Dombrowski

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In the early 1960s the civil rights movement challenged the established legal order in dramatic and profound ways. The movement attacked laws and practices that denied blacks equality, tested our commitment to freedom of speech, and questioned the very structures—such as federalism—that determined who was to hear grievances of civil rights claimants.

One grievance related to state criminal statutes. The movement claimed that certain of these statutes unconstitutionally interfered with organizational activity on behalf of racial equality. The movement demanded access to the federal trial courts to challenge these statutes and to obtain injunctive relief against their enforcement. Access seemed imperative if the drive for racial equality was to maintain its momentum, and yet the inherited rule denied access, remitting the citizen to the state courts, where he could raise his constitutional challenge by way of a defense to a criminal prosecution.

The Supreme Court responded to this challenge in *Dombrowski v. Pfister*[1] and chose the side of access; it opened the doors of the federal trial courts. That case expressed the Warren Court's activism and its determination to protect the civil rights movement. Even more, that case promised—in its own special way—a new era for the federal injunction.

Earlier cases had used the doctrines of equity, most notably the requirement that the alternative remedies at law be demonstrated inadequate before an injunction is granted, to limit the availability of the federal injunction. These precedents were not repudiated by *Dombrowski*, but rather distinguished, circumscribed, and made unavailing. The linkage between the two realms of discourse—federalism and equity—was preserved and yet the equitable doctrines were reinterpreted. They were made to bend to a new vision of federalism, one that posited the federal courts as the primary guardian of constitutional rights. The foundations for radical reform of the federal judicial structure were thereby laid, though in a quiet, statesmanlike manner.

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1. 380 U.S. 479 (1965).

This essay will trace the career of *Dombrowski* over the next decade, but I must first make explicit my complicated relationship to the case. I clerked for its author, Justice Brennan. I write with deep personal ties to the Justice, with enormous admiration for him, and with his lessons well in mind. Justice Brennan was a master teacher; he was generous with his time and made certain that his clerks saw the judicial process at the closest possible range. The Justice cannot, however, be held responsible for anything I say about the case or the strategy that it implies. *Dombrowski* was decided in the Term before my clerkship, and, as best as I can remember, we did not discuss it. But no one could miss its importance to the Justice, to the Court, and to federalism.

In the years immediately following my clerkship, I was involved in civil rights litigation and lived with *Dombrowski* on the front line. *Dombrowski* was at the core of many of our litigative strategies, and that strengthened my attachment to the case, if not my understanding of it. My fascination with the case continued when I later became an academic, but my perspective changed. *Dombrowski* was not just an exercise of judicial power, not just a lawyer's tool, but an object of study to be tested by the rigors of intellectual inquiry. I continued to believe that the theory of federalism overthrown by *Dombrowski* was wrong, and yet I was troubled by *Dombrowski*'s method, its refusal to articulate explicitly the new vision of federalism and its acceptance of the tradition that used the language of equity to express the values of federalism. That method was undoubtedly dictated by the necessity of forging a majority position, and yet that did not quell my doubts. I was troubled by the questions that must plague all clerks-turned-professors, those concerning the limits of judicial statesmanship: Was it consistent with a proper conception of the judicial role? Did it create its own vulnerabilities?

At the outset, these questions did not bear heavily on me. But year after year, just as I was finishing my lectures on *Dombrowski*, the Supreme Court would announce a new decision mooting the lectures and, not so incidentally, seeming to drain *Dombrowski* of any vitality. By the spring of 1976, *Dombrowski* seemed only a formal vestige of another era. Even the era seemed remote and inaccessible to my students. The more remarkable fact was that this retrenchment of the 1970s seemed to be occurring along doctrinal bridges that *Dombrowski* had built. The questions of method pressed more heavily. I wondered why *Dombrowski* had not separated the two realms of discourse, federalism and equity, and had not addressed openly the values of

federalism that were at the core of its meaning; I questioned whether the very statesmanlike quality of *Dombrowski*, manifested by its indirection, had facilitated its own demise. I want to use this essay—the substance of my lectures at Yale in the spring of 1976[2]—to reflect upon these questions of method as well as to develop an analytical framework for thinking about injunctions and federalism.

I

The plaintiffs in *Dombrowski* were engaged in civil rights activity in Louisiana in the early 1960s. They were being prosecuted under the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law,[3] and they turned to a federal court for declaratory and injunctive relief. Their complaint alleged that the statutes were facially overbroad in violation of the First and Fourteenth Amendments, and that the threats of their enforcement were part of a plan of harassment, evidenced by unlawful raids and seizures of records, to discourage civil rights activity in Louisiana.[4]

In 1965 the liberal bloc on the Warren Court was its strongest, yet there were few votes to spare. On the question of access to the federal courts, civil rights litigants could generally count on the Chief Justice, Justice Douglas, Justice Brennan, and Justice Frankfurter's replacement, Justice Goldberg. But after that the going was uncertain. One could not expect a favorable vote from Justice Harlan, and the same might be said of Justice Clark. Justice Black did not participate in *Dombrowski*, though his views on the question—as publicly revealed later—were no doubt known to his colleagues and felt by the Court. There was a hope of obtaining the votes of Justice White and Justice Stewart.

The Chief Justice assigned the task of formulating the Court position to Justice Brennan—a pattern to repeat itself countless times for the Warren Court. Justice Brennan was quite aware of the technical issue posed by the request for affirmative relief. "[C]onsiderations of federalism," he wrote, "have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's

2. I am grateful to my students at Yale, and before that at Chicago, for their affectionate stubbornness, for their criticism and encouragement. I particularly wish to thank two of those students, Jack Schwartz, who with grace and perspective made the initial transition from spoken to written word, and Robert Post, who made the editing process a marvellous intellectual adventure.

3. 380 U.S. at 482 n.1.

4. *Id.* at 481-82, 487-89.

good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework."[5] The precedent that most exemplified this version of federalism was *Douglas v. City of Jeannette*.[6]

Douglas involved an ordinance of the City of Jeannette prohibiting solicitation without a license. The Court was asked to review the district court's dismissal of a suit to enjoin the enforcement of the ordinance against Jehovah's Witnesses. In a case decided the same day, *Murdock v. Pennsylvania*,[7] the Court had held that the ordinance violated the First Amendment when applied to the Witnesses. In *Douglas*, therefore, one might have expected the Court to affirm (or possibly vacate and remand) on the theory that the *Murdock* declaration of unconstitutionality made an injunction against the enforcement of the ordinance unnecessary; the plaintiffs could not demonstrate any likelihood of a future wrong. The Court could have reasoned that its decision in *Murdock* radically changed the picture as it might have existed at the time the *Douglas* suit was filed or at the time the district court acted; now there was no reason to assume the ordinance would be enforced against the Witnesses.[8] This tack would have kept the case at a low visibility, but the Court chose to affirm on a much more ambitious theory.

Chief Justice Stone, writing for the Court, discerned in § 2283, the Anti-Injunction Act,[9] a congressional policy against federal court interference with "threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent." This policy was reinforced by the "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." Such a prosecution afforded an adequate alternate remedy at law to the constitutionally aggrieved defendant, for "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."[10]

Douglas was thus a statement about the structure of American federalism cast in the language of equity. *Douglas* claimed both that

5. *Id.* at 484 (footnote omitted).
6. 319 U.S. 157 (1943).
7. 319 U.S. 105 (1943).
8. The deliberate quality of the *Douglas* theory is evidenced by the fact that the opinion acknowledged the availability of this theory. 319 U.S. at 165.
9. 28 U.S.C. § 2283 (1970): "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."
10. 319 U.S. at 163.

a vital principle of federalism was threatened by the injunctive suit, and that the doctrines of equity should be used to protect that principle. It was vulnerable on both grounds.

Douglas sought to curtail access to federal trial courts to protect, as Chief Justice Stone had once phrased it, "the rightful independence of state governments."[11] For Justice Brennan, however, this vision of federalism was wholly inconsistent with the revision of federal jurisdiction that had occurred after the Civil War and that had given the citizen the right to choose which forum—state or federal—would best adjudicate his grievance against the state.[12] As the Justice was to say much later, "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[13]

Justice Brennan was not unaware that the independence of state governments was affected by federal injunctive relief, but for him *Murdock* and not *Douglas* made the more basic and more correct point about federal structure: the states are bound by federal law, including the Bill of Rights, and the ultimate power to determine the consistency of state laws with superior federal norms is allocated to a federal court, the Supreme Court of the United States. Interference with state governments was thus endemic to the federal structure. For Justice Brennan, federalism was a functioning institution, not an abstract co-existence of mutually impermeable spheres of sovereignty.

Douglas v. City of Jeannette could also be faulted for its use of doctrines of equity—doctrines forged in the battles of English Chancery —to further views of federalism, a political principle central to American government. The linguistic borrowing was a kind of legal prestidigitation. A verbal formula, such as the irreparable injury requirement, suggests that a point is being made about remedies, when in truth a point is being made about the structure of the federal system, one that stands independent of the remedy.

Justice Brennan, however, chose to bore from within. He recognized that both the vision of federalism and the linguistic borrowing of

11. Matthews v. Rodgers, 284 U.S. 521, 525 (1932). Chief Justice Stone cited this language with approval a few weeks after *Douglas* in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943).

12. For the articulation of this view, see the Justice's opinions in Perez v. Ledesma, 401 U.S. 82, 106-10 (1971) (concurring in part and dissenting in part); and Zwickler v. Koota, 389 U.S. 241, 245-49 (1967).

13. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). This language was later quoted by the Justice in dissent in Juidice v. Vail, 97 S. Ct. 1211, 1223 (1977).

Douglas were deeply entrenched, part of a long tradition,[14] and he chose to attack the precedent by indirection. He neither stated his views of federalism explicitly, nor did he attack the language of Chancery in which *Douglas* cast the issues. Rather he accepted that language and construed it to express his vision of federalism. He took up each of the obstacles to access defined by *Douglas*—§ 2283, imminence, and irreparable injury[15]—and one by one demonstrated how they could be surmounted.

The first obstacle was § 2283, which provided that a federal court "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."[16] Unlike Chief Justice Stone, Justice Brennan chose to view this statute not as a source of policy, but rather as a technical barrier. Section 2283 had to be confronted because, by the time *Dombrowski* reached the Supreme Court, there were state grand jury indictments pending against the plaintiffs.

14. On Stone's particular fondness for borrowing from equity, see Gardner, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1203, 1207 n.7 (1946); and Leventhal, *Harlan Fiske Stone*, 49 N.Y. STATE BAR J. 24, 58-59 (1977).

15. *Dombrowski* separately addressed a fourth obstacle—abstention. I do not specifically deal with it in this essay because: (a) it has its roots in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), rather than *Douglas v. City of Jeannette*, and it is not specially tied to injunctions; (b) *Pullman* abstention is confined to a very narrow category of situations, when a state court can by statutory construction obviate the need for a constitutional judgment, *see, e.g.*, Procunier v.. Martinez, 416 U.S. 396, 402-03 (1974); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-13 (1972); (c) much of the discussion in *Dombrowski* under the rubric of abstention was, despite subsequent disclaimers to the contrary (*see* Zwickler v. Koota, 389 U.S. 241, 254 n.17 (1967)), really a discussion of irreparable injury. Justice Brennan stated that in the case where overbroad criminal statutes were chilling First Amendment rights, abstention was inappropriate when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution." 380 U.S. at 491. The same point can be made about this reasoning that I will ultimately make about Justice Brennan's analysis of the irreparable injury requirement: had the *Dombrowski* Court been committed to values presumably served by the abstention doctrine, something I strongly doubt, it might have considered the possible limiting construction to be gained from a state declaratory judgment or injunctive proceeding (as, indeed, Justice Brennan suggested in order to decide whether the statute in *Dombrowski* might be subsequently revived, *see* p. 1114 *infra*).

In years following Younger v. Harris, 401 U.S. 37 (1971), the term "abstention" was sometimes used to describe the rule of that case—a denial of federal court access when a state prosecution is pending. *Younger* abstention is distinguished from *Pullman* abstention because of its theoretical roots (*Pullman* abstention serves not only states rights, but also the policy expressed in Ashwander v. Tennessee Valley Auth., 297 U.S. 298 (1936), of avoiding unnecessary constitutional adjudication); because of the separate conditions of its applicability (*Younger* abstention is appropriate when there is a pending prosecution, *Pullman* abstention when there is available a limiting state construction); and because *Younger* dictates the dismissal of the federal suit while *Pullman* requires a retention of jurisdiction during the parallel state proceedings. *See* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1163-87 (1974).

16. 28 U.S.C. § 2283 (1970).

The Court could have held that § 1983,[17] the civil rights statute upon which the *Dombrowski* suit was founded, was an "expressly authorized" exception to § 2283. Literalism and a true appreciation of the significance of the post-Civil War reconstitution would support such an argument. But there was apprehension that if § 1983 were an exception to the statute, the exception would swallow the rule, for § 1983 is as broad as the Fourteenth Amendment itself. This apprehension was revealed by the sharp division of the courts of appeal on the issue.[18] The Court resolved to avoid a decision on the issue in *Dombrowski.*

Justice Brennan was thus forced to seek other ways to avoid the § 2283 ban. In footnote 2 of *Dombrowski* he advanced two reasons: (1) at the time of the filing of the federal complaint, grand jury indictments against Dombrowski had not yet been obtained, so "no state 'proceedings' were pending within the intendment of § 2283"; (2) in any event the subsequently obtained indictments were tainted because a temporary restraining order against the state prosecutions had been improperly dissolved.[19]

Both of these reasons appear weak. If § 2283 expresses a significant federal policy against federal court intrusion into state processes, the "relevant time" should not be limited to the moment the complaint was filed, but rather it should be any point in the federal litigative process. As for the erroneously dissolved temporary restraining order, it is hard to see why, if § 2283 is really of jurisdictional import, its application should turn on the question of the restraining order at all, especially since the characterization of a decision to deny or dissolve a temporary restraining order as "erroneous" turns on tests peculiar to temporary restraining orders, tests which are only partially dependent upon the merits of the underlying claim and wholly unrelated to the concerns of federalism.[20]

Aside from the merits of these arguments, we should also note that Justice Brennan's chronological treatment of § 2283 carried an im-

17. 42 U.S.C. § 1983 (1970).

18. *Compare* Cooper v. Hutchinson, 184 F.2d 119, 124-25 (3d Cir. 1950) *with* Smith v. Village of Lansing, 241 F.2d 856, 859 (7th Cir. 1957).

19. 380 U.S. at 484 n.2. Justice Brennan possibly could have offered a third reason for escaping the ban of § 2283. He might have argued that the doctrine of Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), which made suits brought by the United States an exception to § 2283, should have been extended to civil rights litigants who, under the theory of their complaint, were not interested in their own individual welfare, but were trying to vindicate a national interest. *See, e.g.*, Studebaker Corp. v. Gittlin, 360 F.2d 692, 696-98 (2d Cir. 1966). Such a theory, however, would have eviscerated the statute and thus would have been no more appealing than declaring § 1983 an exception to § 2283.

20. *See* O. Fiss, Injunctions 168-70 (1972).

portant negative implication. Because he fastened on the time at which the federal complaint was filed as the relevant time for § 2283, he implied that if the state prosecutor won the race to the courthouse and obtained his indictment before the federal plaintiff filed his complaint, § 2283 would bar federal relief. The secrecy of grand juries and the stealthy use of criminal informations gave prosecutors an enormous advantage in such a race. No one knew when the prosecutor began.

This difficulty was compounded by the second requirement of *Douglas v. City of Jeannette*, that to receive injunctive relief a plaintiff must show that the injury which he seeks to prevent is imminent. The requirement was well rooted in equity practice.[21] Despite or perhaps because of the fact that the plaintiffs in *Dombrowski* could easily demonstrate imminent harm—they had been indicted under the Louisiana Subversive Activities and Communist Control Law—Justice Brennan carefully preserved *Douglas*'s rule of equity. Having just invalidated two sections of the Subversive Activities and Communist Control Law because their procedures and presumptions were constitutionally infirm, Justice Brennan in footnote 13 declined to consider plaintiffs' constitutional attack on the Communist Propaganda Control Law. It was uncertain, Justice Brennan said, whether plaintiffs' records had been seized under color of that law; a determination as to its constitutionality "should await determination by the District Court after considering the sufficiency of threats to enforce the law."[22] The harm from the enforcement of this act, in other words, was not demonstrably imminent.

