to undertake the protection of constitutional rights in the spirit of recent Supreme Court decisions.[84] It is only when state

81. See note 65 supra.

82. See Note, Section 1983: A Civil Remedy for the Protection of Civil Rights, 39 N.Y.U.L. Rev. 839 (1964), in which the author points out that the legislative purpose behind the enactment of § 1983 "was to open the federal courts to Negroes denied equality, even at the expense of state power and independence," citing Cong. Globe, 42d Cong., 1st Sess. 376 (remarks of Congressman Lowe), 459 (remarks of Congressman Coburn), 514 (1871) (remarks of Congressman Poland). "Congress' purpose in enacting the section was to alter the balance of power between state and federal authorities so that federal courts could more effectively protect federal rights." Id. at 842. One of the primary arguments for passage of the Civil Rights Act of 1871 was "that the federal government was unworthy of existence if it could not protect its citizens' fundamental rights." Id. at 842. (Footnote omitted.)

83. In Dombrowski, the state courts had not ruled promptly enough upon the limits of the Louisiana statutes regulating freedom of association. Appropriately zealous enforcement of the first amendment, in the Supreme Court's view, would have involved a limiting ruling either when the arrest warrants were applied for or soon after the individual plaintiffs were arrested and their records seized.

84. Under Dombrowski, if a § 1983 action is brought to enjoin a state prosecution, the state court involved need only rule promptly and correctly upon the scope of the statute

courts fail to perform their duties under the Constitution, including the duty to teach restraint to overzealous prosecutors,[85] that the federal courts can act. The Civil Rights Act cannot be invoked if highly questionable prosecutions, such as those involved in *Dombrowski*, are not threatened or begun. It is not the Supreme Court but the malfunction and misuse of state judicial systems that make federal intervention necessary.

IV. Possible Limitations of the Holding in Dombrowski

Attempts to limit the holding in *Dombrowski* and to restrict the policy which it appears to embody can be expected to focus primarily upon two aspects of the case: (1) the fact that it involved statutes attacked as, and held to be, unconstitutional on their face, and (2) the fact that the federal action was commenced prior to the formal institution of state criminal proceedings.

With respect to the first aspect, the following language of the Court is particularly pertinent:

> We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas v. City of Jeannette*, statutes are justifiably attacked on their face as abridging free expression, *or as applied for the purpose of discouraging protected activities.*[86]

It is clear that the disjunctive phrasing employed above was quite consciously and purposefully drafted, for there were two parts to the "holding" of the case: one to the effect that certain provisions of the anti-subversive law were unconstitutional "on their face," and another requiring a trial on the merits of the claim under section 1983 that other statutory provisions were about to be unconstitutionally applied.

The Court had before it some statutory provisions which were unusually vague by any standards in their definition of criminal conduct, and those it summarily struck down as unconstitutionally vague "on their face." But the Court also had before it questions involving the *application* of provisions not quite so vague for allegedly improper purposes and to the alleged serious injury of various constitutionally protected

involved and, if necessary, upon the existence of "probable cause" for the prosecution or the existence of "bad faith." If it does this, no federal interference will be required.

85. If the state judge supervising the grand jury in Dombrowski had refused to permit the return of a true bill either upon the ground that the statutory provisions relied upon were unconstitutionally vague or upon the ground that there was insufficient evidence presented to support an indictment, federal court action might not have been necessary. There are indications in the facts of Dombrowski that the state court may have applied an unduly permissive standard of "probable cause" in permitting return of the indictment. Witness the ruling of the state court judge in quashing the arrest warrants, for example.

86. 380 U.S. at 489-90. (Emphasis added.)

rights. As to the statutory application issues raised by the claim under section 1983, the Court held that those, too, were worthy of determination at a full trial and sufficiently substantial to justify an interlocutory injunction.[87] There is no basis for limiting the application of *Dombrowski* to one of its two separate holdings.

