CONSTITUTIONAL LAW—FEDERAL ABSTENTION HELD IMPROPER WHERE CRIMINAL PROSECUTION IS THREATENED UNDER STATE SUBVERSIVE ACTIVITIES STATUTE TO DISCOURAGE PLAINTIFFS FROM CONTINUING CIVIL RIGHTS ACTIVITIES. *Dombrowski v. Pfister* (U.S. 1965).

The plaintiffs, a civil rights organization[1] and individuals[2] active in civil rights in the South, filed a complaint in federal district court invoking the Civil Rights Act[3] and seeking declaratory relief and an injunction restraining defendants[4] from prosecuting or threatening to prosecute[5] plaintiffs for alleged violation of two Louisiana subversive activities statutes.[6] The complaint alleged that the statutes were unconstitutional on their face, because of vagueness and overbreadth;[7] and as applied, because any possible valid interpretation would not include the plaintiffs' activities.[8] A three-judge district

1 The organization was the Southern Conference Educational Fund, Inc. (SCEF).

2 The individuals were Dombrowski, the executive director of SCEF, who was joined by intervenor Smith, the treasurer for SCEF, and intervenor Waltzer, an attorney for SCEF.

3 Specifically the plaintiffs rely on REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964) which provides: "Every person who, under color of any statute, . . . 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." In this case the plaintiffs alleged that their rights to free speech as guaranteed under the first amendment were being abridged and that the application of the statutes to them was not being made in good faith but was part of a plan to harass them and discourage their protected activities. If true the allegations would bring the defendants within the proscriptions of § 1983.

4 The defendants were the Governor, police and law enforcement officials, and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana.

5 At the time the complaint was filed the individual plaintiffs had been arrested, their homes and offices searched at gunpoint, and their records and files seized, thus effectively crippling the operation of SCEF. A Louisiana judge had ordered the arrests quashed as not based on probable cause and declared the evidence illegally seized. Nevertheless, the defendants had continued to threaten prosecution of the plaintiffs.

6 Subversive Activities and Communist Control Law, LA. REV. STAT. ANN. § 14:358-74 (Supp. 1964); Communist Propaganda Control Law, LA. REV. STAT. ANN. § 14:390-90.8 (Supp. 1964).

7 The vagueness doctrine is basically a due process argument and the Supreme Court has stated the test as follows: "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordon v. De George, 341 U.S. 223, 231-32 (1951).

8 The application argument charges a misapplication of a possibly otherwise constitutional statute. It alleges that even though possible valid constructions are found for a statute, it is impossible to include the plaintiff's activities within these constructions. In this case the plaintiffs are also alleging that the misapplication is a violation of the Civil Rights Act, see statute cited note 3 *supra*.

court[9] dismissed the complaint for failure to state a claim upon which relief could be granted.[10]

The Supreme Court granted certiorari "to settle important questions concerning federal injunctions against state criminal prosecutions threatening protected expression."[11] In reversing,[12] the Court held that: (1) the complaint alleged sufficient irreparable injury to justify equitable relief;[13] (2) it was improper for the district court to abstain pending state court interpretation of the statutes since "the abstention doctrine is inappropriate for 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";[14] (3) the statute proscribing participation in the formation, management or support of any subversive organization was invalid because it was unconstitutionally vague and uncertain;[15]

[9] The three-judge district court was convened pursuant to 28 U.S.C. § 2281, which provides: "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 therefore is heard and determined by a district court of three judges convened under section 2284 of this title."

[10] Dombrowski v. Pfister, 227 F. Supp. 556 (E.D. La. 1964).

[11] Dombrowski v. Pfister, 380 U.S. 479, 483 (1965).

[12] Before considering the other issues in the case, the Court discussed the problem of federal jurisdiction to hear the case. 28 U.S.C. § 2283 provides that: "A court of the United States may not grant an injunction to stay proceedings in a State court except as *expressly authorized by Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis added.) The Court found that at the time of the filing of the original complaint by plaintiffs in federal court, no state proceedings were pending within the meaning of § 2283, citing *Ex Parte* Young, 209 U.S. 123 (1908); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 366-78, (1930); and Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 728-29 (1961). The Court concluded that state grand jury indictments, issued against the plaintiffs after the federal court had dismissed the plaintiffs' complaint, were not proceedings within the meaning of the act because the indictment had been issued only because of the federal court's error in dismissing. Having reached this conclusion the Court found it was unnecessary to decide whether the Civil Rights Act constituted an *expressly authorized* exception to § 2283, thus requiring that plaintiffs' case be heard based upon the allegations under the Civil Rights Act. 380 U.S. at 484.