This analysis seems artificial. In light of the entire pattern of Louisiana's law enforcement against Dombrowski and his associates, a genuine threat existed that this statute would also be enforced. More than that, the failure to consider the constitutionality of this statute was at odds with one of the central props of the whole opinion, the special vulnerability of precious First Amendment rights to the "chilling effect" of prosecutions. If the very possibility of a prosecution discouraged political activity and compelled the interdiction of the Communist Control Law, it seems inconsistent to claim that the attack on the Communist Propaganda Law was premature and should await further threats of enforcement. The strain in the logic reveals the strategic quality of footnote 13, as does the nominal quality of the restraint. The Court had already used the test of *Speiser v. Randall*[23]

21. *See, e.g.*, Fletcher v. Bealey, 28 Ch. D. 688 (1885).
22. 380 U.S. at 496 n.13.
23. 357 U.S. 513 (1958).

to invalidate the registration requirement of Louisiana's Subversive Activities and Communist Control Law,[24] and application of the same test would have been sufficient to invalidate the identical provision in the Communist Propaganda Control Law.[25] This would have been a small step indeed.

Seen by itself the application of the imminency requirement might have been of no moment—a very minor concession. But as I have already suggested it cannot be seen by itself. It must be placed alongside the first avoidance strategy—the chronological gloss of § 2283. Together they placed the civil rights litigant in a squeeze play. If he sought federal injunctive relief too soon, the imminency requirement would defeat the action; if he waited too long, the prosecutor might have brought charges barring equitable relief under § 2283. In the years immediately following *Dombrowski*, this problem did not seem acute, perhaps because Brennan's treatment of imminency in footnote 13 was *sotto voce*.[26] Yet in later cases the advantage to the prosecutor was enhanced when the Court elevated the imminency requirement to constitutional dimensions and gave it an unintended stringency.[27] The litigant was forced to wait, virtually to the point when a prosecution was commenced, when he could be faulted for being too late.

The third potential obstacle to access, the irreparable injury requirement, was the core of the *Douglas* decision. The case had held that a defense to a criminal prosecution was an adequate remedy at law and thus that a federal plaintiff subject to criminal prosecution was not facing irreparable injury. Justice Brennan accepted the equitable premise, that the federal injunction should be available only if a criminal defense were an inadequate remedy, and yet he circumvented its effect by linking the concept of irreparable injury to the particular characteristics of a First Amendment claim. Because First Amendment rights are both special and fragile, defense to a criminal prosecution

24. The Louisiana Subversive Activities and Communist Control Law required registration of "Communist front" organizations, and provided that if an organization were so identified by the Attorney General of the United States, by the federal Subversive Activities Control Board, or by a congressional committee, it was presumptively to be so classified for Louisiana purposes. The Court held this scheme invalid under the rule of *Speiser v. Randall*, *id.* at 526, *quoted in* 380 U.S. at 496: "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion . . . ."

25. Justice Brennan noted that the definition of "communist propaganda" in the Louisiana Communist Propaganda Control Law contained "a presumption identical to that which we have found to be invalid" in the provision regarding communist front organizations. 380 U.S. at 496 n.13.

26. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535, 580-84 (1970).

27. *See* pp. 1118-19, 1133, 1135, 1152 *infra*.

is an inadequate means of protecting them when the federal plaintiff claims they are threatened by an overbroad statute or by bad-faith harassment.[28]

It is crucial, especially in view of the way in which *Dombrowski* was subsequently to be rewritten, to understand the logical relationship between the two claims of overbreadth and bad-faith harassment and the irreparable injury requirement. For this purpose, the procedural posture of *Dombrowski* is revealing. The case reached the Supreme Court on the appeal of a dismissal of plaintiffs' complaint for failure to state a claim. There was no evidentiary record before the Court, only the pleadings. An overbreadth claim can be adjudicated on the pleadings because it is a pure law question, not implicating factual issues. This is not true of the claim of bad-faith harassment, which is critically dependent on factual assertions. The Court ordered the issuance of the injunction on the basis of the pleadings alone, and from that it is fair to assume that the injunction was issued on the basis of the overbreadth claim. Only in the context of its direction to the district court to frame a specific decree did it order an evidentiary hearing on the bad-faith harassment issue. Therefore *Dombrowski,* as much through this procedural mime as through the words of the opinion, identified overbreadth and bad-faith harassment as independently sufficient grounds for rendering a criminal defense an inadequate remedy at law.

The central contribution of *Dombrowski* was its linkage of irreparable injury and the doctrine of overbreadth. The doctrine, largely revived and developed in the 1960s by Justice Brennan in another civil rights case, *NAACP v. Button,*[29] permitted a statute to be invalidated when challenged under the First Amendment because of its inhibition of constitutionally protected activity. To connect the doctrine with irreparable injury, Justice Brennan relied on two unique aspects of the overbreadth claim. First, the doctrine imported a novel conception of standing. A plaintiff who charged that a statute was overbroad need not himself have established that his own activity would have been protected by the First Amendment; he could seek an injunction invalidating the statute on behalf of those who were protected. This loosened concept of standing rested upon the premise that fragile First Amendment rights would suffer unless the validity of the facially overbroad statute could be adjudged in the earliest possible case, regardless of whether the particular litigant was on one

28. 380 U.S. at 490-92.
29. 371 U.S. 415, 432-33 (1963).

side or the other of the constitutional line of demarcation. Second, under the overbreadth doctrine a victorious plaintiff would gain a judgment invalidating a statute on its face—in all its applications—instead of a focused judgment that the statute was unconstitutional as applied.

The overbreadth doctrine thus functioned to protect free expression as a "transcendent value to all society and not merely to those exercising their rights."[30] In *Dombrowski* Justice Brennan linked the concept of irreparable injury to this societal value. He hypothesized that a defense to a criminal prosecution was atomistic and thus unable to provide the broad protection needed for First Amendment rights. The result of a criminal trial determined at most whether or not a statute was unconstitutional as applied. If the activity of the individual defendant were found to be constitutionally protected, he would be acquitted; if not, he would be convicted. Perhaps after a long series of prosecutions the constitutional contours of the statute might be hammered out; but even then the criminal process would not be providing the litigant with the means to vindicate quickly and effectively the social right to free expression. Moreover, the criminal process was segmented. The constitutional issue could remain undecided if, for example, charges were dismissed for lack of evidence. Finally, the very defensive character of the alternative remedy contributed to its inadequacy. In situations unlike that in *Dombrowski*, where criminal prosecutions were only threatened, the threat could effectively chill First Amendment rights, and yet the citizen would have no power to obtain that remedy.

On this account the criminal defense did seem inadequate for the protection of First Amendment rights, and the bar erected by *Douglas v. City of Jeannette* had to fall. *Dombrowski* thus appeared as a tour de force—precedent was preserved but gutted. As we probe further, however, the analysis seems vulnerable. First, the *Dombrowski* conception of the criminal defense was too atomistic. No weight was given to the possibility of granting a motion to dismiss the criminal indictment on the ground that the statute was invalid on its face. That the overbreadth claim might be asserted as part of the criminal defense was in fact recognized by the Court in subsequent years.[31]

Second, the power of the federal injunctive remedy was exaggerated. The irreparable injury requirement demanded a comparative perspec-

30. 380 U.S. at 486.

31. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973); Gooding v. Wilson, 405 U.S. 518 (1972).

tive and could be satisfied only by identifying defects in an alternative noninjunctive remedy at law—in this instance the criminal defense—that were not present with the injunction. Yet some of the defects *Dombrowski* attributed to the criminal defense were also present with the federal injunction. A criminal court might reject the motion to dismiss on an overbreadth theory, but that contingency was also present in an injunctive suit. A citizen could not initiate a criminal defense, but the power of the plaintiff to initiate an injunctive suit was limited by the imminency requirement. Similarly, the judgment rendered in an injunctive proceeding might be no broader—no more effective to curb chilling effect—than one granting a motion to dismiss. For example, as the *Dombrowski* Court acknowledged in footnote 7, the statute might be revived once it received an acceptable limiting construction, and, so construed, might be applied to such conduct occurring before its reinterpretation as had received "fair warning."[32] Speakers might be chilled by the mere risk that they would subsequently be deemed to have received such warning.

Third, the narrowness of the lens inherited from *Douglas v. City of Jeannette* forced Justice Brennan to limit artificially the scope of his analysis. Even assuming the defense to a criminal prosecution was sufficiently flawed to render it "inadequate," a determination of irreparable injury should have included an evaluation of other alternative remedies at law. More importantly, if concerns of federalism were paramount, federal injunctive relief should have been measured against the entire universe of *state* remedies, legal or equitable. Thus state injunctive or declaratory proceedings could have protected the values implicit in an overbreadth claim as well as a federal injunction,[33] yet the irreparable injury doctrine precluded such a broad comparison.

A similar point could be made about the Justice's use of the bad-faith harassment claim, the other sufficient ground for a finding of irreparable injury. Since the harm lay in the fact of a bad-faith prosecution rather than its outcome, a criminal defense was an inadequate remedy. On the other hand, if the purview of the lens were widened and remedies other than the criminal defense considered, some might be found adequate. State declaratory judgments, state injunctions, or

32. 380 U.S. at 491 n.7.

33. In Matthews v. Rodgers, 284 U.S. 521, 526-29 (1932), for example, the Court held that district courts are without equity jurisdiction where the constitutionality of a state tax law may be challenged in a suit at law in state court to recover taxes paid under protest. The Court held that the availability of this procedure obviated the need for a determination as to the adequacy of defense to a criminal action for nonpayment.

state malicious prosecution actions, for example, might have been at least as adequate as a federal injunction.

Dombrowski's treatment of the bad-faith harassment claim was also vulnerable because the meaning of the claim remained unsettled. I see four strands running through the discussion, but no exact definition:[34] first, a prosecution brought with no chance of success, either because no evidence whatever exists against the defendant, or because the statute is patently invalid; second, discriminatory enforcement or the use of impermissible criteria for prosecution, such as a defendant's race or political beliefs; third, vindictively repetitive prosecutions; and fourth, intentionally aborted prosecutions, designed to deprive the defendant of an opportunity to adjudicate the validity of the statute.[35]

Dombrowski did not relate these elements of bad-faith harassment to one another or to possible state remedies. The more significant fact is the enormous evidentiary difficulty faced by a litigant in proving any of these elements. The first crude form of bad-faith harassment occurs relatively infrequently; the others present the imposing evidentiary burden of demonstrating prosecutorial motive. As a practical matter—and in contrast to the overbreadth claim—the universe of bad-faith-harassment claims that can be established is virtually empty.[36]

34. "Bad-faith harassment" is Justice Brennan's phrase in his later opinion in Perez v. Ledesma, 401 U.S. 82, 97 (1971) (concurring in part and dissenting in part). Other members of the Court treated the two elements conjunctively, "bad faith *and* harassment," Younger v. Harris, 401 U.S. 37, 53 (1971) (emphasis added), or occasionally disjunctively, a "state proceeding . . . motivated by a desire to harass or . . . conducted in bad faith," Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975). Since one cannot readily imagine either good-faith harassment or bad-faith without harassment, the phrase is tautological (but nevertheless useful to identify, or at least label, a certain species of prosecutorial behavior).

35. *See* 380 U.S. at 490.

36. In the period after *Dombrowski* but before Younger v. Harris, 401 U.S. 37 (1971), most lower courts were reluctant to find bad-faith harassment on the part of state officials. Maraist, *supra* note 26, at 585-87. On occasion, though, exceptions were made. *See* Duncan v. Perez, 445 F.2d 557 (5th Cir.), *cert. denied,* 404 U.S. 940 (1971); Cantrell v. Folsom, 332 F. Supp. 767 (M.D. Fla. 1971); Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), *aff'd,* 467 F.2d 113 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972) (involving Jim Garrison's notorious pursuit of an alleged Kennedy assassin); Taylor v. City of Selma, 327 F. Supp. 1191 (S.D. Ala. 1971) (finding harassment of two of three plaintiffs). If anything, exceptions became even less frequent under *Younger*'s regime of "Our Federalism." A review of the reported cases decided in the years after *Younger* reveals only five instances in which bad-faith harassment was established in suits seeking to enjoin pending state criminal prosecutions. *See* Krahm v. Graham, 461 F.2d 703, 707 (9th Cir. 1972); Universal Amusement Co. v. Vance, 404 F. Supp. 33, 48-50 (S.D. Tex. 1975), *vacated and remanded on other grounds sub nom.* Butler v. Dexter, 425 U.S. 262 (1976); Llewelyn v. Oakland County Prosecutor's Office, 402 F. Supp. 1379, 1388-89 (E.D. Mich. 1975); International Soc'y for Krishna Consciousness, Inc. v. Conlisk, 374 F. Supp. 1010, 1013-14 (N.D. Ill. 1973); *cf.* McGuire v. Roebuck, 347 F. Supp. 1111, 1124-25, 1129 (E.D. Tex. 1972) (finding of bad-faith harassment, but no injunction of pending prosecution; declaratory relief granted and the city council enjoined from "re-enacting such

The great significance of *Younger v. Harris*[37] is that it shrank *Dombrowski* down to this empty universe.

II

Dombrowski was at peril from the very start. The intricacies of its analysis could not hide its revolutionary promise. It appeared to open doors that had long been kept shut by *Douglas v. City of Jeannette.* Like a diagram with footprints and arrows, it showed the way around all of the second-order obstacles to federal injunctive relief against state prosecutions. "Chilling effect" and "overbreadth" became the slogans of civil rights litigators.

Though steeped in the language of equitable remedies, *Dombrowski* was of course not a struggle about remedies but about judges. Justice Harlan, in dissent, complained of the majority's "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."[38] In truth, this was not the majority's assumption, but the plaintiffs'. The majority could only be faulted, if that is the proper word, for indulging it; the majority was willing to respect the plaintiffs' judgment as to which forum—state or federal—would be more likely effectively and fairly to adjudicate their grievance against the state.

The Court's indulgence could have been predicated on a number of premises: that access to federal courts should be presumed because they were the primary guardians of constitutional rights; that the state court judges of the South were partial and unwilling to protect the civil rights movement; that a rule respecting a citizen's choice of forum would, by and large, enhance the likelihood of the citizen's success and that likelihood should be enhanced; or, more neutrally, that there was no sensible way of second-guessing a citizen's choice of forum. In order to second-guess a plaintiff's choice of forum, a federal court would have had either to have presumed irrebuttably that the state courts were fair or to have placed the state courts on trial. The first alternative was at odds with the little we knew from experience,

ordinance"). For cases that have found allegations of bad faith sufficient to require an evidentiary hearing, see Timmerman v. Brown, 528 F.2d 811, 815-16 (4th Cir. 1975); and Reed v. Giarrusso, 462 F.2d 706, 711 (5th Cir. 1972). In the one case where the Supreme Court reviewed findings of bad-faith harassment, it reversed the lower court. Hicks v. Miranda, 422 U.S. 332, 350-51 (1975); *cf.* Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975) (allegations of bad-faith harassment properly dismissed by the district court). For a discussion of bad-faith harassment in the *Littleton* litigation, see pp. 1151-52 *infra.*

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

38. 380 U.S. at 499 (Harlan, J., dissenting).

and the second was almost unthinkable. It would have overburdened the front end of each lawsuit and been self-defeating—the very inquiry itself would have been a massive affront to state officials.

The *Dombrowski* opinion explicitly articulated and analyzed none of these premises. Instead it adopted wholesale the conceptual apparatus of *Douglas v. City of Jeannette,* and achieved its ends by finessing the concept of irreparable injury. The result was that the altered vision of federalism, the underlying premise of the case, remained submerged, silent beneath the smooth manipulation of equity doctrine. And if, as we have seen, that manipulation was vulnerable on several counts, the underlying vision of federalism would remain undefended.

This became crucially important as the *Dombrowski* majority began to fall apart. There were, first, personnel changes. Thurgood Marshall had replaced Clark. On the other hand, the Chief Justice had been replaced by Warren Burger; and Goldberg's position had passed to Fortas and then on to Blackmun. Even more importantly, the context had altered. For one thing, the civil rights movement had matured: it had lost its regional focus. If the rules were changed to benefit the movement, the changes would have a national scope. Moreover, beginning with Watts in the summer of 1965, black riots broke out in many large cities of the nation. These traumatic events had little to do with the civil rights protests and demonstrations that marked the early 1960s; but they—like the assassinations of President Kennedy, Senator Kennedy and Martin Luther King—no doubt affected the Justices' perception of those protest activities. The Justices were less inclined to intervene on behalf of the movement, less inclined to guarantee it a federal forum. This disaffection was reinforced by the change in the tactics and underlying grievances of radical politics. Protests were no longer confined to civil rights; the anti-war movement and student radicalism moved to the center of the First Amendment arena. The silent sit-in was overtaken by massive and often vituperative demonstrations, such as the march on the Pentagon, the demonstration at the Democratic National Convention in Chicago, or the student takeovers at Columbia and Cornell. It was no longer clear that the silent premises that lay at the heart of *Dombrowski* could carry the day.

The issue came to a head in 1971 in *Younger v. Harris.*[39] The case was carefully put together to take advantage of *Dombrowski.* The diagram was followed to a letter. The plaintiffs in *Younger* presented

39. 401 U.S. 37 (1971).

the quintessential overbreadth claim: they sought to enjoin the enforcement of the California Criminal Syndicalism Act, a statute seeming to reach the mildest speech and deriving from an earlier era of Red Scares and attacks on the IWW. The choice of plaintiffs was also careful. One of them, Harris, had a prosecution already pending against him, and since that directly posed the issue of whether § 1983 was an exception to § 2283, counsel made sure a second group of nonprosecuted plaintiffs, including radical political activists and a teacher, joined in with a claim of chilling effect to cushion the potential loss on the § 2283 issue.