The fact that the federal action was begun before state indictments were returned provides a more reasonably arguable ground for limiting the holding and policy of the case.[88] But the arguments for limitation appear to run counter to the reasoning of the Court, for such arguments would make individual constitutional rights vary with the highly fortuitous circumstance of whether or not the private party was able to get his papers filed in the federal court before the prosecution could write out an information or present the case to a grand jury. The unfortunate defendant whose counsel was not immediately aware of the possibility of a federal action, or who simply lost the race despite the quickest possible action of alert counsel, would find his case grinding its way through the state courts. All of the "irreparable injuries" to constitutional rights, which the Court stated in *Dombrowski* to be unconscionable in light of the "transcendent value to all society" of "constitutionally protected expression," would occur without the immediate redress stated by Mr. Justice Brennan to be absolutely essential to the vitality of the first amendment.[89]

It is almost inconceivable that the Court, after having so recently decided *Dombrowski* on the ground that fundamental rights require immediate determination where delay will result in their violation regardless of the ultimate result, would vitiate that rationale by holding that the rights of those who win the race to court are deserving of better protection than the rights of those who lose the race. In view of the fact that the Court *did* require the issuance of an injunction against a prosecution which had *in fact* commenced, albeit through a procedural fluke, it would require an awkward kind of judicial back-pedaling for the Court subsequently to disavow the issuance of injunctions against

87. Id. at 490.

88. See Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964). The court distinguished this case from others, where no prosecutions had been commenced and "in order to obtain judicial determination of the constitutionality of the statutes, the plaintiffs must subject themselves to arrest and prosecution in the state courts . . . ." by noting that, "here, an injunction is sought against the further prosecution of actual, pending cases in the state court . . . ." Id. at 592. Negro appellants had sought injunctions against their prosecution for violation of a state court injunction and a city ordinance, both of which limited the manner of appellant's demonstrations. The claim that the injunction and ordinance were unconstitutional was not reached by the court, which declined to enjoin pending state criminal proceedings under principles of comity and under § 2283. See note 65 supra.

89. 380 U.S. at 486.

state prosecutions pursuant to section 1983, for it would be forbidding the lower courts to do what it has, in effect, already done.

In this connection, it is well to consider whether the statement in the second footnote to the decision[90] that these indictments did not commence "proceedings," can (or should) be accepted at face value. It is clear that, when the Supreme Court decided *Dombrowski*, the State of Louisiana was doing *something* to Dombrowski and the other plaintiffs under color of two indictments. And whatever that something was, the Supreme Court ruling put an end to it by declaring the indictments null and void. The State of Louisiana, the federal plaintiffs, and all three judges in the district court below regarded these state prosecutions as criminal proceedings in the courts of Louisiana, and most people, lawyers as well as laymen, would probably share that view. It would seem, therefore, that the reasoning of footnote 2 is, at least, questionable. Viewed realistically and from the point of view of common understanding, there *were* criminal proceedings involved in *Dombrowski*, and the Supreme Court *did* forbid the State of Louisiana to continue them by instructing the court below to issue "a decree restraining prosecution of the pending indictments . . . ."[91]

The considerations which militate against denying power to the federal courts under section 1983 to enjoin unconstitutional state court proceedings commenced immediately prior to federal actions would not apply with the same force to a rule which regarded the commencement of the state trial, rather than the date of the charging document, as marking the end of the defendant's opportunity to commence federal proceedings. Such a rule would be less arbitrary and more equitable than one based upon the date of indictment or information, because it would substantially eliminate the "race of diligence" problem and provide defendant a reasonable time within which to seek federal relief. Furthermore, it would not require any serious conflict with state judicial procedures, since little judicial action is normally required between charge and trial of a criminal case. Indeed, where criminal proceedings are commenced by information rather than indictment, prior to trial no state judicial action is usually required at all, except for the setting of bail. It should be noted, however, that the language and apparent legislative purpose of section 1983 contain nothing to support such a limitation of its application.[92]

90. Id. at 484 n.2.

91. Id. at 497.

92. See note 82 supra. Cf. Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950), and pp. 100-02 infra, in which the court did not attach any significance, for purposes of § 1983, to the fact that state criminal proceedings were in progress when the federal action was begun.

Beyond the two limiting factors previously discussed, the question is bound to arise as to whether the *Dombrowski* doctrine is limited to first amendment cases or whether other "fundamental" rights can properly form the basis for similar relief—*e.g.*, the right to equal protection of the laws.

Extended discussion of this question so soon after the decision would simply compound pure speculation. It would seem quite likely, however, that at least *some* fundamental rights beyond the first amendment will be held to fall within the *Dombrowski* rationale. The selection of such rights and the pace at which they are selected will probably be based upon factors such as the following: (1) the degree of importance that the Court is willing to attribute to the right; (2) the degree to which the right shares, with those of the first amendment, a susceptibility of irreparable injury through delay in adjudication; (3) the likelihood of greatly increased friction between state and federal courts if the right were included; (4) the zeal and speed with which the Court decides to attack the overall problem of the injustice caused by judicial delay in criminal cases.