[13] The Court found that the facts surrounding the arrests, searches and seizures, and the threatened prosecutions were clearly sufficient to show the "chilling effect on free expression" which resulted. 380 U.S. at 487. The Court also concluded that the allegations in the complaint depicted a situation where the defense of the criminal prosecution would not adequately protect the rights of the plaintiffs. This was based on the view that it was the prosecution and its incidents that were the alleged wrong, not the possible end result of the prosecution.

[14] *Id.* at 489-90.

[15] The definition of subversive organization was found to be "substantially identical to that of the Washington statute which we considered in Baggett v. Bullitt. . . . We held that the definition . . . was unduly vague, uncertain and broad." 380 U.S. at 493-94.

(4) the statute creating an offense of failure to register as a member of a Communist-front organization was unconstitutional on its face as resting on an invalid statutory presumption;[16] and (5) the complaint alleging that state officers invoked and threatened to invoke criminal process without any hope of ultimate success, but only to discourage plaintiffs' civil rights activities, stated a claim under the Civil Rights Act.[17] *Dombrowski v. Pfister*, 390 U.S. 479 (1965).

The *Dombrowski* decision constitutes a major reevaluation of the abstention doctrine as applied to the enjoining of state criminal prosecutions. The doctrine of abstention requires a federal court with jurisdiction over a case involving state and federal issues to postpone a hearing on the federal issues and first allow the state courts to determine the issues of state law. Thus, where a litigant raises a federal constitutional issue in a case involving state issues as well, the federal court may avoid an immediate decision by abstaining and allowing the state courts to act first. The rationale for the doctrine combines the reluctance of the Supreme Court to decide a constitutional question unless it is absolutely required to do so, with the policy of allotting the state courts a proper place in our federal system.[18] The leading abstention case is *Railroad Comm'r of Texas v. Pullman Co.*[19] In *Pullman* the Court was faced with an order of a state railroad commission requiring white conductors to replace colored porters in charge of Pullman cars. The Court found that "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue."[20] However, it refused to decide the

---

[16] The statute provided that the fact that an organization was "officially cited or identified by the Attorney General of the United States . . . or any committee or subcommittee of the United States Congress as a . . . communist front organization . . . shall be considered presumptive evidence of the factual status of any such organization" and the Court found that this statute failed to comply with "procedural safeguards demanded" by Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), a prior decision on the same issue. 380 U.S. at 495.

[17] See note 44 *infra*. The Court also held that the record in the case of LA. REV. STAT. ANN. § 14:390-90.8 (Supp. 1964), was insufficient to allow a decision on the merits. The Court indicated that the ruling on this statute should await a determination by the district court of the sufficiency of the threats to enforce the law.

[18] One writer has recognized four separate conditions under which abstention is practiced. They are: "(1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion on the federal court docket." WRIGHT, FEDERAL COURTS § 52, at 169 (1963). It should be noted that Wright indicated that the fourth condition is not recognized by the Supreme Court. The other three are essentially based on the concept of federalism.

[19] 312 U.S. 496 (1941).

[20] *Id.* at 498.

case because there was a serious question as to the authority of the commission to issue the order under the state law. The Court held:

> The law of Texas appears to furnish easy and ample means for determining the Commission's authority. . . . In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.[21]

The Court remanded the case, instructing the district court to retain jurisdiction pending the determination of the state issues in the state courts. In *Pullman*, though the federal court deferred to the state court, it should be noted that there was no showing by the plaintiffs that the constitutional claim could not be adequately protected in the state court.

In subsequent cases the Supreme Court has held abstention to be applicable in a variety of different fact situations, but the cases have not involved situations where threats of immediate prosecution under criminal statutes were present.[22] The delay[23] and cost to the parties resulting from federal abstention have been recognized but are generally justified by a strong policy argument in favor of the traditional comity doctrine under which federal courts have declined to interfere with state judicial proceedings.[24] Generally, where injunctions to restrain criminal prosecutions have been sought, the Supreme Court has not relied on abstention. Rather, in cases where relief has been denied, the Court has based its decision on the absence of a clear showing of immediate irreparable injury.[25] In addition, the

---

21 *Id.* at 501.

22 See Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957); Albertson v. Millard, 345 U.S. 242 (1953); Shipman v. Du Pre, 339 U.S. 321 (1950); AFL v. Watson, 327 U.S. 582 (1946); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Berford v. Sun Oil Co., 319 U.S. 315 (1943); City of Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942). In all these cases abstention was declared proper but in none of them was there a present threat of immediate enforcement of a state criminal statute.