But all this careful preparation was for nothing. Their case was demolished, along with a goodly portion of *Dombrowski*. And while that may have been expected given the changes in Court personnel and social context, there were two remarkable features to *Younger*, features that especially inform our inquiry into the limits of judicial statesmanship. First, the apparatus created by *Dombrowski* was used to close the door to federal injunctive relief. The squeeze play between imminency and irreparable injury, which lay dormant in *Dombrowski*, was tightened and brought fully to bear. The activists and teacher sought federal relief too soon; Harris, too late. Second, and even more remarkably, Justice Brennan concurred in that result.

The opinion was written by Justice Black, who had not participated in *Dombrowski* and who had joined Chief Justice Stone's opinion in *Douglas*. He saw *Dombrowski* as the enemy. He countered with "Our Federalism," a conception derived from the 1793 Anti-Injunction Act[40] (and blindly overlooking the Civil War, reconstruction, legislation such as §§ 1331, 1343 and 1983,[41] and all such intervening events), and from a "notion of 'comity,' that is, a proper respect for state functions."[42] But Justice Black, no less than Justice Brennan, did not analyze, rigorously or otherwise, the underlying tenets of federalism. He merely gave us a new shibboleth, "Our Federalism," to express the anti-nationalist sentiment that was to guide his interpretation of the equitable doctrines that *Dombrowski* preserved from *Douglas*.

Armed with "Our Federalism," Justice Black first construed the imminency requirement to eliminate the nonprosecuted plaintiffs. The attack was quick and unconvincing: "A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or specula-

40. 28 U.S.C. § 2283 (1970).
41. *Id.* §§ 1331, 1343 (1970 & Supp. V 1975); 42 U.S.C. § 1983 (1970).
42. 401 U.S. at 44.

tive are not to be accepted as appropriate plaintiffs in such cases."[43] No explanation was given why the fears of the activists and teacher were merely "imaginary" or "speculative," especially given the historic origins of the statute, its apparent reach, and the pendency of the prosecution against Harris. No account was taken of what was then established doctrine—that First Amendment rights were especially "vulnerable" and "important," thus warranting the earliest judicial intervention. No reason was given why an adjudication at the behest of the teacher and activists would be flawed; surely there was sufficient adverseness to ensure that the issues were fully litigated. And to say, as Justice Black did, that the relief sought by the plaintiffs was a "serious matter" hardly justified refusing to adjudicate the merits of their claim altogether. If the requested relief was a "serious matter," so was the refusal to adjudicate that request.

In the second prong of his attack, Justice Black dealt with the prosecuted plaintiff, Harris, and concluded that he could not demonstrate irreparable injury. Black said that "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable.' "[44] In reaching this conclusion, Justice Black fastened on a central ambiguity of the irreparable injury requirement—its failure to specify *how* inadequate alternative remedies must be before federal equitable relief would be available. The imperatives of "Our Federalism" were interpreted to require that "even irreparable injury is insufficient unless it is 'both great and immediate.' "[45] "Our Federalism" thus both supplied the raison d'être of the irreparability requirement and simultaneously inflated its rigor. At the same time Justice Black dismantled the central achievement of *Dombrowski*, the linkage of irreparable injury and overbreadth.

Justice Black dealt with the overbreadth branch of *Dombrowski* by essentially treating it as unpersuasive dictum.[46] He denied that *Dombrowski* used overbreadth to meet the irreparable injury requirement and argued that in any event, overbreadth could not meet the irreparable injury requirement as properly understood in the light of "Our Federalism." He dismissed the supposed chilling effect on First Amendment rights of overbroad statutes. He spoke of the impossibility of guarding against the chilling effect of overbroad statutes, and thus

43. *Id.* at 42.
44. *Id.* at 46.
45. *Id.* (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926)).
46. *Id.* at 50-53.

neatly caught Justice Brennan in his own trap. Justice Black said that since footnote 7 in *Dombrowski* left open the possibility of retrospective validation of an overbroad statute, the chilling effect would exist anyway, even with broad injunctive relief to the federal plaintiff. Finally, he complained that the total invalidation of state statutes on an overbreadth theory was inconsistent with traditional conceptions of the adjudicatory process.

Having eliminated the overbreadth branch of *Dombrowski,* the question remained whether the irreparable injury requirement—now inflated by the requirements of "Our Federalism"—could ever be met. Justice Black identified two possible situations: bad-faith harassment, the only branch of *Dombrowski* allowed to survive; and statutes " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.' "[47] Few litigants could bring themselves within either of these categories.[48] Harris was no exception, and access to federal injunctive relief was denied.

Although there was a prosecution pending against Harris, Justice Black's opinion—so strident and overreaching—did not focus on this aspect of the case. The adequacy of the criminal defense as an alternative remedy to the federal injunction was not tied in his analysis to an actual pending prosecution. Yet there was reason to believe the pendency of the prosecution was significant: Justice Black, in a manner reminiscent of Chief Justice Stone in *Douglas,* used § 2283 as his policy oracle, and that statute is activated only when there are proceedings in a state court. In a separate concurrence, Justices Harlan and Stewart, whose votes were needed for the *Younger* majority, em-

47. *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). The *Dombrowski* conception of bad-faith harassment may have been spacious enough to include this exception. *See* p. 1115 *supra.*

48. For a discussion of the narrowness of the bad-faith harassment exception, see note 36 *supra.* The narrowness of the flagrantly and patently violative exception was evidenced by *Younger* itself. Harris could not bring himself within the exception, and yet the statute under which he was indicted had been effectively invalidated in Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969), as the Court itself acknowledged. 401 U.S. at 40-41. The limited nature of the exception is reconfirmed by the Court's latest pronouncement in Trainor v. Hernandez, 45 U.S.L.W. 4535, 4538, 4539-44 (U.S. May 31, 1977), in which four of the Justices complained of the Court's rigid treatment of the exception. Justice Stevens complained that such treatment "actually eliminates one of the exceptions" under the *Younger* doctrine. *Id.* at 4542 (Stevens, J., dissenting). *Hernandez* was one of only three cases in which a district court had utilized the flagrantly and patently violative exception. The others were Nihiser v. Sendak, 405 F. Supp. 482 (N.D. Ind. 1974), *vacated and remanded,* 423 U.S. 976 (1975) (for reconsideration in light of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)); and McGuire v. Roebuck, 347 F. Supp. 1111 (E.D. Tex 1972) (declaratory relief).

phasized the fact that a prosecution was pending against Harris.[49] This created the possibility that, wholly apart from these exceptions, the irreparable injury requirement might have been satisfied had no prosecution been pending against Harris. It was thus possible to read *Younger* to mean that the bar to access it created was vitally dependent upon a pending prosecution.

It was just this possibility that provides the key to understanding what otherwise seems inscrutable—Justice Brennan's concurrence in *Younger*. He saw in this possible interpretation of *Younger* an opportunity to salvage as much of *Dombrowski* as he could. Justice Black had tried to reduce *Dombrowski* to a virtual nullity, and Justice Brennan countered by trying to reduce *Younger*. Justice Brennan's strategy was to reduce *Younger* to a rule requiring that no prosecution be pending against the federal plaintiff, and to shift the focus from injunctions to declaratory judgments. Once again, the Justice chose not to meet the principles of "Our Federalism" head on, but to blunt their implication by the deft manipulation of technical doctrine.

Justice Brennan chose his ground in *Perez v. Ledesma*,[50] a companion case to *Younger* in which the plaintiff, against whom there was no prosecution pending, was seeking a declaratory judgment. Evidently Justice Black feared that his *Younger* majority would dissolve over the question whether there should be access to a federal court if there were no prosecution pending. He took pains to avoid the issue in his majority opinion in *Perez*, holding that the question of the constitutionality of a parish obscenity ordinance, as to which no prosecution was pending, was not properly before the Court. Justice Brennan, on the other hand, was determined to use *Perez* as a forum for articulating and launching his post-*Younger* strategy.[51]

Justice Brennan set up his *Perez* opinion by agreeing that neither declaratory nor injunctive relief would be available if there were a state prosecution pending against the federal plaintiff. His willingness

49. 401 U.S. at 54-55 (Stewart, J., concurring). Only Justices Burger and Blackmun joined in Justice Black's opinion without qualification; Justices White and Marshall joined Justice Brennan's separate concurrence in the result; Justice Douglas dissented.

50. 401 U.S. 82 (1971).

51. Justice Black relied in part on Moody v. Flowers, 387 U.S. 97 (1967), which held that a three-judge court could not be properly convened to consider statutes of only local application, such as a local ordinance. 401 U.S. at 86-87. Justice Brennan surmounted Justice Black's technical obstacle by arguing that once a three-judge court is properly convened to consider one controversy between two parties, it can consider all issues between the parties, including challenges to local ordinances. *Id.* at 98-100 (Brennan, J., concurring in part and dissenting in part). Justice Brennan's desire to use *Perez* as a forum is betrayed by his discussion of the merits. He acknowledged that even the local prosecutor did not contest the unconstitutionality of the ordinance. *Id.* at 130.

to abide by such a no-prosecution-pending rule in the injunctive context was signaled by his concurrence in *Younger*.[52] His willingness to abide by it in the declaratory context was signaled by his separate concurrence in the result of another *Younger* companion, *Samuels v. Mackell*,[53] involving a challenge to the New York criminal anarchy statute. The *Younger* majority held in *Samuels* that the declaratory judgment was subject to the requirements of *Younger* and that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment."[54] Justice Brennan concurred only in the proposition that, in the absence of bad-faith harassment, declaratory judgments should not issue in the face of a pending prosecution. He referred to his *Perez* opinion for further elaboration,[55] an opinion that stands as a major essay on the distinction between federal declaratory judgments and injunctions.[56]

This distinction did not seem relevant to the imminency requirement.[57] The injunction consists of a declaration of rights and duties backed by threat of sanction. It gives the defendant one more chance. The declaratory judgment, on the other hand, gives the defendant two more chances: it consists of a declaration of rights and duties, and if the defendant disobeys the plaintiff cannot get a contempt order, but only an injunction to prevent another act of disobedience. The injunction, then, involves an additional element of coercion, an additional threat of sanction for disobedience; but this difference does not functionally relate to the issue of imminency, to the question of when a court should intervene. In any event, after *Younger* imminency was given an Article III case-or-controversy rather than an equity basis, and thus it would apply with equal rigor to declaratory

52. Strictly speaking, this is true only for that aspect of the case concerned with Harris. The Justice could have taken a stand on the other plaintiffs, the activists and the teacher, particularly given his sensitivity to the chilling effect of overbroad statutes. But perhaps he wanted to save his capital for other ventures, or feared that he would lose the votes of White and Marshall, who joined his *Younger* concurrence as well as his opinions that day in *Samuels* and *Perez*.

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

54. *Id.* at 73.

55. *Id.* at 75-76 (Brennan, J., concurring in result).

56. *Perez* was foreshadowed by Zwickler v. Koota, 389 U.S. 241, 254 (1967), where Justice Brennan, writing for the Court, made plain that "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."

57. There is muffled suggestion to the contrary in the Justice's opinion in *Perez*, 401 U.S. at 119 n.12. But that should be compared with his opinion in the second *Zwickler* case, Golden v. Zwickler, 394 U.S. 103 (1969), carefully preserved and noted in *Perez*. *See* 401 U.S. at 101-03.

judgments and injunctions, or for that matter, to any remedy afforded by a federal court.

The great benefit of the shift from injunctions to declaratory judgments lay in its impact on the other obstacles to access identified in *Douglas* and preserved in *Dombrowski*—§ 2283 and irreparable injury. On a literal or highly technical reading, § 2283 did not seem applicable to declaratory judgments; indeed, in the mid-1960s civil rights litigators started focusing on declaratory judgments to avoid the § 2283 bar. In his *Perez* opinion, the Justice declared that § 2283 was not applicable to declaratory judgments.[58] Moreover, as a new statutory creation, the declaratory judgment was not moored to the history of equity. After an extended discussion of the Federal Declaratory Judgment Act of 1934, Justice Brennan dryly noted in *Perez*, "The prerequisites for injunctive and declaratory relief are different."[59] In contrast to the reasoning of the *Samuels* majority, Justice Brennan argued that declaratory relief should not be subject to the equitable requirement of irreparable injury, a requirement that *Younger* had made so inhospitable.

This reasoning meant that *Dombrowski* could now be built on in a practically important way. Aside from the trivial category of claims of bad-faith harassment, access under *Dombrowski* was conditioned upon the presentation of an overbreadth claim; it was the special structural features of that claim that rendered the alternative remedy, the criminal defense, inadequate. But once declaratory judgments were freed from the traditional formulas of equity, declaratory relief could issue whether or not the federal plaintiff faced irreparable injury or inadequate alternative remedies at law. There was no need to find a special feature of the plaintiff's claim that could not adequately be accommodated by the criminal defense. There was no need to rely on overbreadth. The claim need not even be based on the First Amendment.

Justice Brennan, however, still needed to explain his concurrence in the holding of *Samuels*, that if a prosecution were pending against the federal plaintiff no declaratory relief would issue. The *Samuels* majority had explained this holding in terms of the irreparable injury requirement. Without that requirement, Justice Brennan had to create a new formula to anchor his proposed no-prosecution-pending bar. For that purpose he chose the concept of "comity." "Comity" was to function for declaratory judgments in much the same way as

58. 401 U.S. at 128-29 n.18.
59. *Id.* at 123.

"irreparable injury" was to function for injunctions—as the doctrinal anchor for rules restricting access. Frankness was served by this linguistic exchange. The masking of federalist values in the language of equity, a tradition epitomized by *Douglas v. City of Jeannette* and perpetuated in *Dombrowski*, could now be abandoned, at least in the realm of declaratory judgments.

"Comity" is a spacious concept; it can serve whatever values are infused into it. In *Perez*, Justice Brennan concluded that if a state prosecution were pending, "the interests protected by federal intervention must be weighed against the broad countervailing principles of federalism."[60] However, if no prosecution were pending, Justice Brennan made clear that for him a proper understanding of the principles of comity began with "the congressional scheme that makes the federal courts the primary guardians of constitutional rights."[61] Operationally this meant that in the absence of a pending prosecution the federal declaratory remedy became a presumptively available remedy against an unconstitutional state statute: When no state prosecution is pending "[o]rdinarily a declaratory judgment will be appropriate if the case-or-controversy requirements of Article III are met . . . ."[62]

Over time, such easy availability of declaratory judgments would have an important bearing on the availability of injunctions. This is because in many situations injunctions and declaratory judgments are functionally equivalent. In such situations it would be hard—either on a practical or theoretical level—to use doctrines like the irreparable injury requirement to maintain two sets of rules, one more restrictive than the other.[63] Thus Justice Brennan's strategy in *Perez* was deeply laid, its implications so much more profound than its appearance. But for the moment he was content nominally to preserve the distinction between injunctions and declaratory judgments, theorizing that irreparable injury, and not his loosened concept of comity, should remain a barrier to the issuance of a federal injunction. A bad-faith harassment claim would be in itself sufficient to surmount it. Absent a bad-faith harassment claim, it could be surmounted only if there were no prosecution pending. If no prosecution were pending, it could, at least according to Justice Brennan, be satisfied by a finding of overbreadth.

60. *Id.* at 121.
61. *Id.* at 104.
62. *Id.* at 121.
63. *See* pp. 1144-48 *infra*.

The crucial concession of Justice Brennan's *Perez* strategy was that all federal anticipatory relief, injunctive or declaratory, would be barred if there were a prosecution pending. It was a retreat from *Dombrowski*. At the time the Supreme Court directed the issuance of the injunction in *Dombrowski*, there was a prosecution pending in the state courts. That there was no prosecution pending at the time that the federal suit had been *filed* was of questionable significance, since in *Perez* Justice Brennan treated the time of *hearing*, not of filing, as the critical point for applying the no-prosecution-pending rule.[64] There was a state prosecution pending against the plaintiff in *Perez* at the time he filed his suit, but by the time the suit was heard in federal district court the state prosecution had been *nolled*.

Wholly apart from the question whether the no-prosecution-pending bar represented a revision of *Dombrowski*, it seems clear that it is without adequate theoretical foundation. Justice Brennan's analysis of the appropriate "countervailing principles of federalism" was weak and half-hearted. His first claim was that the pending state prosecution would provide a concrete opportunity for the defendant to vindicate his constitutional claims.[65] The problem with this justification is, of course, that it ignored the defects in the criminal defense that Justice Brennan himself had noted earlier in connection with *Dombrowski*.[66] The pendency of the prosecution may eliminate one shortcoming of the criminal defense, the absence of power in the citizen to initiate it, but curing one defect does not eliminate the others.