V. Some Relevant Considerations and Implications of the Decision

Whatever the limits of its holding may be, the ruling in *Dombrowski* is quite likely to result in a substantial alteration of existing federal-state judicial relationships, for this case significantly broadens the power of the lower federal courts to supervise the handling of fundamental constitutional questions by state courts, and it may well foreshadow further broadening of such powers in cases to come. At the same time, it imposes upon those federal courts a duty to exercise these newly-broadened (or newly-created) powers promptly and boldly, through the issuance of injunctions where basic individual rights will suffer serious injury through delay in adjudication. In cases where first amendment rights are threatened with irreparable damage either through enforcement of a criminal statute reasonably challenged as unduly vague, or through improper application of a statute so as to stigmatize constitutionally protected acts, the lower federal courts now appear to be under a mandate to provide a prompt forum for the definition and protection of the rights placed at issue in the circumstances of each case.

The state courts will not be precluded from acting. They will be perfectly free to exercise all of the judicial powers that they have always exercised, provided that the limits imposed by the Constitution upon the prosecuting authorities are adequately set forth prior to or soon after the commencement of state prosecutions. Hereafter, the state courts, if

they do not want to surrender initial jurisdiction over certain constitutional questions entirely to the federal courts, will be required to act in some cases and upon some statutes with a promptness which will undoubtedly conflict with the habits and, perhaps, with the personal beliefs of some of their judges.

The pressure which the implications of *Dombrowski* place upon the state courts is substantive as well as temporal, for the duty imposed upon the federal courts goes beyond the mere requirement of seeing that either they, or the state courts, rule promptly upon certain constitutional questions. *Dombrowski* appears to require not only that the lower federal courts insure prompt adjudication, but also that they supervise state court rulings to insure that the constitutional issues decided are decided correctly (in the eyes of the federal bench), as well as promptly. This is strong and dramatic stuff in the history of judicial federalism, and it threatens to change, at least for a time, the balance—if not the essential structure—of the federal-state judicial framework. But such implied pressure is unmistakably present in Justice Brennan's opinion, and it is likely to be recognized before long by federal and state judges alike.

This new judicial delegation to the federal district and circuit courts, of a portion of the Supreme Court's traditional supervisory power over state court administration of basic constitutional issues, is perhaps the natural product of an increasingly crushing calendar, an ever-mounting concern with the practical protection of basic personal freedoms, and a reluctant, if unstated, admission that a number of state judicial systems throughout the country have been passing on to the Court, in an unjustifiable number of cases, the task of deciding fairly clear constitutional questions. All who have maintained even a casual familiarity with constitutional decisions by the Court in recent years know that it has been demonstrating increasing concern with the problem of insuring that personal rights are protected through prompt and realistic procedures for all citizens—regardless of race, religion, economic status, geographic location, or some other rationally irrelevant factor. Long-standing judicial fictions and hitherto untouchable problems have been re-examined in light of practical realities, and old rules have been changed when the purposes that they were designed to achieve were not satisfactorily accomplished. In the *Dombrowski* case itself, the previously strong presumption of state court willingness to examine Supreme Court decisions on constitutional questions with an open mind and to follow those decisions faithfully has been vigorously shaken, but not uprooted.

In recent years, the Court has seen fit each term, in a significant number of constitutional cases, to reverse state court decisions with brief reference, often one sentence, to the decision or decisions which

clearly dispose of the issue on appeal so far as the Court is concerned.[93] It is, at least, reasonable to suppose that the members of the Court feel that such brief handling of decisions, aside from constituting a departure from historical tradition, is unfair to litigants who have presented serious constitutional questions and who are entitled to have the law applied to their cases with at least a modest measure of judicial reasoning.

But the facts of the Court's calendar must be faced, and the unfortunate result has been that reasoning simply could not be provided in many cases in which the court below was clearly wrong in its interpretation of recent Supreme Court opinions—*e.g.*, the many and varied "sit-in" and "freedom ride" cases of recent years. The *Dombrowski* opinion should provide state courts with the motivation for interpreting properly Supreme Court decisions on constitutional issues, for, if they err in the future as they sometimes have in the past, they may find themselves reversed by highly reluctant federal district courts exercising the jurisdiction conferred upon them by section 1983 and related statutes. Thus, the reasoning that has often been lacking stands to be provided by one court or another.