23 An example of this is the litigation required to decide the merits of Spector Motor Serv., Inc. v. McLaughlin, *supra* note 22. WRIGHT, *op. cit. supra* note 18, § 52 at 171, points out that "nine years of litigation in five different courts was required before the case was finally determined on the merits." At the time the Supreme Court originally decided the *Spector* case it appeared to be an excellent one for abstention since the state taxing statute involved was obviously not clear.

24 See WRIGHT, *op. cit. supra* note 18, § 52; *contra*, Clark, *Federal Procedural Reform & States' Rights*, 40 TEXAS L. REV. 211, 222-25 (1961).

25 See Douglas v. City of Jeannette, 319 U.S. 157 (1943); Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45 (1940). These cases all emphasized the absence of a clear showing of immediate irreparable injury and refused to enjoin state criminal prosecutions.

Court has found that the normal incidents of a prosecution will not constitute the necessary irreparable injury. Though it is clear that this ruling effectively requires adjudication in the state courts, as does abstention, the basis of the holding is different. Rather than deference to state courts, the inappropriateness of the injunctive remedy is the basis of the decision. Thus, in *Douglas v. City of Jeannette*[26] the Court stated:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. 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.[27]

In holding that injunctive relief was improper the Court stated "we cannot say the declared intention to institute other proceedings is sufficient to establish irreparable injury in the circumstances of this case."[28]

However, in *Harrison v. NAACP*,[29] the Court did apply abstention where an injunction restraining criminal prosecutions was sought. There the plaintiffs sought declaratory relief and an injunction in a federal court to restrain enforcement of five Virginia statutes which were designed to thwart the NAACP in its efforts to aid Negroes to secure their constitutional rights.[30] The plaintiffs' complaint was based partially on the Civil Rights Act.[31] The district court found that three of the statutes were clear, requiring no interpretation by state courts, and declared them unconstitutional. The Court rejected an argument urging the federal court to refrain from enjoining a state criminal prosecution and stated, "however, it is also well recognized that a criminal prosecution may be enjoined under exceptional circumstances where there is a clear showing of danger of immediate irreparable injury. . . . It is obvious that the present case falls in . . . [that] category."[32] The Supreme Court

[26] *Supra* note 25.
[27] *Id.* at 163.
[28] *Id.* at 164.
[29] 360 U.S. 167 (1959).
[30] The district court found that the statutes were "enacted for the express purpose of impeding the integration of the races in the public schools . . ." of Virginia. NAACP v. Patty, 159 F. Supp. 503, 511 (E.D. Va. 1958).
[31] 42 U.S.C. § 1981, 1983, see statute cited note 6 *supra.*
[32] NAACP v. Patty, 159 F. Supp. at 521.

reversed, however, and ordered the lower court to abstain from ruling on the statutes because there were unresolved issues of state law involved. Significantly, the Court affirmed the finding of the presence of irreparable injury but determined that it could be avoided by an agreement between the parties not to prosecute the plaintiffs pending the determination of the state issues in a state court.[33] The Court ignored the fact that the plaintiffs' allegations brought the case within the Civil Rights Act. Thus, *Harrison* extended the application of the doctrine to include two areas: first, claims alleging a violation of the Civil Rights Act; second, cases seeking to enjoin state criminal prosecutions where irreparable harm was present.

The dissenting opinion in *Harrison* concentrated on the effect which the provisions of the Civil Rights Act should have on the abstention doctrine. Mr. Justice Douglas writing for three members of the Court stated:

> It seems to me that it was the District Court's duty to provide this remedy, if the appellees, who invoked that Court's jurisdiction under the Civil Rights Act, proved their charge that appellants, under the color of the Virginia statute had deprived them of civil rights secured by the federal constitution.[34]

The dissent also noted that the state policy reflected in the statutes was clearly opposite to the federal law and stated: "we need not—we should not—give deference to a state policy which seeks to undermine paramount federal law. We fail to perform the duty expressly enjoined by congress on the federal judiciary in the Civil Rights Act when we do so."[35]

At this point the doctrine had in effect become an inflexible rule which required federal courts to abstain if the state courts either could limit the statute in question to make it constitutional or could declare the statute void. Cases subsequent to *Harrison* indicate a reevaluation by the Supreme Court regarding the desirability of such an inflexible abstention rule.

Griffin v. County School Board of Prince Edward County[36] involved the resistance of Prince Edward County officials to the Supreme Court decision[37] requiring integration of public schools.

[33] The prosecution had agreed to such an arrangement both during the federal court litigation and in the state court litigation ordered by this decision.
[34] 360 U.S. at 181.
[35] *Id.* at 184.
[36] 377 U.S. 218 (1964).
[37] Brown v. Board of Education, 347 U.S. 483 (1954).