As a second line of argument, Justice Brennan suggested that when a prosecution is pending, affirmative federal relief would not accelerate the determination of constitutional rights. Resort to a federal court, he said, would "not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded."[67] This argument is also unpersuasive. The very purpose of the federal affirmative relief—declaratory or injunctive—is to stop the state prosecution. The citizen claims that the state statute is invalid, and if his claim is upheld, it would be unthinkable to allow the state prosecution to wend its way to conclusion.

Finally, Justice Brennan invoked a concern for preserving the in-

64. 401 U.S. at 109. Justice Brennan explicitly reserved the question whether federal relief would be proper if a state prosecution were begun after the filing of the federal suit but before the federal hearing. *Id.* at 117 n.9. *See* p. 1134 & note 98 *infra*.

65. *Id.* at 121.

66. *See* pp. 1112-14 *supra*.

67. 401 U.S. at 121.

tegrity of state processes. He stated that "federal intervention may disrupt the state proceeding through the issuance of necessary stays," and noted that when a state prosecution is pending, federal consideration of claims for affirmative relief create the possibility of "unwarranted and unseemly duplication of the State's own adjudicative process."[68] It is here that the Justice struck the most responsive chord, and yet the argument fails for its incompleteness and its inconsistency with the other tenets of his nationalism. The concern with "unseemly duplication" does not express a considered judgment about federal structure, but rather a conclusion to which the Justice was, in my judgment, driven by the necessities of judicial politics.

This concern with the integrity of state processes is consistent with the Justice's reluctance to have federal courts oversee evidentiary rulings in ongoing state processes—a reluctance he carefully expressed in *Dombrowski*.[69] But in *Perez* he used this concern with the integrity of state processes to bar federal adjudication of the constitutionality of the underlying state criminal statute, and that seems at odds with the nationalism of *Dombrowski*. The Justice did not distinguish the "unseemly duplication" that he spoke of in *Perez* from the duplication that necessarily occurs whenever the Supreme Court reverses a state criminal conviction, as in *Murdock* itself, or whenever a federal court grants a writ of habeas corpus after conviction, as in *Fay v. Noia*,[70] another Brennan achievement. Moreover, such delicate concern for the integrity of state processes is evidently incompatible with Justice Brennan's defense of the bad-faith harassment exception to the no-prosecution-pending bar. Although Justice Brennan asserted that federal intervention to prevent bad-faith harassment would not interfere with good-faith law enforcement,[71] this presupposes the validity of the claim. Access must depend on the nature of the claim, not the outcome of a trial. While adjudicating the merits of a bad-faith harassment claim, federal courts would have to interfere with state proceedings by enjoining prosecutions.

68. *Id.*

69. In footnote 3 of *Dombrowski*, 380 U.S. at 485 n.3, the Justice announced: "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

70. 372 U.S. 391 (1963).

71. 401 U.S. at 120. Justice Brennan also asserted that adjudication of bad-faith harassment claims did not necessarily require a decision on the constitutionality of a statute. *Id.* Of course, if the claim were that a prosecution had been brought with no chance of success because the statute in question was patently invalid, arguably embraced within Justice Brennan's conception of bad-faith harassment, *see* p. 1115 *supra*, constitutional adjudication of the statute's validity would be required.

Even more fundamentally, Justice Brennan's adoption of a no-prosecution-pending bar is irreconcilable with his position that federal anticipatory relief should be available in the absence of a pending prosecution. Justice Brennan sought to justify federal intervention in such circumstances on the grounds that "individuals should be able to exercise their constitutional rights without running the risk of becoming lawbreakers."[72] The trouble with this justification is that it was merely an argument for anticipatory relief, not for *federal* relief. After all, state declaratory or injunctive relief could equally well serve this function. The necessity for federal judicial intervention could be established only with an additional premise: that once called upon by the citizen, it was the responsibility of federal courts to protect constitutional rights by determining the constitutionality of state statutes. And this premise—encapsulated in his phrase "the federal courts [are] the primary guardians of constitutional rights"[73]—is deeply at odds with Justice Brennan's concession that federal relief should not be available if state prosecutions were pending. Even if the "principles of comity" required a healthy respect for state proceedings, the ultimate question had to be the power to determine the constitutionality of state laws. Once that power was clearly recognized to lie in federal courts, respect for the states would seem irrelevant to whether it was exercised before, during, or after a state prosecution. The disruption and duplication occasioned by federal affirmative relief in the context of a pending prosecution should not be viewed as "unseemly," but rather as the necessary and appropriate consequence of the role of the federal courts as "the primary guardians of constitutional rights."[74]

Although the no-prosecution-pending bar was not intellectually compelling, it was a concession made in a serious attempt to forge a new Court position. The intent was to salvage as much of *Dombrowski* as possible in the face of a generally hostile majority. Justice Brennan's *Perez* opinion was joined by Justices Marshall and White, and it was composed with an eye toward Justices Stewart and Harlan's concurrence in *Younger*, which pointedly noted that "the Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions."[75] And, of course, Justice Brennan knew he could always count on Justice Douglas—Douglas alone had dissented in *Younger*, declaring

72. 401 U.S. at 120.
73. *Id.* at 104.
74. *See* pp. 1131-32 *infra*.
75. 401 U.S. at 55 (Stewart, J., concurring) (emphasis in original).

that even if a prosecution were pending access to federal equity court should remain. In fact Justice Douglas had refused to concur in Justice Brennan's *Perez* opinion, possibly because he considered it an unwarranted retreat from *Dombrowski*.

The Court took a first step toward vindicating Justice Brennan's *Perez* strategy the very next Term. After seven years of strenuously avoiding the question, the Court in *Mitchum v. Foster*[76] finally ruled that § 1983 was an exception to § 2283. The irony of the case is striking. In *Younger* Justice Black focused exclusively on § 2283 as a policy oracle, ignoring whatever message § 1983 had to transmit; in *Mitchum* Justice Stewart not only rediscovered § 1983, but found that it made § 2283 inoperative. Indeed, Justice Stewart pointed to historical research suggesting that § 2283 was predicated more on hostility toward injunctions as a remedy than on any vision of federal structure.[77]

By the time of the *Mitchum* decision, § 2283 had in fact lost most of its significance as a technical obstacle to federal affirmative relief. Even in the absence of the statute, *Younger* and *Samuels* effectively barred anticipatory remedies if a state prosecution was pending. There were no longer grounds for the fear that had previously restrained the Court, that a § 1983 exception to § 2283 would eat up the statute. The practical benefit of *Mitchum* was that if a prosecution were pending, an injunction requested because of bad-faith harassment could be issued; it would not be barred by the statute. And, although evidentiary problems render this universe near-empty, the very existence of the bad-faith exemption suggests the possibility of other exemptions, and further revisions. Even Justice Black in *Younger* had reserved judgment on whether "[o]ther unusual situations calling for federal intervention might also arise."[78] Doctrine has a malleability not present in statutes.

Mitchum eliminated the § 2283 bar for injunctions. Another facet of the *Perez* strategy—the rule that access for declaratory judgments would "ordinarily" exist if no prosecution were pending—still needed majority status. That seemed almost inevitable given the alignments in *Younger* and *Perez*, but the law awaited a formal declaration. That first occurred, of all places, in *Roe v. Wade*.[79]

The plaintiff in *Roe* had brought a federal anticipatory suit against a state criminal statute prohibiting abortions. The Court issued a

76. 407 U.S. 225 (1972).
77. *Id.* at 232-33 n.10.
78. 401 U.S. at 54.
79. 410 U.S. 113 (1973).

declaratory judgment, but declined to overturn the district court's denial of an injunction. Of special significance was the fact that the Court vindicated a substantive due process claim, not a First Amendment or an overbreadth claim, thereby establishing that, as Justice Brennan had suggested in footnote 10 of his *Perez* opinion,[80] neither was a prerequisite to federal declaratory relief. However, *Roe* was not fully determinative, since the striking quality of the substantive issue obscured and conceivably limited the availability of access; perhaps the case was as *sui generis* on the access issue as it was on the merits.

The full triumph of Justice Brennan's strategy was therefore delayed until 1974. Fittingly, it was Justice Brennan himself who wrote for the Court in *Steffel v. Thompson*,[81] vindicating his position that a declaratory judgment might be issued so long as no prosecution was pending, regardless of the appropriateness of injunctive relief. And although *Steffel* involved a First Amendment challenge, it granted relief upon a claim that a statute was invalid as applied, the antithesis of the typical overbreadth claim.

III

Justice Brennan's *Perez* strategy kept *Younger* and "Our Federalism" at bay. Much of *Dombrowski* was salvaged. But the Brennan formulation of the no-prosecution-pending rule and his shift of focus to declaratory relief were both primarily tactical maneuvers. The vision of federalism that underlay *Dombrowski* remained unarticulated, vulnerable to doctrinal retrenchment. The new Court of the 1970s owed it no allegiance.

At the time of *Younger* the nation was just beginning to emerge from the radicalism of the 1960s. As we moved deeper into the 1970s memories of the trauma persisted, and as a memory, the dislocation became more prominent than the justice of the underlying grievances. Even more, the conservative bloc had grown. By the time of *Younger*, Nixon had already placed Burger and Blackmun in position; indeed they were the only ones who unqualifiedly joined Justice Black's high-pitched *Younger* opinion. In time Nixon replaced Justice Black with Powell, and then appointed Rehnquist to fill Justice Harlan's vacancy. By the mid-1970s the bloc that fully subscribed to *Younger* had grown by one, and of even greater significance was the fact that in Justice Rehnquist the Right had obtained a youthful, vigorous, and in-

80. 401 U.S. at 117 n.10.
81. 415 U.S. 452 (1974).

deed clever spokesman. The Nixon bloc was one vote short of a majority, but the middle of the Court—Justices Stewart and White—was accessible. They had voted for *Dombrowski,* indeed they had joined Justice Brennan's opinion, and yet I suspect that those were reluctant votes, more dependent on concession and context than on any strong vision of the proper allocation of judicial power in a federal structure. With the vote of either Stewart or White the Burger Court could pass from the transitional phase of 1971 and begin its program of retrenchment—leaving *Dombrowski* on the books, but returning to the regime of *Douglas v. City of Jeannette.* At that point Justice Brennan would move from spokesman of the Court to dissent.

A. *The No-Prosecution-Pending Bar*

Justice Brennan attempted to rescue *Dombrowski* by agreeing to the no-prosecution-pending bar in *Perez.* That occurred in 1971. Ironically, in the mid-1970s that bar became a doctrinal vehicle for retrenchment. Its potential for such use derived from its ambiguities: (1) *Who* must the proceeding be against? (the identity issue); (2) *When* must the proceeding be pending? (the temporal issue); and (3) What *kind of proceedings* are covered? (the type-of-proceeding issue). The drift of the decisions is unclear with respect to the first of these interstitial issues, but there can be no doubt that the others were seized as entry points for a further assault on *Dombrowski.*

1. *The Identity Issue: Personalization*

The suit for affirmative relief has been primarily conceptualized as benefiting only a single plaintiff. Suppose, however, we broaden our perspective and consider the situation in which many people are adversely affected by the existence or enforcement of an allegedly unconstitutional statute. A is not being prosecuted, B is. The no-prosecution-pending bar prevents B from obtaining federal affirmative relief. But is B's disability only personal to him? That raises what I shall call the identity issue: against whom must the prosecution be pending if the *Younger* bar is to apply?

This issue first arose in the abortion cases. A prosecution under the Texas abortion law was pending against a plaintiff-intervenor in *Roe* v. *Wade,* Dr. Hallford. Hallford advanced an ingenious argument whereby, for *Younger* purposes, his status as a "potential future defendant" would entitle him to federal relief, notwithstanding his status as a current state defendant. Justice Blackmun rejected this contention out of hand and, on *Younger* grounds, denied Hallford permission to

intervene.[82] The more striking point, however, is that Justice Blackmun went on to consider the merits. In other words he treated the no-prosecution-pending bar as a personal defect; the prosecution pending against Hallford would not preclude federal anticipatory relief at the behest of another plaintiff as to the very same statute.

For the Court to have held that the existence of a single prosecution disabled all other potential plaintiffs for anticipatory relief in the state would have been remarkable. At the same time, personalization of the no-prosecution-pending requirement seems at odds with "Our Federalism." The critical fact in *Roe v. Wade* was that once the state statute was declared unconstitutional the pending prosecution against Hallford would for all practical purposes be stopped, and this would violate the principles of comity *Younger* sought to advance. Hallford could probably count on the district attorney "voluntarily" dropping the prosecution, for ultimately the defendant would have to be released. But even if the district attorney persisted, the operative assumption, at the time of *Roe* and thereafter, was that Hallford would either be entitled to the collateral estoppel effect of the judgment in Roe's case (for the state was fully represented) or conceivably to injunctive relief under 28 U.S.C. § 2202.[83]

This inconsistency between the personalization of the no-prosecution-pending bar and "Our Federalism" did not go unnoticed. In 1974 in *Steffel v. Thompson*,[84] a counterattack was launched by Justice Rehnquist seeking to recover this concession to *Dombrowski*. *Steffel* raised the identity issue in a most dramatic form. The plaintiff and a companion had distributed anti-war leaflets at a shopping center until the manager called the police, who threatened the two with arrest unless they ceased their handbilling. Plaintiff left to avoid arrest; his companion persisted, was arrested, and was subsequently charged with violating the Georgia criminal trespass statute. Plaintiff, claiming that the threat of arrest under the statute thwarted his continuing desire to distribute handbills at the shopping center, sought a federal declaratory judgment that the statute, as applied, was an unconstitutional inhibition of his First Amendment rights.[85] Justice Brennan cited the pending prosecution against his companion (the trial of which had

82. 410 U.S. at 126-27.

83. 28 U.S.C. § 2202 (1970): "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." *See* Steffel v. Thompson, 415 U.S. 452, 477-78 (1974) (White, J., concurring); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2771 (1973).

84. 415 U.S. 452 (1974).

85. *Id.* at 454-56.

been stayed pending the decision in *Steffel*) as evidence that the plaintiff had satisfied the Article III case-or-controversy requirement (into which the imminency requirement had been transformed), and proceeded to find that, because there was no prosecution pending against him, there was no *Younger* bar to plaintiff's suit.[86]

Fully aware of the threat posed to "Our Federalism," Justice Rehnquist sought to minimize the effects of such personalization. He wrote separately in an attempt, no doubt a desperate one, to undermine the traditional view of the preclusive effect of a declaratory judgment: "A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties."[87] The federal declaratory judgment may be raised in subsequent state prosecutions "for whatever value it may prove to have"[88]—like a law review article, maybe? Justice Rehnquist's views provoked Justice White, who also concurred specially just to disagree with Justice Rehnquist. (The majority did not think Justice Rehnquist's views worthy of a response; only Chief Justice Burger subscribed to them.) Justice White pointed out that Justice Rehnquist's notion of a declaratory judgment contradicted the express terms of the Declaratory Judgment Act,[89] and, he might have added, sounded like an impermissible advisory opinion. Justice Rehnquist advanced no theory that would give the judgment of the *Steffel* decision binding effect for one individual, and only one individual.

Justice White, it appears in retrospect, had his own preferred method of undercutting the personalization of the no-prosecution-pending bar. In *Hicks v. Miranda*,[90] Justice White, fully aware of the tension between such personalization and "Our Federalism," held for the Court that a theater owner could not seek federal anticipatory relief challenging the constitutionality of a statute under which two of

86. *Id.* at 458-59, 471-73.

87. *Id.* at 482. For an example of a similar limitation of the impact of a successful anticipatory suit, see Cline v. Frink Dairy Co., 274 U.S. 445 (1927). *Cline* was an appeal from a decree enjoining the enforcement of a state criminal antitrust law. The Court vacated the injunction with respect to those plaintiffs against whom prosecutions were pending, but upheld it with respect to those against whom prosecutions were only threatened. The distinction was not rationalized on grounds of federalism, however, but was explained by the maxim that equity would not enjoin pending criminal proceedings. *Id.* at 453.

88. 415 U.S. at 482 (footnote omitted).

89. *Id.* at 477 (citing 28 U.S.C. § 2201 (1970): "Any such declaration shall have the force and effect of a final judgment or decree . . . .").