It may be asked precisely where in the opinion the Court indicated that the lower federal courts now have a duty to supervise decisions rendered by state courts on issues falling within the ambit of *Dombrowski*. First, the Court held that the doctrine of "abstention" did not apply to "cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."[94] The Court later stated:

> The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.[95]

Clearly, the words just quoted impose a supervisory role upon the lower

93. 1964 Term: e.g., Walker v. Georgia, 381 U.S. 355 (1965) (per curiam); Parrot v. City of Tallahassee, 381 U.S. 129 (1965) (per curiam); Callendor v. Florida, 380 U.S. 519 (1965) (per curiam); Thomas v. Mississippi, 380 U.S. 524 (1965) (per curiam); Abernathy v. Alabama, 380 U.S. 447 (1965) (per curiam); McKinnie v. Tennessee, 380 U.S. 449 (1965) (per curiam); Blow v. North Carolina, 379 U.S. 684 (1965) (per curiam).

1963 Term: e.g., Mitchell v. City of Charleston, 378 U.S. 551 (1964) (per curiam); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam); Henry v. City of Rock Hill, 376 U.S. 776 (1964) (per curiam); Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam); Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) (per curiam).

94. 380 U.S. at 489-90.

95. Id. at 491. (Footnotes omitted.)

federal courts, for who but the court which issued the initial injunction would be in a position to modify it upon the basis of a subsequent state court ruling containing a "permissible narrow construction" of the statute in question? Thus, if the state courts wish to act, the federal court must rule upon the correctness of the action taken. If the state courts do not act, the federal court must act for them.

VI. Does 42 U.S.C. § 1983 Constitute a Statutory Exception to 28 U.S.C. § 2283?

The policy arguments, based upon the reasoning of *Dombrowski*, against limiting its holding to cases in which the federal injunction proceeding is commenced before the state criminal proceedings, have been previously discussed. Since those arguments involve the constitutional rationale of the *Dombrowski* ruling, they should exert a strong influence upon, and perhaps determine, the more technical statutory issue which will arise when a case in which the state first acted reaches the Court.

That statutory issue involves two federal statutes. Section 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[96]

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[97]

In *Dombrowski*, the Court stated the issue raised by the collision of these two statutes as "the question whether suits under 42 U. S. C. § 1983 (1958 ed.) come under the 'expressly authorized' exception to § 2283."[98] And it concluded that, in the circumstances of the case, it was "unnecessary to resolve" this question.[99] The language of footnote 2 seems to state two reasons for the Court's decision that the statutory question was not before it: (1) "[T]he grand jury was not convened and indictments were not obtained until after the filing of the complaint, which sought interlocutory as well as permanent relief . . . ." and (2) "nor

96. 28 U.S.C. § 2283 (1964).
97. Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).
98. 380 at 484 n.2.
99. Ibid.

are the subsequently obtained indictments 'proceedings' against which injunctive relief is precluded by § 2283."[100]

The Court's first reason is perfectly straightforward. The federal proceeding came first; therefore, the interlocutory injunction issued by Judge Wisdom (and lifted only by a procedural accident) did not stay "proceedings" within the meaning of section 2283, but the *commencement* of proceedings, and, therefore, section 2283 was not operative in the circumstances. The second reason is more subtle and quite interesting. Its basic reasoning might be stated as follows: Since the interlocutory injunction issued by the court below was necessary "in aid of its jurisdiction" (and of the appellate jurisdiction of the Supreme Court) within the meaning of section 2283, it was erroneous for the district court to lift the injunction knowing that an appeal would be taken; and, therefore, the injunction must be regarded as never having been lifted at all.

The sentence, "Nor are the subsequently obtained indictments 'proceedings' against which injunctive relief is precluded by § 2283," can also be interpreted as meaning that a state indictment does not commence "proceedings in a State court" within the meaning of section 2283. This interpretation would regard the course of a prosecution as composed of a number of different "proceedings," some of them judicial (the grand jury proceedings, motions, trial, and appeals), and some of them executive or administrative (all preparations by the prosecution outside of the courtroom) rather than one single, continuous "proceeding." Under such a view, the indictment would simply signify that a charge is outstanding against the defendant which will require court proceedings in the nature of a trial at some future time. It would not, of itself, constitute or signify the existence of a continuous state judicial proceeding. Similarly, the drawing of a distinction between "judicial" proceedings and "executive" or "administrative" actions on behalf of the state in the nature of a "prosecution" would permit the Court to conclude that an injunction against a malicious and unfounded state prosecution, undertaken for the purpose of penalizing constitutionally protected acts, is really an interference only with improper executive action and not with "proceedings in a State court," provided that no truly "judicial" proceedings are actually in progress when the federal injunction is issued.[101] Such a conclusion could be supported upon the ground that, far from interfering with state court proceedings and thereby creating undesirable friction between federal and state courts, a federal court doctrine requiring determination