The officials had closed their public schools and the plaintiff sought a declaratory judgment to require the schools to be kept open. The defendants asked the federal court to abstain until the state courts had decided whether the schools were required to be kept open under Virginia law. The district court declined to abstain but the circuit court reversed. On certiorari, the Supreme Court cursorily disposed of the abstention doctrine in one paragraph of its opinion. The Court stated: "in the first place the Supreme Court of Appeals of Virginia has already passed on all the issues here. . . . But quite independent of this we hold that the issues here imperatively call for decision now."[38] Thus, the doctrine was greatly debilitated by the Court's holding that the need for a rapid decision was sufficient to overcome the abstention doctrine, even where there was no threat of criminal prosecution.

In *Baggett v. Bullitt*,[39] the constitutionality of two Washington loyalty oath statutes was challenged in a class action brought by members of the faculty and student body of the University of Washington. Although the constitutionality of the statutes had not been ruled on by the state court,[40] the Supreme Court held abstention was not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist "the 'special circumstances' . . . prerequisite to its application must be made on a case-by-case basis. . . . Those special circumstances are not present here."[41] In *Baggett* the Court emphasized the undesirability of piecemeal adjudication if the federal court abstained but it did not establish any clear standards for the lower federal courts to apply in determining whether abstention was proper in future cases.

In *Dombrowski*, the Court has set forth specific criteria which it considers sufficient to overcome the abstention doctrine, at least in a case where a criminal prosecution is threatened. The Court stated that a federal district court must hear a case and decide it on the

38 377 U.S. at 229.

39 377 U.S. 360 (1964).

40 One statute had been challenged in the state courts earlier and the case had gone to the United States Supreme Court, but was remanded and later dismissed on other grounds. No threat of prosecution was imminent in this case; rather, the plaintiffs contended they must either sign a vague oath or suffer the loss of their jobs. They sought to invalidate the statutes before signing the oaths with the associated possible perjury offense.

41 377 U.S. at 375.

merits if a statute is attacked as unconstitutional either on its face or as applied for the purpose of discouraging protected activities, assuming that immediate irreparable injury is alleged and supported by the facts. In addition, if a violation of the Civil Rights Act is alleged, abstention is always inappropriate if the other elements of irreparable injury and inadequate remedy at law are present.[42] The Court thus restored a federal remedy in two areas which had been proscribed by *Harrison*, *i.e.*, cases invoking the Civil Rights Act and cases seeking to enjoin criminal proceedings where irreparable injury to the plaintiff is present.[43] In addition, the Court determined that statutes are to be construed by federal courts as they exist when the federal jurisdiction is invoked, not at some hypothetical future date after a state court has construed the statute in a limited manner.[44] This approach is directly opposite to the underlying rationale of abstention because it neither defers to the state courts nor does it avoid an immediate decision of the constitutional issue by the federal courts.

In determining the limits of *Dombrowski*, one must recognize that an essential element was present: the danger of irreparable injury; *i.e.*, plaintiff's constitutionally protected rights were found to be abridged by the threatened prosecutions. In addition, the statutes in question were attacked on their face or as applied to the plaintiffs. Although either one of the allegations would be sufficient to support the holding in *Dombrowski*, their presence does emphasize the need for a clear violation of the plaintiff's constitutional rights.

A summary of the steps required by the *Dombrowski* decision before a district court may enjoin a state criminal proceeding is as follows: first, the court must establish jurisdiction to hear the case; second, it must establish the presence of imminent irreparable injury; third, it must determine that the allegations with respect to the statutes are within the "on its face or as applied" rule of *Dombrowski*; fourth, it must determine that the statute is in fact unconstitutional. These steps replace a mechanical approach whereby the court

[42] Specifically, the Court held, "if these allegations state a claim under the Civil Rights Acts, . . . as we believe they do . . . the interpretation ultimately put on the statutes by the state courts is irrelevant. For an interpretation rendering the statutes 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.

[43] The dissenting opinion pointed out that the *Dombrowski* case was indistinguishable from *Harrison* and thus effectively overruled it. 380 U.S. at 501 n.3.

[44] 380 U.S. at 490.

merely had to determine that unresolved state issues were present in order to abstain in favor of state court adjudication. In cases where the above tests are not met, abstention is still valid but the vitality of the doctrine has been greatly diminished.[45] Hopefully the application of the new rules will result in substantial justice at a reasonable cost in time and money and will tend to eliminate cases where justice is delayed and consequently denied.

GERALD J. O'NEILL

[45] See Davis v. Mann, 377 U.S. 678 (1964), Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964); O'Brien, *The Abstention Doctrine*, 40 CAL. S.B.J. 487 (1965).