90. 422 U.S. 332 (1975).

his employees were presently being prosecuted. No prosecution was pending against the theater owner; yet the *Younger* bar was deemed applicable on the theory that his interests and those of the state defendants "were intertwined."[91]

Justice White also turned the personalization theory to the advantage of "Our Federalism" in the context of a class action. The question was whether a federal plaintiff against whom a prosecution was pending would be disabled from suing as the representative of a class, some or most members of which had no prosecutions pending against them. Justice Blackmun had carefully left that question open in footnote 7 of *Roe v. Wade*,[92] but in *O'Shea v. Littleton*[93] Justice White answered it, holding that a named plaintiff cannot serve even in a representative capacity if a prosecution is pending against him. The named plaintiff must himself satisfy the no-prosecution-pending bar. *Littleton* also held that the named representative must personally have standing under Article III, by demonstrating that he is in imminent danger of being prosecuted.[94] Thus the harshness of the squeeze play created by the juxtaposition of the Article III-imminency requirement and the no-prosecution-pending bar could not be avoided by the representative form of a lawsuit.[95]

91. *Id.* at 348-49 (alternative holding).
92. 410 U.S. 113, 127 n.7 (1973).
93. 414 U.S. 488 (1974).
94. The *Littleton* case was not a declaratory suit aimed at a statute, such as *Roe v. Wade*, but rather a request for an injunction that would effectively have required court supervision of the administration of justice in Cairo, Illinois. I will later discuss the special difficulties posed by such an injunction to the values of "Our Federalism," *see* pp. 1148-60 *infra*, and yet it is hard to see why the difference in remedies should require different qualifications for serving as a representative of a class. More recently, in Trainor v. Hernandez, 45 U.S.L.W. 4535 (U.S. May 31, 1977), Justice White applied the *Littleton* theory to bar a challenge against a statute. He wrote: "Appellees have argued here that the relief granted in favor of other class members is not barred by *Younger* and *Huffman* because state cases were not pending against some of them. Since the class should never have been certified, we need not address this argument." *Id.* at 4538 n.11.
95. Relief from this bind may be available when there is an antecedent or real-world nexus between the plaintiff and the persons purportedly represented, such as between a union and its members. Allee v. Medrano, 416 U.S. 802 (1974), decided shortly after *Littleton*, suggested as much. In *Allee* the Farm Workers Union and some of its members sought injunctive relief against harassment of their organizing activities by the Texas Rangers and declaratory relief against several Texas statutes. Justice Douglas suggested that even if prosecutions were pending against individual union members, the union, against which no prosecution was pending, might itself be entitled to maintain the federal anticipatory action on behalf of all its members, including those against whom prosecutions were pending. *Id.* at 814. Chief Justice Burger, in a separate opinion joined by Justices White and Rehnquist, strenuously resisted this suggestion. *Id.* at 830-31. It is of some interest that Justice Blackmun, the author of *Roe v. Wade*, joined the majority in *Allee* and wrote separately in *Littleton*. Justice Powell did not participate in *Allee*.

2. *The Temporal Issue: The Reverse Removal Power*

On the identity issue the Court's position has not significantly deteriorated from that staked out by Justice Brennan in *Steffel.* It has been circumscribed but not withdrawn. On the temporal issue, however, the Burger Court has taken a decisive step against the vision of federalism underlying *Dombrowski.* The issue was addressed in a second part of *Hicks v. Miranda.* In an opinion by Justice White the Court resolved the temporal issue in the most draconian fashion—so much so that Justice Stewart, along with Justices Marshall, Brennan and Douglas, dissented and bitterly complained: "The doctrine of *Younger v. Harris* reflects an accommodation of competing interests. The rule announced today distorts that balance beyond recognition."[96]

The temporal issue is conceptually simple. It asks when a prosecution must be pending in order to serve as a *Younger* bar. In *Perez* there was no prosecution pending at the time of the federal hearing (although there was a prosecution pending at the time the federal anticipatory suit was filed). The bar was inapplicable. But what if there was a prosecution pending at the time of the federal hearing but not when the federal suit was filed? *Dombrowski* would suggest the no-prosecution-pending bar is also inapplicable; in *Dombrowski* an injunction had issued although there was a state prosecution pending at the time of the federal hearing, at the time the Supreme Court declared the state statute invalid. Presumably this was predicated on the view that there was no prosecution pending at the time the federal suit had been filed.[97] That would seem to have resolved the remaining temporal issue, making the bar inapplicable if no prosecution was pending at the time of filing, and yet Justice Brennan beat a puzzling retreat in *Perez.* In footnote 9 he formally reserved the question and thereby reopened it.[98] Why?

In retrospect it appears that Justice Brennan made the concession to obtain Justice White's vote (the only other Justice joining his *Perez* opinion was Justice Marshall) and thus to create a broad spectrum of support for his *Perez* opinion. Four years later in *Hicks v. Miranda,* Justice White, overlooking the fact that he had joined *Dombrowski,* seized footnote 9 of *Perez* and declared the question

96. 422 U.S. at 357 (Stewart, J., dissenting).

97. Although strictly speaking *Dombrowski* only defined a pending prosecution for the purposes of § 2283, this seems only a formal distinction.

98. 401 U.S. at 117 n.9: "I put to one side the question not presented in *Ex parte Young,* or in this case, whether federal court relief would be proper when a state prosecution pending at the time of the federal hearing was begun after the federal suit was filed."

"open"—or, as he put it, "At least some Justices have thought so."[99] He then continued: "[W]e now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force."[100]

From the perspective of *Younger*, "Our Federalism," and the interests they seek to further, the rule of *Hicks v. Miranda* makes sense. As I pointed out in my criticism of *Dombrowski*'s chronological treatment of § 2283,[101] if a state proceeding is in fact pending at the time federal relief is issued, the effect of the relief on a state would be virtually the same regardless of whether the state prosecution or the federal suit was filed first, regardless of who had won the race to the courthouse. As a practical matter, however, *Hicks* was a devastating blow to *Dombrowski*.

As noted, latent in *Dombrowski* was a squeeze-play: the juxtaposition of imminency and a chronologically construed § 2283 required the litigant to find a moment for filing the suit that was neither too early nor too late. *Steffel* preserved this predicament, though it now arose from the conjunction of an Article III-based imminency requirement and the no-prosecution-pending bar. "Preserved" may be too soft a word to describe the contribution of *Younger*, given the stringent interpretation of the imminency requirement, the virtual insistence upon an actual threat of prosecution.[102] But however severe the predicament might have been after *Younger*, *Hicks* took it one step further: there was no point in even playing the game. There was no way the litigant could win. The rule of *Hicks* meant that even if the litigant found that magic moment for filing his suit—the moment that was neither too early nor too late—the state was given the power to deny access to the federal court by simply initiating a criminal prosecution in state court.

By pursuing the logic of "Our Federalism" to utter extreme, *Hicks* fundamentally altered the structure of the federal jurisdictional scheme: it vested the district attorney—not the aggrieved citizen—with the power to choose the forum, and, indeed, the nature of the proceeding in which the federal constitutional claim would be litigated. In essence, *Hicks* created—in such stark contrast to the post-Civil War

99. 422 U.S. at 349 & n.17.
100. *Id.* at 349.
101. *See* p. 1109 *supra*.
102. *See* Juidice v. Vail, 97 S. Ct. 1211, 1215-16 & n.9 (1977); O'Shea v. Littleton, 414 U.S. 488, 497-98 (1974). *See also* Warth v. Seldin, 422 U.S. 490, 507-08 (1975).

removal statutes[103]—a *reverse removal power*: a power to remove a case from the federal court to the state court. After a federal anticipatory suit is filed, the district attorney can initiate a criminal prosecution against the aggrieved citizen and by that action abort the federal suit and remit the citizen to adjudicating his claim as a defense in a criminal prosecution in the state court.[104]

3. *The Type-of-Proceeding Issue: From Criminal to Civil*

The spirit of "Our Federalism" also motivated the Burger Court's treatment of the third of the interstitial questions—what kind of state proceedings would trigger the *Younger* bar? The question is whether *Younger* was keyed to a pending *prosecution* or a pending *proceeding*. The state proceeding in *Younger* was a criminal one; in their separate opinion Justices Stewart and Harlan emphasized this fact, stating that the outcome *might* have been different if the state proceeding were civil.[105] For the next four years no majority formed on the issue. This period of indecision produced an exemption from the *Younger* bar for inherently biased proceedings, such as one in which challenges to a state licensing scheme are heard by a state board consisting of those already licensed.[106] Then in 1975, the Court—the Nixon four

103. *E.g.*, 28 U.S.C. § 1443 (1970).

104. The Court also made it clear that this power could not easily be circumscribed by impugning the motives of the district attorney; it is a preemptory power. The district court had in part based its finding of bad-faith harassment on the fact that the state seemed to have filed the criminal proceeding in response to the filing of the federal affirmative suit. And yet the Court dismissed the finding of bad-faith harassment as "vague and conclusory." 422 U.S. at 350-51 & n.19.

105. 401 U.S. at 54-55 (Stewart, J., concurring).

106. Gibson v. Berryhill, 411 U.S. 564 (1973).

In his dissent in Trainor v. Hernandez, 45 U.S.L.W. 4535, 4542-44 (U.S. May 31, 1977), Justice Stevens built on the *Gibson* theory in a way that threatened the *Younger* no-prosecution-pending bar itself.

At issue in *Hernandez* was the Illinois Attachment Act which plaintiffs claimed was constitutionally infirm due to its failure to provide adequate notice and hearing before assets were attached. As one might expect, the federal suit was commenced after the attachment proceeding, and the defendant insisted that federal court access was barred by the pendency of the latter proceeding. Justice Stevens thought the *Younger* bar inapplicable, however, because the Illinois attachment proceeding "does not afford a plain, speedy and efficient remedy for [the] federal claim." *Id.* at 4544. He cited *Gibson* for this standard. *Id.* at 4544 n.15.

The very purpose of the *Younger* bar is to prevent a federal court inquiry into the adequacy of the state proceeding, and that purpose would be defeated if the state proceeding that triggers the *Younger* bar were itself to be tested by the standard Justice Stevens proposed. The *Hernandez* majority responded to Justice Stevens's point; they agreed to remand to the district court, but only on the question whether the plaintiffs could present their federal claim in the state attachment proceeding. *Id.* at 4538 & n.10. It is of some note, however, that Justice Stewart joined the Stevens dissent, as well as the Brennan-Marshall dissent (which focused on the civil character of the pending proceeding and on one other exception to the *Younger* bar, the patent

plus Justices White and Stewart—spoke in *Huffman v. Pursue, Ltd.*[107]

In *Huffman*, an Ohio prosecutor invoked that state's public nuisance statute and obtained a judgment in the county Court of Common Pleas closing a theater that specialized in allegedly pornographic movies. Rather than appeal the judgment within the Ohio court system, the theater management sought and obtained injunctive and declaratory relief in federal district court under § 1983 on the grounds that the nuisance statute was overbroad and amounted to impermissible prior restraint. On appeal to the Supreme Court, the state raised the *Younger* doctrine as a bar to federal relief.[108]

Justice Rehnquist, for a majority of six, held that the *Younger* bar was applicable, at least for the kind of state proceeding "which in important respects is more akin to a criminal prosecution than are most civil cases."[109] He emphasized two features of the state court proceeding: "The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials."[110]

With these features in mind, the result in *Huffman* is as explicable in terms of "Our Federalism" as that in *Hicks*: there is no necessary connection between a state's interest and the remedy it chooses to effectuate the interest. It is hard to see why respect for state functions is any less derogated by interrupting a civil proceeding to enforce state law than it is by halting a criminal proceeding. Federal habeas corpus would not be available if the state proceeding were civil, but this was viewed—perhaps with good reason given the *Younger* premises—as a minor deficiency. Justice Rehnquist countered that even assuming that a litigant who presents a federal claim is entitled to a decision on the merits by a federal court (a premise that Justice Rehnquist obviously doubted), Supreme Court review of the completed state court appellate process could be sought; "[w]e do not understand," he said, "why the federal forum must be available prior

invalidity of the state statute). Thus it might be said that Justice Stevens managed to bring the Court within one vote of a return to the regime of the irreparable injury requirement pure—unencumbered by the no-prosecution-pending bar—though cast in the terms "plain, speedy and efficient."

107. 420 U.S. 592 (1975).

108. The *Younger* issue was raised below, Brief for Appellants app. N at 3-7, Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), but was not ruled on by the district court. The Supreme Court, on the other hand, treated the *Younger* claim as having a priority, almost like a jurisdictional defect. 420 U.S. at 599. Yet in another case, Sosna v. Iowa, 419 U.S. 393, 396-97 & n.3 (1975), the Court permitted the parties to waive the *Younger* claim, and thereby suggested that the claim did not have jurisdictional status.

109. 420 U.S. at 604.

110. *Id.*

to completion of the state proceedings in which the federal issue arises . . . ."[111]

It would be a mistake, however, to view *Huffman* in a limited fashion—as a carefully tailored resolution of an issue specifically reserved by the initial Stewart-Harlan concurrence in *Younger*. Justice Rehnquist himself subsequently used the precedent in a way that ignored the special characteristics of the state civil proceeding in *Huffman*. In *Juidice v. Vail*[112] he applied *Younger* principles to a state's contempt process, whether "labeled civil, quasi-criminal, or criminal,"[113] even though the state was not a party to the proceeding, and even though a state's interest in the contempt process "is not quite as important as is the State's interest in the enforcement of its criminal laws, . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman* . . . ."[114] The three-judge district court in *Vail* had taken seriously Justice Rehnquist's emphasis that *Younger* principles applied only to state proceedings in aid of and closely related to criminal statutes and on that ground found the *Younger* bar inapplicable. Justice Rehnquist commented, "This was not an implausible reading of our holdings."[115] In a later footnote, Justice Rehnquist reserved the question of whether the *Younger* bar would apply to "all civil litigation,"[116] a reservation Justice Brennan characterized as "tongue-in-cheek."[117]

Vail, decided in March 1977, made clear that the presence of the state is not a necessary condition for triggering the *Younger* bar. Two months later, the Court took the logic of "Our Federalism" manifested in *Huffman* one step further; it made the presence of the state a sufficient condition. In *Trainor v. Hernandez*,[118] the Court held the *Younger* bar applicable to any proceeding, civil or criminal, brought by the state. The opinion of the Court, written by Justice White, did not state the rule so broadly; it emphasized that the proceeding in question—an attachment proceeding to recover welfare payments alleged to have been fraudulently procured—was "brought by the State in its sovereign capacity."[119] But the concept "sovereign capacity," as distensible as it is inscrutable, is likely to provide no limitation in fact.

111. *Id.* at 606.
112. 97 S. Ct. 1211 (1977).
113. *Id.* at 1217.
114. *Id.*
115. *Id.* at 1216.
116. *Id.* at 1218 n.13.
117. *Id.* at 1222 n.*
118. 45 U.S.L.W. 4535 (U.S. May 31, 1977).
119. *Id.* at 4537.

4. *A New Requirement: Exhaustion of State Remedies*

The full implications of *Huffman* can perhaps best be understood when the case is seen not simply as a basis for expanding the reach of the no-prosecution-pending bar, but as a vehicle for the introduction into the *Younger* line of a new requirement altogether, the exhaustion of state appellate remedies. *Huffman*'s exhaustion requirement works a fundamental revision of the federal jurisdictional scheme for affirmative suits. It is as architectonic as the reverse removal power of *Hicks* and the no-prosecution-pending bar itself.

The exhaustion issue arose in *Huffman* because, on one view, there were no longer any state proceedings pending against the federal plaintiff. The Court of Common Pleas had rendered judgment before the federal proceeding was commenced. The plaintiff had lost. The Supreme Court nevertheless held that the citizen was not free to commence a federal affirmative suit until he had completed all levels of state appellate review. If the Court had stopped at this point, *Huffman* might have been understood as simply addressing an issue of duration—for what period is a state prosecution pending? Answer: Until the state appellate procedures are completed. But the Court did not stop at that point; it subtly substituted the word "unless" for "until" and thus did not simply resolve an ambiguity implicit in the no-prosecution-pending bar, but rather created a new rule. The Court held that if a federal plaintiff forgoes the opportunity to seek appellate review in the state courts, he forfeits his right to ask the federal district court for affirmative relief.[120]

This rule cannot be understood in terms of the interests set forth to support the no-prosecution-pending bar. State proceedings are not stopped in midair. The justification for the appellate-exhaustion requirement was thus articulated under a new rationale: the necessity of preserving the opportunity of state appellate courts to supervise the trial courts of their jurisdiction.[121] But, of course, more had to be at stake; state appellate supervision is a "good thing," but if it denies a citizen the choice of forum to adjudicate his grievance, it is not clear why the appellate-supervision function should prevail,

120. Justice Rehnquist's language in *Huffman* has an unnerving quality:

> While appellee had the option to appeal in state courts at the time it filed this action, we do not know for certain whether such remedy remained available at the time the District Court issued its permanent injunction, or whether it remains available now. In any event, appellee may not avoid the standards of *Younger* by simply failing to comply with the procedures of perfecting its appeal within the Ohio judicial system.

420 U.S. at 611 n.22.

121. *Id.* at 609.

especially when the countervailing value seems to have a secure statutory base in § 1983. The appellate-supervision theory can justify the denial of access only if we postulate two other values: (a) a desire to shift the burden of the procedural system so that the plaintiff's chances of winning are reduced, or (b) a desire to make the state courts the primary adjudicatory institution in the country for federal as well as state claims. Neither desire can be adequately defended.