100. Ibid.

101. This reasoning would be consistent with the reasoning of the Court in Ex parte Young, 209 U.S. 123, 155-63 (1908).

at the outset of the constitutional propriety of questionable actions by state prosecutors would have the desirable effect, in cases where the actions are indeed improper, of avoiding both (1) the cost of expensive and time-consuming state judicial proceedings and (2) the federal-state friction which inevitably results from the reversal of contrary state court decisions by the Supreme Court.

Analytically, it would seem that the statutory issue can be viewed most profitably as involving interpretation of section 1983, rather than section 2283, for the crucial question would appear to be whether or not section 1983 authorizes injunctions against state prosecutions. If the distinction between "prosecutions" and "judicial proceedings" is accepted, the question would be two-fold: (1) whether or not section 1983 authorizes injunctions against state prosecutors forbidding them to continue unconstitutional prosecutions, and (2) whether or not that statute also authorizes injunctions against state judicial proceedings directed at state judges. But, regardless of the form in which the issue is presented, the central inquiry should be into the meaning and legislative purpose of section 1983. And if injunctions against state prosecutions are necessary to achieve the purposes of section 1983, then that statute should be regarded as a congressionally stated exception to section 2283.[102]

In order to hold that section 1983 does not authorize federal injunctions against state prosecutions, the Court would have to conclude that in enacting that statute Congress intended to protect citizens of the United States against malicious and unfounded acts in violation of fundamental constitutional rights, provided those acts are done by state officials other than prosecutors and/or judges. In other words, the conclusion would be that section 1983 reaches a conspiracy entered into for improper reasons in violation of fundamental rights where the conspiracy involves the local sheriff, the mayor of the town, members of the state legislature, and the state highway patrol; but, if the other conspiring officials manage to have a state criminal prosecution commenced—for example, by perjuring themselves or having others do so before a grand jury or by involving the local prosecutor or members of the grand jury in their conspiracy—then section 1983 is inoperative.

102. In Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965), the appellants were arrested for staging sit-in demonstrations in public restaurants. They brought suit in the district court seeking a federal injunction against the prosecutions upon the ground that the acts which prompted the arrests were protected by a federal right created by Title II of the Civil Rights Act of 1964. The district court refused to grant a temporary order restraining the prosecutions. The Fifth Circuit accepted the theory of the action and reversed the court below. In so doing, the court concluded that Title II creates a statutory exception to § 2283 and pointed out that "§ 2283 does not require that an exception to it refer specifically to § 2283," citing Amalgamated Clothing Workers v. Richmond Bros. Co., 348 U.S. 511 (1955). Id. at 230. See note 65 supra.

It is quite clear that such a conclusion as to the meaning of section 1983 would run completely contrary to the language of the statute[103] and to the basic rationale of *Dombrowski*, which is that section 1983 is designed to protect individuals and groups from being officially harassed—whether by prosecution, threatened prosecution, or any other injurious action—for improper reasons unrelated to any valid state purpose or without probable cause in violation of basic personal constitutional rights. This opinion was a mandate to the court below to issue a permanent injunction against further prosecution of the plaintiffs under new indictments[104] if they could prove either (a) that the prosecutions and threats thereof were done because the plaintiffs were active on behalf of civil rights for Negroes in Louisiana, or (b) that the prosecutions would have no substantial basis in fact.[105] The existence of such a mandate in *Dombrowski* involving state prosecutors would seem to dispose of the possibility of any subsequent interpretation of section 1983 which would remove prosecuting officials from its application.