The first impeaches the supposed neutrality of procedural rules. The second cannot be supported by the usual interests served by federalism, the need for decentralization, respect for local community norms, and the encouragement of local experimentation. Since interpretation of the federal Constitution is at stake, national uniformity would appear a necessity rather than a luxury. Nor can the desire to make the state courts the nation's primary adjudicatory institutions be based on considerations of efficiency; total work load is not reduced, but only redistributed from the federal to the state courts, and there is no reason to believe that the latter can handle the work more effectively. Justice Rehnquist's opinion in *Huffman* did not seek to defend either value; it did not even acknowledge them.

To be certain, the *Huffman* exhaustion rule will not fully effectuate either of these postulated desires, for the plaintiff apparently has the right to return to the federal court after completing the state process. But perhaps Justice Rehnquist was counting on delay—the statute would remain in force until the appellate review was completed; on attrition—the forced journey through the state courts might exhaust the citizen grievant; or possibly on preclusion—the citizen might be precluded from adjudicating afresh in federal court the issues he was obliged to litigate in state courts in defending the state prosecution or proceeding.[122] Indeed Justice Rehnquist alluded

122. The "normal rules" of res judicata and collateral estoppel would seem to preclude relitigation once the citizen's claim that the statute was unconstitutional had been heard in the state courts, even though the claim was tendered in a defensive posture. The question is whether there are exceptional circumstances in litigative sequences such as *Huffman* that would warrant a departure from the normal rules. Such circumstances might be found in the sanction imposed on the citizen and considerations of federalism.

If the state proceeding results in imprisonment, the citizen can raise his claim in a federal habeas proceeding, and that remedy has been viewed as exempt from the normal rules of preclusion; such was the teaching of Fay v. Noia, 372 U.S. 391, 421-24 (1963). *Fay* seems to have been limited more recently by Stone v. Powell, 428 U.S. 465 (1976), but the rule of *Stone* might not be applicable to a claim challenging the constitutionality of the underlying statute.

Even if the state proceeding is a civil one, or if for some other reason the habeas remedy is not available, an exception from the ordinary rules of preclusion might be found in considerations of federalism, in a desire to preserve the citizen's right to choose

to this last possibility in footnote 18 of *Huffman*: "We in no way intend to suggest . . . that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings."[123] This was no light matter, even for the Burger Court, and accordingly Justice Rehnquist postponed a final resolution of the issue: the state "did not plead res judicata in the District Court, and it is therefore not available to them here."[124] The tip to the state for future cases was provided.

Admittedly, the exhaustion rule of *Huffman* has two limitations. In the first place, *Huffman* appears limited to ongoing state proceedings. The *Huffman* state proceeding was an injunctive proceeding, and the state trial court injunction was still in effect when the federal suit was filed.[125] There was no emphasis on this circumstance in *Huffman* itself; Justice Rehnquist did not invoke it in justification of the exhaustion requirement, and it has little to do with the justification he did employ, the appellate-supervisory one. Nevertheless, in its latest pronouncement on the issue, *Wooley v. Maynard*,[126] Chief Justice Burger, writing for a six-man majority, saw this circumstance as central to *Huffman*.

In *Wooley* a Jehovah's Witness had been convicted three times of violating a New Hampshire law requiring license plates to bear the state motto, "Live Free or Die." For the first offense the Witness was fined $25; for the second he served 15 days in jail; and for the third, the conviction was "continued for sentence."[127] In no instance did he appeal. Instead, like the theater owner in *Huffman*, he, along with his wife, brought a federal suit seeking injunctive and declaratory relief against enforcement of the state statute.

Chief Justice Burger thought the *Wooley* suit did not fall within the *Huffman* exhaustion requirement because "the relief sought is wholly prospective."[128] He noted that the Witness had already served

the federal forum to adjudicate his grievance against the state. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(c), (e) (Tent. Draft No. 1, 1973) (new determination of issue "warranted by differences in the quality or extensiveness of the procedures followed in the two courts or to factors relating to the allocation of jurisdiction between them," or warranted "by impact of determination on the public interest"). But this reasoning is not likely to be persuasive to a Court motivated by the spirit of "Our Federalism" evidenced in *Huffman* itself.

123. 420 U.S. at 606 n.18.
124. *Id.* at 607 n.19.
125. *Id.* at 608.
126. 97 S. Ct. 1428 (1977).
127. *Id.* at 1432.
128. *Id.* at 1433.

the sentence on two of the convictions; the fact that the sentencing of the third had been "continued" was explained away in a most unhelpful fashion.[129] The Chief Justice emphasized the first two convictions, and observed that the plaintiff "does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, *e.g.*, upon his driving privileges."[130] We were not told whether this restriction of federal relief merely stemmed from a limitation in the plaintiff's existing prayer for relief; nor were we told why the plaintiff should not have his record "expunged" and the collateral effects "annulled" once the state statute was declared invalid. I am thus left with the strong impression that *Wooley* was but a subsequent gloss on the *Huffman* exhaustion requirement, a late discovery by some of the Justices of its vast implications. It was an attempt to limit *Huffman*—an attempt that is marred by its strained quality (the determination to ignore the third conviction), by its essential ambiguities (a failure to specify what kinds of collateral effects would be sufficient to precipitate the *Huffman* bar), and by the absence of any theoretical foundation (a failure to relate *Wooley* to the appellate-supervisory rationale of *Huffman*). A line not supported by reason is not likely to remain straight.

The second limitation on the *Huffman* exhaustion requirement is that it is addressed to state *appellate* remedies. The rule of *Monroe v. Pape*,[131] relieving the § 1983 litigant from exhausting state trial remedies before turning to the federal trial courts, thus seems preserved.[132] But that concession may well be an illusion given the no-prosecution-pending bar and the reverse removal power of *Hicks v. Miranda*. If a prosecution is pending at the time the federal suit is to be commenced, or if a state prosecution is commenced soon after, the citizen appears remitted to the state courts for the adjudication of his federal constitutional claim. *Monroe v. Pape*, like *Dombrowski*, may soon be but a formal vestige of another era.[133]

129. The Chief Justice handled the issue by simply quoting the finding of the federal district court that "'[n]o collateral consequences will attach'" to the third offense unless the plaintiff is arrested and prosecuted for a fourth time. *Id.* at 1433 n.8. He did not explain why the continuing possibility of an amplified sanction did not bring the plaintiff's case within the *Huffman* bar. This possibility was predicated upon the constitutionality of the underlying New Hampshire statute, just as the continuing injunction in *Huffman* was predicated upon the constitutionality of Ohio nuisance law (as applied).

130. *Id.* at 1433.

131. 365 U.S. 167 (1961). For the application of the rule in the injunctive context, see McNeese v. Board of Educ., 373 U.S. 668 (1963).

132. *See* 420 U.S. at 609 n.21.

133. Compare footnote 21 of *Huffman*, 420 U.S. at 609 n.21, with footnote 16 of *Vail*, 97 S. Ct. at 1219 n.16.

Huffman, like *Hicks*, ravages the vision of federalism that underlay *Dombrowski*. This is revealed not just by what it did, but by what it said—not just by the technical rules, but by the reasons offered in defense of them. When the plaintiff in *Huffman* sought to take advantage of a traditional exception to exhaustion requirements, claiming that in the light of a recent decision of the Ohio Supreme Court an appeal would be "futile,"[134] Justice Rehnquist countered by distinguishing the Ohio precedent from the plaintiff's claim. He also rebuked the plaintiff for trying to make the kind of prediction that every litigator must about the likelihood of success. Then Justice Rehnquist added:

> Appellee obviously believes itself possessed of a viable federal claim, else it would not so assiduously seek to litigate it in the District Court. Yet, Art. VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.[135]

This statement, above all else, marks the distance that we have come from *Dombrowski*. It takes us back to what Justice Harlan claimed was the real but implicit premise of *Dombrowski*—the view that the citizen was entitled to act on his belief that state judges could not be trusted. That premise has vanished, and it has been replaced by its opposite, openly proclaimed.

B. *The Fate of the Injunction*

The no-prosecution-pending bar has proved a broad avenue for retrenchment. The fate of the second aspect of Justice Brennan's *Perez* strategy, the shift from injunctions to declaratory relief, is harder to characterize. The Court is working toward the essential insight that there are many different types of injunctions, and it has begun to formulate different rules for different types. The crucial distinction has not been any of the traditional ones, those between interlocutory and final injunctions or between mandatory and prohibitory injunctions, but rather it has been the distinction between what I will call statutory and administrative injunctions.[136]

134. 420 U.S. at 610.
135. *Id.* at 610-11.
136. These concepts are introduced in slightly different terms in O. FISS, INJUNCTIONS 1, 51, 325-99, 415-76 (1972).

The statutory injunction seeks to establish a new norm of behavior. The prototype, and thus the source of its name, is an injunction against the enforcement of a statute on its face. The injunction in *Dombrowski* against the enforcement of the constitutionally overbroad Louisiana Subversive Activities and Communist Control Law is an example of the statutory injunction. So would be an injunction, such as that in *Douglas*, against the enforcement of a statute as applied. Crucial is the legal determination that a certain identifiable pattern of behavior is constitutionally protected, not to be punished by criminal statute.

The administrative injunction, by contrast, is more ambitious. It attempts to change actual behavior. The prototype is the injunction against an administrative officer, seeking to prevent conduct such as police brutality that is proscribed by statute and the Constitution. In such cases, the behavioral norms are already articulated in the law; the difficulty is in the implementation of those norms. One common form of administrative injunction attempts to implement general, well-established standards (*e.g.*, do not discriminate on the basis of race, or do not restrain trade) by placing a defendant under increasingly more specific regulatory constraints.[137] Another type, best exemplified by a school desegregation decree, seeks to reorganize an ongoing social institution.[138] In both types of administrative injunctions the practical focus is not on the issuance of the decree, as it is for the statutory injunction, but on its enforcement. An administrative decree requires a long continuing relationship between the equity court and the parties, in which initial directives are modified in light of changed conditions or new insights.[139]

1. *The Implications of* Steffel *for the Statutory Injunction*

Because the statutory injunction is essentially the medium through which a court announces a legal standard of behavior, it fundamentally resembles a declaratory judgment. The statutory injunction, unlike the declaratory judgment, contains a threat of sanction, but the threat is largely unnecessary. The primary question will be the legal validity of a statute, and it is unlikely that a court will need to use its contempt power to enforce its decree. Accordingly, one would expect the access rules for statutory injunctions to be roughly the same as those for declaratory judgments, and the Court has fulfilled this expectation.

137. I have elsewhere termed this a "regulatory" injunction. *See id.* at 1, 325-414.
138. I have called these "structural" injunctions. *See id.* at 1, 415-81.
139. *See id.* at 325-481.

The first step in this direction occurred in the context of an interlocutory statutory injunction. In *Doran v. Salem Inn, Inc.*[140] a federal district court had issued a preliminary injunction prohibiting enforcement of a local ordinance pending the final resolution of the case in federal court.[141] Justice Rehnquist, writing for the Court, refused to uphold the injunction with respect to one of the plaintiffs against whom there was a pending prosecution. Yet he did uphold it for those against whom no prosecution was pending, emphasizing that the relief was interlocutory and would last only for the duration of the federal court hearing on the request for final relief against the ordinance. He noted that these plaintiffs had met the traditional prerequisites for a preliminary injunction, demonstrating both irreparable injury (substantial loss of business and possible bankruptcy) and a likelihood of success on the merits. He stressed the lax "abuse of discretion" standard of appellate review of preliminary injunctions, the "stringent" safeguards surrounding their issuance, and the fact that interlocutory relief would extend only to the named plaintiffs and not otherwise interfere with the town's enforcement of the contested ordinance.

As a first step the stress upon the interlocutory and temporary quality of the statutory injunction was logical: relief entailed only a momentary suspension of the statute. So was the explicit reservation of the question left open in *Younger* and *Steffel,* whether there would be access for a final injunction when no prosecution was pending.[142] But with *Steffel* and *Salem Inn* on the books, the next step—bringing final statutory injunctions under the access rules for declaratory judgments—seemed small and almost predictable. The Court took that step in the spring of 1977 in a second part of *Wooley v. Maynard,*[143] and did so in a way that undermined the irreparable injury requirement for final statutory injunctions and personalized the threat of contempt to enhance the similarity between a statutory injunction and a declaratory judgment.

Though the same phrase is used, the irreparable injury requirement has a different meaning for interlocutory and final injunctions.

140. 422 U.S. 922 (1975).

141. Plaintiffs were three corporations operating topless bars. The bars had suspended topless dancing when a local ordinance prohibiting it took effect, and challenged the ordinance in federal district court, asking for declaratory and injunctive relief. When the district court declined to issue a temporary restraining order, one bar resumed topless dancing and was promptly served with a criminal summons. The other two bars refrained until the district court issued a preliminary injunction enjoining the enforcement of the ordinance. *Id.* at 924-25.

142. *Id.* at 930.

143. 97 S. Ct. 1428 (1977).

An interlocutory injunction issues after an irregular proceeding in which notice may not have been provided and the opportunity for development of the facts and law is truncated. The irreparable injury requirement measures the justification for such irregular relief by comparing a plaintiff's potential injuries during a lawsuit against the possibility of his being made whole at the end through some form of final relief. For a final injunction, however, the irreparable injury requirement serves no such function. In *Douglas* and again in *Younger* it was used as a device to protect the values of "Our Federalism." But since the Court had already acknowledged in *Steffel* that a declaratory judgment was a presumptively available remedy, and since the statutory injunction was in large measure the functional equivalent of a declaratory judgment, the irreparable injury requirement was left without a rationale when applied to a final statutory injunction. In *Wooley* the requirement was nominally preserved, but in fact drained of much of its vitality.

The majority in *Wooley* approved the issuance of a final injunction prohibiting the named defendants from arresting or prosecuting the federal plaintiffs for masking that portion of their license plates that contained the motto "Live Free or Die." The majority stressed the impact the threat of such future prosecutions would have on the plaintiffs' ability "to perform the ordinary tasks of daily life which require an automobile."[144] For the majority this was irreparable injury "sufficient to justify injunctive relief."[145] Justice White, however, argued that *Douglas v. City of Jeannette* required that only declaratory relief be granted, since great and immediate irreparable injury had not been demonstrated:

> [T]he State's enforcement of its statute prior to the declaration of unconstitutionality by the federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual circumstances sufficient to warrant an injunction, the standard is obviously seriously eroded.[146]

Justice White was entirely correct: the teeth had been removed from the irreparable injury requirement. *Wooley* essentially placed the final statutory injunction under the no-prosecution-pending rule of *Steffel.*

144. *Id.* at 1434.
145. *Id.*
146. *Id.* at 1437 (White, J., dissenting).

Wooley's assimilation of the access rules of a final statutory injunction to those of a declaratory judgment was supported by the extreme personalization of its final decree. The Court in *Wooley* decided a broad proposition of constitutional law:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.[147]

Yet the Court upheld a decree issued by the district court that only forbade the named defendants from arresting or prosecuting the named plaintiffs under the statute. Thus the threat of contempt would attach only when three New Hampshire officials, the Chief of Police of Lebanon, the Commissioner of the State Department of Motor Vehicles, and the Director of the State Police, and their subordinates attempted to enforce the statute against George and Maxine Maynard.[148] Such relief contrasts sharply with the broad injunction apparently contemplated by *Dombrowski*, "prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control Law here found void on their face."[149]

The restricted scope of the *Wooley* injunction might be based on traditional procedural norms, confining the benefits and burden of an injunction to the named parties.[150] It might also be seen as a gesture on behalf of "Our Federalism," avoiding the offense to state officials that might otherwise arise from broadening the threat of the contempt sanction. The personalized injunction threatens contempt only for the actions of the named defendants, and only with respect to the named plaintiffs, otherwise trusting the state not to enforce the void statute. For the remaining citizens of New Hampshire, it was as if the Supreme Court had issued a declaratory judgment.

Personalization thus worked a marvelous compromise. A toe-hold was secured for the final statutory injunction; relief as effective as the declaratory judgments authorized by *Steffel* was provided; and

147. *Id.* at 1434-35.

148. The Court stated loosely: "[w]e conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates . . . ." *Id.* at 1436 (footnote omitted). In fact, however, the Court merely affirmed the district court's decree, which was directed only at the named defendants. 406 F. Supp. 1381, 1389 (D. N.H. 1976). The defendants were represented by the office of the Attorney General of the State of New Hampshire.

149. 380 U.S. at 497-98.

150. *See* O. Fiss, Injunctions 482-702 (1972).

at the same time, personalization gave comfort to some of the subscribers to "Our Federalism," compensating for the erosion of the irreparable injury requirement. Once personalized, the statutory injunction could be seen as having no greater systemic effect on federal-state relations than the declaratory judgments authorized by *Steffel.*

2. *The Implications of "Our Federalism" for the Administrative Injunction*

Administrative injunctions are especially intrusive. They introduce a dimension of supervision and oversight not present with declaratory judgments or statutory injunctions. Administrative decrees typically embody standards of conduct so general as to acquire their meaning only in specific application to particular aspects of a defendant's conduct, and inject a court into the middle of ongoing social relationships that are neither easy to alter nor easy to understand. As a result, administrative injunctions involve close monitoring of a defendant's performance over long periods of time, continual intervention to increase the specificity and otherwise modify earlier decrees, and the creation of adjunct agencies to assist in the policing of performance.

At the time of *Dombrowski,* access to federal court was assumed for administrative injunctions against state officials. One need think only of the school desegregation or voting rights cases. Ironically, access for such suits seemed much more evident than for those seeking an injunction against a state criminal statute. No one thought that the federalist rule of *Douglas v. City of Jeannette* had any relevance to school desegregation or voting rights injunctions. In part, this was because the criminal defense appeared to be a clear remedial alternative to a federal injunctive suit of the statutory variety. The only alternative to a federal school desegregation or voting rights suit, however, would have been a request for an injunction from the state courts, entrusting them with the tasks of concretizing the constitutional ideal of equality and obtaining compliance with these norms. From the standpoint of the theory of federalism underlying *Douglas* that might have made sense, but it was impossible to get an assist from the traditions of equity because there was no available adequate alternative remedy at law. A denial of access to the federal courts would have had to have been exclusively predicated on pre-Civil War, states' rights federalist notions, and that would have been intellectually intolerable to the Warren Court.

The preferred position for administrative injunctions in the mid-

1960s also derived from the fact that the Warren Court had a very special investment in school desegregation—its very being was tied up with the viability and implementation of *Brown v. Board of Education.*[151] In the state courts *Brown* would collapse. Indeed, in the late 1950s, a few days before the Little Rock crisis, the state supreme court chief justices passed a resolution that criticized the Court for overriding states' rights. This was understood as a defiant attack on *Brown,*[152] and the bitter memory of this event bore heavily on the Justices—at least in 1965.

The commitment to *Brown* ensured federal access for school desegregation suits. It also had implications for administrative injunctions in general. By the time of the enactment of the Civil Rights Act of 1964, *Brown* was accepted into the legal and popular culture as legitimate,[153] so much so that it began to function as an axiom. In the lower courts it yielded arguments of this nature: "This use of injunctive power is analogous to that of *Brown,* and *therefore* it is permissible." As a consequence federal court access was assumed for administrative decrees reaching state prisons and mental hospitals, public housing projects, and local police departments.

By the mid-1970s, however, the Justices personally committed to *Brown* had begun to retire, the integrative ideal embodied in school desegregation decrees had become controversial,[154] and the legal community was obtaining a fuller appreciation of the difficulties of administrative injunctions.[155] As a result *Brown* began to lose its axiom-

151. 347 U.S. 483 (1954).

152. Proceedings of the Tenth Annual Meeting of the Conference of Chief Justices, at 23 (Aug. 19-24, 1958) (Council of State Governments publication) [hereinafter cited as Proceedings]. The attack on *Brown* was somewhat disingenuously denied in the minutes of the Proceedings, *id.* at 24, yet Chief Justice Charles Jones of Pennsylvania surely had a more accurate appraisal of the political realities of the occasion when he noted during the debates that the issue of school desegregation was "'quietly embedded in the resolution.'" N.Y. Times, Aug. 24, 1958, at 1, col. 5; *see* Proceedings, *supra* at 29-30. The Conference of Chief Justices met at Pasadena, California. At roughly the same time, the American Bar Association was holding its annual meeting in nearby Los Angeles; its guests included Justices Brennan and Clark, as well as Chief Justice Warren. Washington Post, Aug. 26, 1958, § A, at 8, col. 1. Scarcely two days after the state chief justices' assault on the Court, Chief Justice Warren, still in Los Angeles, called an extraordinary session of the Court to deal with the Little Rock crisis. N.Y. Times, Aug. 26, 1958, at 1, col. 1.

153. *See* Fiss, *The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after* Brown v. Board of Education, 41 U. CHI. L. REV. 742 (1974).

154. *See* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976); Fiss, *The Jurisprudence of Busing,* 39 LAW & CONTEMP. PROB. 194, 200-04 (1975).

155. *See, e.g.,* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1976); Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976); Comment, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief,* 122 U. PA. L. REV. 1330

atic power. It was to be tolerated, but only as an exception. In addition, the banner of "Our Federalism" signaled a new respectability for explicitly antinationalist principles, thus endangering federal administrative injunctions aimed at state officials. The Burger Court has managed to reverse the relative availability of administrative and statutory injunctions: it has thrown across the former bars even greater than the no-prosecution-pending rule.

The first step in that direction manifested itself in the *Littleton* litigation. The case concerned Cairo, Illinois, where since the 1960s blacks had protested denial of their civil rights in employment, housing, and education. More recently they had embarked on an economic boycott of merchants engaged in racial discrimination. Tension and antagonism grew in the community, and many of the protestors were arrested and prosecuted. An injunctive suit was commenced in federal court. The suit sought an injunction against the local prosecutor requiring him to prosecute whites as vigorously as blacks, and prohibiting him from prosecuting blacks because of their race or civil rights activity. The suit also sought an injunction against a local judge and magistrate, requiring them to make bail determinations on an individualized basis and prohibiting them from discriminating on the basis of race when setting bail or sentencing.

Justice White wrote for the Court in *Littleton,* and there were three strands to his strategy. The first was to avoid a decision on the request for relief against the prosecutor. He accomplished this by dividing the single suit into two, one against the judge and magistrate, *O'Shea v. Littleton,*[156] and one against the prosecutor, *Spomer v. Littleton,*[157] and by eliminating the latter on the ground that there was an intervening change in office. The plaintiffs had sued the then-incumbent prosecutor, Berbling; after a decision by the court of appeals approving the injunction, a new prosecutor, Spomer, was elected. The Court held that since plaintiffs had never charged Spomer personally with anything, the case should be remanded for a determination as to its mootness.

In this disposition the Court may have undermined an injunctive doctrine of proven utility concerning succession in public office. That doctrine—reflected in Federal Rule 25(d)[158] and its equivalent, Su-

(1974); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change,* 84 YALE L.J. 1338 (1975); O. Fiss, The Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University (Apr. 5, 6, 1976) (manuscript on file with *Yale Law Journal*).

156. 414 U.S. 488 (1974).

157. 414 U.S. 514 (1974).

158. FED. R. CIV. P. 25(d)(1).

preme Court Rule 48(3)[159]—allowed the misconduct of predecessors to be attributed to incumbents and automatically substituted successors as defendants in suits against public officials.[160] In the typical school desegregation suit, for example, it was not necessary to show that the incumbent superintendent and board members were guilty of wrongdoing; it was sufficient if their predecessors were guilty of discrimination. Similarly, once an injunction was issued, the plaintiffs were not required to show a continuation of policy each time the school board membership had changed or a superintendent had been replaced; rather the burden of showing a discontinuation of policies was placed on the defendant. The doctrine of substitution of public officials reflects an intent to make injunctions effective over time. Normally an administrative injunction must be in force for a number of years. Moreover, the doctrine manifests an appreciation that administrative injunctions are not aimed at individuals but at those occupying official positions, and that official behavior is largely determined by the structure of the institution—by its traditions, by the nature and quality of the mechanisms to ensure accountability, and by the social context in which the institution operates.

The remand in *Spomer v. Littleton* dealt a blow of unspecified dimensions to this doctrine. Even more striking is the fact that the Court treated a change in office like a jurisdictional defect, incapable of party waiver, secreted up the Court's sleeve, to be played to trump unsuspecting litigants. The issue was not raised; on the contrary, Spomer substituted himself for Berbling as party defendant and (unwittingly) insisted that he fully intended to pursue Berbling's policies.[161] The Court did not even call for briefs on the issue. This mode of proceeding was as questionable as the decision itself, and there is no comfort to be gained from the willingness of Justices Brennan, Marshall, and Douglas to subscribe to it.[162] Both wings of

159. SUP. CT. R. 48(3).

160. *See generally* Comment, *Substitution under Federal Rule of Civil Procedure 25(d): Mootness and Related Problems*, 43 U. CHI. L. REV. 192 (1975).

161. 414 U.S. at 522 n.10.

162. Justice Douglas had originally protested the promulgation of the automatic substitution rule, FED. R. CIV. P. 25(d), 368 U.S. 1012-14 (1961), and that may explain his vote here. However, his views were expressed long before the necessities of school and voting decrees had been fully understood. It should also be noted that in *Spomer* the succession problem arose prior to entry of the decree, and that might be a basis of limitation. *Cf.* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 177-81 (1973) (Brennan, J.) (permitting decree to bind a successor employer notwithstanding FED. R. CIV. P. 65(d), which provides that restraining orders and injunctions shall be "binding only upon parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise").

the Court seemed intent to avoid the risks that inhered in reconciling the tenets of "Our Federalism" with a request for an administrative injunction aimed at prosecutorial behavior that seemed akin to bad-faith harassment.

Younger had sought to reduce *Dombrowski* to a rule assuring access for claims of bad-faith harassment, and in doing so, made such claims an exception to the no-prosecution-pending bar. It was now fully understood, however, that an injunction founded on such a claim, at least as presented in *Spomer v. Littleton,* would have required a federal court to supervise closely the actual behavior of a state officer over a long period of time. The challenge to "Our Federalism" was clear and the Justices sensed their exposure—either compromise "Our Federalism" or impeach the *Younger* exception for bad-faith harassment. The remand in *Spomer v. Littleton* was apparently a response to this dilemma, and the damage to the succession in public office doctrine an ill-considered and unfortunate byproduct.

Turning his attention to the claim against the Cairo magistrate and judge, the claim presented in *O'Shea v. Littleton,* Justice White executed the second strand of his strategy, which was to deploy the squeeze play of *Dombrowski* and *Younger.* By this time the imminency requirement had been assimilated to an Article III case-or-controversy requirement; Justice White preserved this tradition, and then applied the requirement with a stringency that provoked a vigorous dissent from Justices Douglas, Brennan and Marshall. There were allegations in the complaint clearly indicating the current racial turmoil in Cairo and the past wrongs suffered by the plaintiffs, and yet Justice White treated the plaintiffs' claims of future harm as mere "speculation and conjecture."[163] Indeed, with a serenity that I find disturbing, Justice White as much as said in *O'Shea* that the imminency requirement would be satisfied only if a prosecution were pending, and then of course access would be barred by *Younger* (or, if the plaintiffs were in custody, by *Preiser v. Rodriguez!*).[164]

Because the existence of a case or controversy involved factual questions, Justice White, perhaps to avoid whatever interference with state processes would be entailed by an evidentiary hearing on the Article III-imminency issue, turned to the question of what would

163. 414 U.S. at 497.

164. 411 U.S. 475, 500 (1973). *Preiser* held that when a state prisoner challenges "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Federal habeas requires that the prisoner-applicant first exhaust state remedies. 28 U.S.C. § 2254(b) (1970).

constitute irreparable injury if no prosecution were pending.[165] This was the third strand of Justice White's strategy. He ruled that the plaintiffs did not allege sufficient irreparable injury, and thereby avoided the hearing on the Article III-imminency issue, and foreclosed the possibility of amending the complaint to meet that requirement.

For the new majority, committed to the "Our Federalism" of *Younger* and to limitation of federal intervention in state court proceedings, the administrative injunction sought in *O'Shea v. Littleton* was a monstrosity: plaintiffs sought, as Justice White fairly described it, "an ongoing federal audit of state criminal proceedings,"[166] an intrusion into the state judicial sphere so massive as to dwarf the mere enjoining of a prosecution proscribed by *Younger*. What is of particular interest, however, is Justice White's use of the irreparable injury doctrine. In contrast to Chief Justice Burger's later treatment of that doctrine with respect to the statutory injunction requested in *Wooley*, in *O'Shea v. Littleton* Justice White used the irreparable injury requirement with a vengeance. He extracted it from its original statutory context in *Douglas*, the overbreadth branch of *Dombrowski*, and *Younger*, and now used it against an administrative injunction.

In *Douglas*, *Dombrowski*, and *Younger*, the availability of an injunction was dependent upon a showing of inadequate alternative remedies at law. In practice, however, the inadequacy of only a single alternative remedy was considered, the defense to a state criminal prosecution. But in *O'Shea v. Littleton* Justice White laid out an entire laundry list of additional alternative remedies which must be shown to be inadequate: substitution or removal of the judge, change of venue, review on direct appeal, habeas corpus, even prosecution by the United States under 18 U.S.C. § 242![167] Further, Justice White

165. This astonished Justice Blackmun, who could not understand how Justice White, having just posited an Article III jurisdictional defect, could go on to the merits. 414 U.S. at 504-05.

166. *Id.* at 500. Justice White wrote:

> An injunction of the type contemplated by respondents and the Court of Appeals would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*, just as would the request for injunctive relief from an ongoing state prosecution against the federal plaintiff which was found to be unwarranted in *Younger*. Moreover, it would require for its enforcement the continuous supervision by the federal court over the conduct of the petitioners . . . involving any of the members of the respondents' broadly defined class.

Id. at 501 (footnote omitted).

167. *Id.* at 502-03. Section 242 authorizes criminal prosecutions against those who under cover of law deprive a person of "rights . . . secured . . . by the Constitution or laws of the United States" or subject a person to additional punishment because of his race. 18 U.S.C. § 242 (1970).

added a presumption of adequacy to all of the alternative remedies. He listed each one without questioning its effectiveness in terms of the plaintiffs: How were they supposed to initiate a federal criminal prosecution? Were they to stay content until they were imprisoned and could avail themselves of habeas? The adequacy of these alternative remedies was evidently to be presumed from the very fact that Justice White was able to think of them. He stressed further that to justify an injunction plaintiffs' irreparable injury must be " 'both great and immediate.' "[168] In light of all this, it is hard to see how any injunctions could ever issue. In effect, Justice White turned the equitable doctrines of *Dombrowski* inside out. Irreparable injury had become an impassable bar.

Arguably this constriction of the administrative injunction was meant only for the extraordinary case presented by *O'Shea v. Littleton*, involving an attack on the practices of the state judiciary itself. *O'Shea v. Littleton* might have been thought to be the injunctive counterpart to the immunity from damage judgments created by *Pierson v. Ray*;[169] it might have simply reflected the fact that judges usually obtain a special status in doctrines they make for themselves.[170] Or it might have been thought that the concerns of "Our Federalism" were rooted in a particular solicitude for state judicial systems, which in turn accounted for the denial of access in *O'Shea v. Littleton*. But with the benefit of hindsight, all that is but wishful thinking. Last Term the Court gave a clear signal that the logic of "Our Federalism" could not be confined, and that federal access for administrative injunctions aimed at any state officials was to be curtailed.

That signal, of course, was *Rizzo v. Goode*.[171] The suit in *Rizzo* primarily sought to protect minorities in Philadelphia from police misconduct. The plaintiffs' case was modeled on the typical civil rights litigation of the 1960s; it focused on a series of incidents of police misconduct as a means of establishing a pattern or practice of such misconduct.[172] This proof, the district court found, not only

168. 414 U.S. at 499 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971), which in turn had quoted Fenner v. Boykin, 271 U.S. 240, 243 (1926)).

169. 386 U.S. 547 (1967).

170. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967).

171. 423 U.S. 362 (1976).

172. According to Justice Rehnquist, the district court had held that the plaintiff had made out a successful action for relief by showing "an 'unacceptably high' number of [incidents of police misconduct] of constitutional dimension—some 20 in all—occurring at large in a city of three million inhabitants, with 7,500 policemen." *Id.* at 373. He distinguished the district court's "unadorned finding of a statistical pattern" in this police misconduct, *id.* at 375, from the situations in Hague v. CIO, 307 U.S. 496 (1939), Allee v. Medrano, 416 U.S. 802 (1974), and Lankford v. Geltson, 364 F.2d 197 (4th Cir.

revealed that there was a significant danger posed by the actions of individual police officers, but also that supervisory officers—such as the City Police Commissioner—had failed in their duties. This finding, plus a desire to obtain the most effective and yet least intrusive remedy, led the district court to address its decree to the supervising officers, not to the individual police officers.[173] The district court ordered the supervising officers to revise police manuals and to draft "a comprehensive program for improving the handling of citizen complaints."[174] The proposed program had to include adjudication by "an impartial individual or body, insulated so far as practicable from chain of command pressures."[175]

This technique of first having the defendant draft the proposed relief to be entered against it—the plan-submission technique—was modeled after the school desegregation cases. From that experience we know that its minimalist quality is but an illusion. After submission of the draft program, the plaintiff will have the opportunity to object. Undoubtedly there will be defects in the submission, and the district court will have to rule on those objections, and in all likelihood will probably have to construct its own decree (based on submissions). The plan-submission technique might be understood as an attempt to capitalize on the expertise of the defendant, but more often than not the dynamics that led to the initial violation prevent the defendant from using its expertise effectively to control its own behavior. Moreover, even after an appropriate program is designed and the defendant ordered to abide by it, jurisdiction must be retained to determine whether the decree is being fully implemented and whether it is adequate to eliminate the pattern of misconduct.