A fortiori, if state prosecutors fall within the intended coverage of section 1983, it must be regarded as constituting a statutory exception to section 2283. However, the circuit courts which have ruled on the question of the possibility of such a statutory exception are evenly divided.[106]

Cooper v. Hutchinson,[107] decided by the Third Circuit in 1950, was the first circuit court ruling on the question of whether or not section 2283 applies to actions under the Civil Rights Act. In that case, three New York lawyers, retained by Cooper to assist New Jersey counsel in handling his second trial for murder, were summarily forbidden by the presiding state court judge to participate in the trial. Although they had participated by leave of court in the appeal which resulted in the reversal of Cooper's conviction for murder and in the ordering of a new trial, the New York attorneys were deprived of the authority to participate further

103. See note 82 supra.

104. The previously issued indictments were struck down.

105. It would appear that if there were to be an affirmance on appeal of the previous state court ruling on the absence of any factual basis for the charges already made, then the federal plaintiffs would be entitled to rely upon some form of collateral estoppel to bolster, if not to determine altogether, their right to a permanent injunction from the district court in the absence of some new evidence produced by the Louisiana officials.

106. Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950); see Morrison v. Davis, 252 F.2d 102 (5th Cir.), cert. denied, 356 U.S. 968 (1958); Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957), aff'd, 254 F.2d 883 (3d Cir. 1958); 1A Moore, Federal Practice § 0.213(2) (2d ed. 1965); cf. United States v. Wood, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1963). Contra, Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); see Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963).

107. 184 F.2d 119 (3d Cir. 1950).

in Cooper's defense by the judge assigned to try the case. This action was taken without any hearing on the matter and without any charge of misconduct having been made. No reason was apparently given for the state court order.

A federal action was then commenced on behalf of Cooper under what is now section 1983, in which an order was requested requiring the state judge to permit the out-of-state lawyers to represent Cooper. The grounds for the complaint were that the state court order threatened a violation of Cooper's constitutional rights and of his rights under the Civil Rights Act because (1) the order was "summary, arbitrary, capricious and unreasonable," and (2) it threatened to deprive him of his constitutional rights to due process of law and to representation by counsel of his choice guaranteed by the fifth, sixth, and fourteenth amendments.

On appeal from a district court judgment[108] dismissing the complaint, the Third Circuit held: (1) that the state court order was indeed arbitrary; (2) that "the client's right to representation has been interfered with . . .";[109] (3) that, if the New York attorneys were not permitted to continue to represent Cooper, he would suffer irreparable injury to his constitutional rights; (4) that the "right to assert a claim under Section 1 of the Civil Rights Act of 1871 is not dependent upon the prior pursuit of relief under state law";[110] and (5) that "the provision in the Judicial Code forbidding the use of the injunction against state court action has a stated exception when a federal statute allows it, as it does here."[111] Thus, a majority of the court (one judge dissenting) seems to have assumed that, if the Civil Rights Act was intended, as it states, to protect "any citizen of the United States" from "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," then it must authorize "suit[s] in equity" against judicial officials who threaten to violate such rights under color of state law.[112]

But the court did not order that an injunction issue immediately from the court below. It reasoned (1) that the doctrine of *Douglas v. City of Jeannette*[113] required the withholding of an injunction against state court proceedings until the holding of the unconstitutional proceedings and the consequent violation of rights was a virtual certainty, and (2) that this doctrine and the purpose of the Civil Rights Act would be adequately

108. Cooper v. Hutchinson, 88 F. Supp. 774 (D.N.J. 1950).
109. 184 F.2d at 123.
110. Id. at 124.
111. Id. at 124. (Footnote omitted.)
112. See Note, 39 N.Y.U.L. Rev. 839, 843-46 (1964).
113. 319 U.S. 157 (1943).

served if the district court were to retain jurisdiction of the case and refrain from issuing its injunction until the state courts had made a final ruling on Cooper's right to outside counsel.[114] If the trial were ordered to be conducted without the presence of outside counsel, then the necessary injunction should issue.

In *Morrison v. Davis*,[115] the Fifth Circuit, consisting of then Chief Judge Hutcheson, Judge (now Chief Judge) Tuttle, and Judge Jones, found *Browder v. Gayle*[116] controlling and held, in a per curiam opinion:

> That case disposes of the contention that the federal court should not grant an injunction against the application or enforcement of a state statute, the violation of which carries criminal sanctions. This is not such a case as requires the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U.S.C.A. § 1983. Whatever may be the rule as to other threatened prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed the judgment of the trial court in the Browder case in which the same contention was advanced. To the extent that this is inconsistent with Douglas v. City of Jeannette, Pa., 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324, we must consider the earlier case modified. Moreover we think the trial court here properly held: "It is not the Court's view that in our civilization it is necessary to have incidents requiring arrests to have the rights of people declared." These plaintiffs are not being prosecuted; they have not violated the state law; they are seriously affected by the provision of the statute which places a criminal penalty on the street car operators who permit them to travel on a street car without complying with the unconstitutional statute. They are asking relief from such constraint. Since all transportation can be denied them under the statute unless they obey the illegal requirement, it is not even apparent that they could put themselves in position to be arrested and prosecuted even if they sought to test their constitutional rights in that manner, which we hold they do not have to do.[117]

In *Smith v. Village of Lansing*,[118] the Seventh Circuit stated that section 2283 prohibits federal courts from "issuing injunctions 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"[119] and that "there is nothing in the Civil Rights Act . . . that suspends or modifies this statute."[120]

However, the "holding" thus stated went a good deal further than the facts of the case required. Plaintiff had brought his action under the

114. 184 F.2d at 124-25.

115. 252 F.2d 102 (5th Cir.) (per curiam), cert. denied, 356 U.S. 968 (1958).

116. 142 F. Supp. 707 (M.D. Ala.), aff'd per curiam, 352 U.S. 903 (1956). Cf. Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964).

117. 252 F.2d at 103.

118. 241 F.2d 856 (7th Cir. 1957).

119. Id. at 859. See p. 97 supra.

120. 241 F.2d at 859.

Civil Rights Act to enjoin the enforcement of a state court judgment entered in a condemnation proceeding, which he had argued fully on the merits at trial and had appealed to the highest courts of Illinois, all without success. Since he made no attempt to seek Supreme Court review of the state court rulings against him, the federal court could have (and probably should have) ordered his complaint dismissed upon either of two related grounds: (1) that the plaintiff had waived his right to federal court review of the constitutionality of the state action in question when he failed to seek Supreme Court review, or (2) that the Civil Rights Act is not designed to provide relief against proposed enforcement of state court judgments that have been fully appealed in the state courts, since petition to the Supreme Court provides adequate relief for persons so situated. There was, therefore, no need for the court to reach the question of the application of section 2283 to the case.

In any event, the case was palpably different from one in which the attacked state proceedings have been only threatened or just begun. The policy emphasized in *Dombrowski* of protecting the plaintiff from injury due to prolonged state court proceedings is clearly inapplicable to a situation in which such proceedings have been completed. The result in *Smith* would have been the same under a rule permitting the commencement of substantial Civil Rights Act injunction actions any time before trial in the state court.[121]

VII. Conclusion

In *Dombrowski v. Pfister,* the Supreme Court was clearly concerned with providing practical and realistic protection for fundamental constitutional rights. It was also faced with the problem of injustice resulting from delay in the judicial process. The remedy of a federal court injunction under the Civil Rights Act of 1871 provided the Court with a method of dealing effectively with both problems.

In pointing out that the doctrine of abstention based upon federal-state judicial comity was inapplicable where the lack of immediate action by the federal court will result in irreparable injury to fundamental rights,[122] the Court removed one of the basic underpinnings from the rationale of *Douglas v. City of Jeannette,*[123] for the reasoning of *Douglas* proceeded in large measure from the assumption that (1) adherence to orderly and established judicial procedures is the necessary burden of every citizen and, therefore, (2) it cannot constitute a threat of irreparable injury to require that a defendant questioning a prosecution against

121. Accord, Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963), which also involved the commencement of a federal action after state proceedings were completed.

122. 380 U.S. at 491-92.

123. 319 U.S. 157 (1943).

him upon substantial constitutional grounds follow ordinary appellate procedures in order to vindicate his constitutional rights. Now that the Supreme Court has rejected the practice of following *Douglas* as a rigid rule and has pointed out that principles of comity should not be invoked to frustrate the effective protection of constitutional rights, the door has been left ajar for the federal courts to permit greater use of injunctions to protect civil rights than has been possible in the past. The *Dombrowski* reasoning provides strong support for the conclusion that section 1983 constitutes a statutory exception to section 2283.

Viewed against the background of recent Supreme Court decisions on questions of procedural fairness in state criminal prosecutions, *Dombrowski* can be seen as one of a series of decisions designed to eliminate glaring discrepancies between federal practice in criminal cases and that of the various states. A few years ago, the Constitution was interpreted to permit state courts to admit illegally seized evidence, although such evidence was not admissible in federal trials.[124] *Mapp v. Ohio*[125] raised the federal court rule to the level of a constitutional principle and required the states to conform to it. Prior to *Gideon v. Wainwright*,[126] the states were not required to provide court-appointed counsel for criminal defendants except in capital cases, although federal courts and those of many states provided free counsel to indigents charged with all serious crimes. Now federal and state practice in this area are substantially the same and required to be so by the Constitution.

Although the analogy to *Mapp* and *Gideon* may seem, at first glance, to be remote, it really is not, for *Dombrowski* is yet another case which will have the effect of promoting uniformity of practice between federal and state courts throughout the country. Like *Mapp* and *Gideon*, *Dombrowski* will, eventually, work a substantial change in the way that state trial and lower appellate courts deal with criminal cases. In cases—particularly those involving the first amendment—where the factual foundation for the prosecution seems questionable or where some basis exists for a charge of bad faith on the part of the prosecution, *Dombrowski* requires, at the beginning of the case, careful scrutiny of the evidence and a sound determination as to the existence of probable cause for the proceedings before they are permitted to begin or to move on to trial. This will work no hardship upon prosecutors who bring only well-founded cases. Indeed, it should save a certain amount of time on the part of state courts and counsel by weeding out an occasional bad case without the necessity of a full trial. Moreover, it will definitely have the effect of

124. Wolf v. Colorado, 338 U.S. 25 (1949).
125. 367 U.S. 643 (1961).
126. 372 U.S. 335 (1963).

causing state prosecutors and trial courts to test the facts of cases raising basic constitutional questions against controlling Supreme Court decisions, for the accuracy of their efforts in this connection may be put to the test in the federal courts.

Of course, *Dombrowski* represents only the first step taken by the Court in the direction of permitting the use of injunction actions under the federal civil rights statutes to test state prosecutions against basic principles of constitutional law. As the body of this discussion indicates, *Dombrowski* leaves some very important questions unanswered. Although it would be highly desirable for the Supreme Court to seize its first available opportunity to resolve some of these undecided questions, one cannot predict confidently that it will do so.

In the past, the Court has often allowed decisions clearly foreshadowing even more dramatic rulings to stand for a time as writing on the wall, apparently in the hope that the warning thus provided would be heeded in the appropriate quarters and that stronger and broader opinions implementing the earlier rationale would prove unnecessary.

It is unquestionably appropriate for the Supreme Court to move by steady and carefully calculated steps toward full realization of desirable and necessary constitutional policies. All judicial action must be characterized by restraint and deliberation if it is to be respected as just, appropriate, and necessary. But there is room for serious debate as to the pace at which the calculated steps of the law should be taken in the rapidly developing and quickly changing society in which we live. If optimism about the beneficial impact of its decisions is one of the reasons why the Court sometimes delays for what seems to be a long time in following through along well-outlined paths, such optimism is seldom, if ever, rewarded. Strong hints are never enough. The next step has to be taken eventually, and the unfortunate history of the "deliberate speed" language of the *Brown* decision of 1954[127] shows all too well that sometimes greater pain is caused by imposing a serious change of law upon the nation slowly than would result if the operation were performed swiftly, without leaving a long period of time for emotional and futile last-ditch legal battles and deliberate inaction by those who would prevent the impending alteration.[128]

It is perhaps indicative of a changing attitude toward the proper pace of legal change that the one-man-one-vote decisions of 1964 contained no "deliberate speed" language and, indeed, contained strong indications

127. Brown v. Board of Educ., 347 U.S. 483 (1954).

128. See Bickel, The Decade of School Desegregation: Progress and Prospects, 64 Colum. L. Rev. 193 (1964); Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Colum. L. Rev. 1163 (1963).

—which were heeded—that the lower courts should proceed with all possible dispatch to implement the newly-stated doctrine.

It is reasonable to expect the Court to develop the rationale of *Dombrowski* along the lines indicated in the preceding discussion. One may hope that it will do so in the near future, for, if strong and unmistakable pressure is put quickly upon the state judicial systems to protect individual rights at the trial level, the initial shock may be great in some areas, but a long and angry period of uncertainty can be avoided.

No matter when the Court decides to clear up the questions which *Dombrowski* leaves undecided, this decision is quite likely on its own to have a substantial impact upon state court handling of certain constitutional questions. If it does not, there will be a serious change in the relationship which has existed until now between the lower federal courts and the judicial systems of some states.