1966), which involved not simply a large number of violations, but "a 'pervasive pattern of intimidation' flowing from a deliberate plan by the *named* defendants," 423 U.S. at 375 (emphasis in original). This provides one avenue for limiting *Rizzo*, assuming this language can be taken at its face value, which I doubt. Justice Blackmun surely had a better understanding of the structure of the proof in *Rizzo* itself. He wrote:

> Small as the ratio of incidents to arrests may be, the District Court nevertheless found a pattern of operation, even if no policy, and one sufficiently significant that violations "cannot be dismissed as rare, isolated instances." 357 F. Supp., at 1319. . . . The Court's criticism about numbers would be just as forceful, or would miss the mark just as much, with 100 incidents or 500 or even 3,000, when compared with the overall number of arrests made in the city of Philadelphia. The pattern line will appear somewhere. The District Court drew it this side of the number of proved instances.

Id. at 383-84.

173. Council of Organizations on Philadelphia Police Accountability and Responsibility v. Rizzo, 357 F. Supp. 1289, 1318-20 (E.D. Pa. 1973), *aff'd in relevant part*, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

174. *Id.* at 1322.

175. *Id.* at 1321.

If not, supplemental relief will be needed. The cycle would then repeat itself.[176]

The *Rizzo* Court was well aware of the reality of this injunctive intervention and determined to have no part of it. The majority was almost the same as in *O'Shea v. Littleton*—Justices White, Stewart, Rehnquist, Burger, and Powell (only Justice Blackmun, who in any event separately concurred in *O'Shea*, broke ranks and wrote the dissent in *Rizzo*). Justice Rehnquist spoke for the Court.

Justice Rehnquist began by expressing doubts that the plaintiffs met the case-or-controversy requirement of Article III; he thought they had failed to show a "real and immediate threat of repeated injury."[177] He emphasized the improbability of such a showing since the alleged future perpetrators—the individual policemen—remained "unnamed" and "unknown" and the risk of future injury was allegedly linked to the absence of adequate disciplinary procedures. The plaintiffs, he said, could only offer speculation as to what "one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."[178]

Rizzo was brought as a class action, commenced by 24 named individuals and two broad-based community organizations on behalf of all the citizens of Philadelphia, but particularly the black population. Once account is taken of the class character of the *Rizzo* suit, Justice Rehnquist's Article III point appears less persuasive and indeed less clear.

Justice Rehnquist's point might have been that, although there were individuals in the class who were sufficiently subject to the risk of future harm to have Article III standing, none of the named plaintiffs had demonstrated a sufficient personal risk to establish his own standing. Justice Rehnquist quoted from *O'Shea v. Littleton*, which held that " 'if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class' which they purport to represent."[179]

The difficulty is that *Littleton* was not settled precedent for this holding. It was, for example, contradicted by a case decided a few

176. For a case study of the plan-submission technique in the Montgomery schools, see O. FISS, INJUNCTIONS 415-84 (1972).

177. 423 U.S. at 372.

178. *Id.*

179. *Id.* at 373 (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

weeks after *Littleton, Allee v. Medrano,*[180] which stated that a union would have standing "to raise any of the claims that a member of the union would have standing to raise."[181] There was no suggestion in *Allee* that individual union members who were exposed to the risk of future harm had to be named as plaintiffs, or even that they had to be identified. Nor would any Article III policy be served by such requirements. Accordingly, the concern in *Rizzo* should not have been whether the 24 named individual plaintiffs would be subject to police misconduct in the future, but, more importantly, whether members of the two named organizations were likely to be so injured, and whether the named organizations were adequate spokesmen for their members.

Justice Rehnquist, however, might have been making a different point. He might have been arguing that since the risk of future harm to *any single citizen* was so low, no individual in the plaintiff class had Article III standing. While such a position might have some basis in a cold view of statistical probabilities, it has no foundation in Article III policies or social reality. There is no reason why individual risks cannot be aggregated.

Rizzo was essentially a suit between a group, the black citizens of Philadelphia, and a local agency, the police department. The named parties functioned as representatives of these social entities. If, as the district court found, there was a pattern of police harassment directed against the group, Article III should require only, first, that the group is still at risk, and, second, that the named plaintiffs are adequate representatives of the group. These were the standard requirements for school desegregation cases, at least before Justice Rehnquist started rewriting the law.[182] They assured sufficient adverseness and at the same time made federal injunctive power available to curb

180. 416 U.S. 802 (1974).

181. *Id.* at 819 n.13. For an instance in which the Court allowed probable injury to unnamed, unidentified members of a group or class to satisfy the Article III requirements, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 753-54 (1976) (pharmaceutical advertising). Note also those cases dismissing mootness objections on the theory that the controversy continues to exist between the defendant and the group that a plaintiff purports to represent even though his individual claim has become moot: Franks v. Bowman Transport. Co., 424 U.S. 747, 752-57 (1976) (employment discrimination); Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); and Sosna v. Iowa, 419 U.S. 393, 401-03 (1975). In *Sosna* Justice White dissented, complaining of the inconsistency with *Littleton*. 419 U.S. at 411-18 (White, J., dissenting).

182. *Compare* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (Brennan, J.); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); and Green v. New Kent County, 391 U.S. 430 (1968) (Brennan, J.) *with* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 429-31 (1976) (treating the United States as the only remaining plaintiff); and Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (per curiam).

unconstitutional action directed against social groups rather than against identifiable individuals.[183]

Strangely, Justice Rehnquist failed to carry his Article III argument to its conclusion. Perhaps sensing the disarray of the precedents or the vulnerability of his argument, he was content merely to express "serious doubts" about the justiciability of the suit. He distinguished *Littleton* on the grounds that *Rizzo* "did not arise on the pleadings. The District Court, having certified the plaintiff classes, bridged the gap between the facts shown at trial and the classwide relief sought . . . ."[184] But surely, given the Article III nature of his objections, the fact of certification seems irrelevant. If Justice Rehnquist had in fact located an Article III objection to the plaintiff side of the lawsuit, neither the action of the parties nor that of the court below would bar Supreme Court review of the issue. As Justice Rehnquist is fond of reminding us, jurisdictional flaws are always open for review—indeed that is why so many standard equitable doctrines are given Article III status. It enhances the Supreme Court's capacity to supervise the lower courts.

Since his rejection of plaintiffs' Article III status was not definitive, Justice Rehnquist proceeded to other more decisive points. He rejected the plaintiffs' duty-of-supervision theory because, he asserted, it was inconsistent with the language of § 1983 (which of course is not true).[185] He finally came to rest on the federalism point. Justice Rehnquist quoted from *O'Shea v. Littleton,* and cited his own opinions in *Salem Inn* and *Huffman,* all of which served as the proxy for the "Our Federalism" of *Younger* (a case that oddly was not cited). Then he burst forth with his peroration:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited

183. My views on the group character of much of the school desegregation litigation are elaborated in Fiss, *Groups and the Equal Protection Clause,* 5 PHILOSOPHY & PUB. AFF. 107 (1976).

184. 423 U.S. at 373 (footnote omitted).

185. The language of § 1983 is strikingly comprehensive:

> 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.

Cf. Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 YALE L.J. 317, 330-31 (1976) (discussing the action-inaction distinction in the context of school segregation).

> either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.[186]

Several lines later he softened this declaration—perhaps in exchange for an additional vote—by emphasizing that what is involved here is the "internal disciplinary affairs" of a state agency: "When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts."[187] But perhaps the emphasis is more mine than his, and in any event the axiomatic shift embodied in *Rizzo*—especially when read in conjunction with *Hicks* and *Huffman*—is unmistakable. The axiom for the administrative injunction is now *Younger* and not *Brown*. The district court was rebuked—indeed several times—for saying that its power to enter such a decree was "firmly established."[188]

What makes *Rizzo* so blunt is that its vision of federalism is not masked behind the language of equity. "Irreparable injury"—so central to the *Littleton* analysis—does not make an appearance in *Rizzo*. At the most there is a catchall phrase invoking " 'the principles of equity, comity, and federalism.' "[189] In striking contrast to *Littleton*, there is no pretense that the federal injunctive remedy is being denied *because* there is an alternative adequate remedy. The value preference is more starkly embraced: even if no other remedy is available, the doors of the federal equity court will be closed.

This is a step forward, the frankness enhances accountability, yet I question if the language has fully worked itself pure. "Federalism" is closer to the mark than "irreparable injury"; but I wonder whether "federalism" is itself being used as a proxy for another set of values. I suspect that it is. I suspect that at the heart of *Rizzo*—and at the heart of the progeny of "Our Federalism"—is more than a concern that federal courts should not interfere in state agencies. I suspect that at the heart of *Rizzo* there is a new version of laissez faire—one specially tailored to the welfare state.[190] It consists of a desire to in-

186. 423 U.S. at 380.

187. *Id.*

188. *See id.* at 371, 373-74, 376, 380.

189. *Id.* at 379 (quoting Mitchum v. Foster, 407 U.S. 225, 243 (1972)).

190. *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). In his dissent in Juidice v. Vail, 97 S. Ct. 1211, 1222-23 (1977), Justice Brennan noted that the

> Court in a series of decisions . . . has shaped the doctrines of jurisdiction, justi-

sulate the status quo from judicial interference, regardless of whether the protected institution is a judicial system, legislature or administrative agency. I suspect that the overarching spirit of the Burger Court is a hostility toward the activism of judges, not just federal judges. "Federalism" is but one handle available to the Supreme Court for curbing some of the more ambitious—more idealistic—projects of its own judges.[191] I am also willing to speculate that it is this very purpose of the present majority of the Supreme Court that so fundamentally alienates Justice Brennan—the activist judge par excellence, prepared to use the judicial power for all its worth to preserve constitutional rights like freedom of expression and racial equality.

IV

The tactics of Justice Brennan's *Perez* opinion have borne bitter fruit: the no-prosecution-pending rule has been used to cripple the remaining aspirations of *Dombrowski,* while the shift in focus to declaratory relief has left the administrative injunction unprotected and vulnerable. Brennan's maneuvers in *Perez,* however, were primarily *strategic,* expressive of a distinct conception of judicial role, one of judicial statesmanship, and it is as such that they must be evaluated.

The judicial statesman aspires to state his views *authoritatively.* By this I do not mean that he intends merely to express his views, however clearly, cogently, and consistently. That would be to aspire only to intellectual authority. The authority to which the statesman aspires is that of positive law. He wishes to give his views the authoritativeness that comes from their being the views of the Court. Academics have long glorified the judge who seeks no more than intellectual

ciability and remedy so as increasingly to bar the federal courthouse door to litigants with substantial federal claims. . . .

These decisions have in common that they have been rendered in the name of federalism. But they have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated . . . and systematic . . . violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly reflect the nature of our federalism.

191. Other decisions especially illustrating this purpose are Alyeska Pipeline Service Co. v. Wilderness Soc., 421 U.S. 240 (1975) (attorneys fees unavailable, subsequently curtailed by Civil Rights Attorneys Fee Awards Act of 1976, 42 U.S.C.A. § 1988 (West Supp. 1976)); Eisen v. Carlyle & Jacquelin, 417 U.S. 156 (1974) (notice for class action); and the standing cases, Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 (1976), and Warth v. Seldin, 422 U.S. 490 (1974). The Burger Court does appear to condone judicial activism in the name of state autonomy. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977).

authority, and no wonder—they share with him a common conception of professional role, with its emphasis on truth for its own sake, individualism, and the absence of power. At the same time we have failed to appreciate and understand the judge who seeks a different source of authority. His contribution to our public life is no less vital, his intellectual accomplishments no less impressive.

The judicial statesman has a grandiose view of the Court, a deep belief in the practical significance of what it says and does. This attitude is coupled with a certain modesty of self and position: the judicial statesman aspires to speak through the Court, not above it. A dissent or separate concurrence comes only as a last resort, when there is a division over principle, when the views of the majority are fundamentally at odds with his. The judicial statesman is also a realist. He understands that an authoritative position for the Court can only be created through bargaining and compromise.

This is so because the Court is a committee, a collectivity, and because the life tenure of Justices ensures that the committee will in all likelihood be constituted by persons of widely disparate views. At the time of *Dombrowski* the Court consisted of Justices appointed by Presidents Roosevelt, Eisenhower, and Kennedy; and through the next decade we have had a Court with the appointees of Presidents Roosevelt, Eisenhower, Kennedy, Johnson, Nixon and Ford, representing almost the whole panorama of major political currents in modern America. In addition, with the increasing role of discretionary jurisdiction, the questions addressed are almost by definition difficult; they are often politically sensitive and capable of a wide range of resolutions. To obtain the votes necessary for the creation of an authoritative decision, a Justice must almost inevitably bargain with concessions. One Justice "announces" the opinion of the Court, but he must state the views of five.

Concessions can take place on two distinct levels. One is the *explanatory level.* For example, *Dombrowski* adopted the explanatory system—the equitable language—of *Douglas v. City of Jeannette.* The same could be said of the use of "Our Federalism" in Justice Rehnquist's opinions in *Huffman* and *Rizzo,* and in the *Hicks* and *Littleton* opinions of Justice White. In each, a great deal more was at stake than the Court was prepared to admit. Concessions can also occur at a *decisional level.* In *Dombrowski,* for example, Justice Brennan decided not to rule on the question whether § 1983 was an exception to § 2283, but instead chose to give § 2283 a chronological gloss (footnote 2); he decided to allow overbroad statutes to be applied retrospectively to those with fair warning (footnote 7); and he refused

to rule on the constitutionality of the Communist Propaganda Control Law on the ground that the threat of prosecution was not imminent (footnote 13). Similarly, in *Perez* Brennan conceded to be open the question whether federal relief would be appropriate if a state prosecution, begun after a federal suit was filed, were pending at the time of the federal hearing (footnote 9).

The concessions of the judicial statesman make vulnerable the very precedent they create. They expose his reasoning to criticism, both by the profession and by the other Justices. Thus in *Younger* Justice Black used the footnote 7 of *Dombrowski* to impeach the overbreadth branch of that decision. Concessions also provide doctrinal building blocks that facilitate—though obviously do not cause—changes in direction. For example, the continued use of the irreparable injury requirement in *Dombrowski* facilitated *Younger* and *Littleton; Dombrowski's* chronological gloss on § 2283 and footnote 9 of *Perez* facilitated *Hicks v. Miranda;* the *Perez-Steffel* concession to the no-prosecution-pending bar, when placed alongside the imminency requirement conceded in footnote 13 of *Dombrowski,* created the squeeze play, an analytic structure later used to deny access.

Concessions can also be faulted because of the frailty—one might almost say the futility—of the bargains they create. The bargains are often upset by personnel changes on the Court. Those of *Dombrowski* were made vulnerable by the replacement of Warren, Fortas, and Harlan, by Burger, Blackmun, and Rehnquist. More surprisingly, those of *Younger, Hicks,* and *Huffman* are threatened by Douglas's replacement, Justice Stevens, who in the access cases of his first full Term, *Vail, Wooley,* and *Hernandez,*[192] wrote separately, revealing an unease with the tenets of "Our Federalism" and displaying a moderation that may make him more influential than Douglas with the other Justices. It is also true that precedents are often overtaken by changing social contexts, which may lead some of the members of the Court who are more tenuously tied to the bargain—such as Justices Stewart and White—to change their views. They joined *Dombrowski,* and yet in the 1970s lent their support to "Our Federalism." Justice Stewart joined *Younger, Huffman, Littleton,* and *Rizzo;* Justice White stood with Brennan in *Younger,* but joined *Huffman* and *Rizzo,* and became the spokesman of the Burger Court in *Hicks, Littleton,* and *Hernandez.*

To point to the vulnerability of a judicial bargain is not to impeach the role of the judicial statesman. It is to admit the perilous

192. *See* notes 48 & 106 *supra.*

quality of his work, but not to deny its value. The judicial statesman seeks a Court resolution as a means of providing guidance to the bar, the citizen, and the lower courts. Even more, he senses the importance of authoritative statements at a particular moment and is prepared to act on that perception. The judicial statesman is neither detached nor fatalistic.[193] *Dombrowski*, for example, must be in part understood as an integral aspect of the attempt—the noble attempt —of the Warren Court to protect the civil rights movement of the mid-1960s, and in order to serve that function an *authoritative* resolution was necessary. It would not have been sufficient for Justice Brennan merely to have expressed his views. At the same time the Justice realized that none of the concessions exacted by his brethren could obscure *Dombrowski*'s overarching message—the doors of the federal equity court, long shut by *Douglas v. City of Jeannette*, were now open.

Of course, decisions must be judged not simply by their effect at the moment they are announced, but by how they will be used as precedent. That judgment can be made in retrospect by a historian. But a Justice can only act on assumptions about the balance of power in the future. If a majority can hold together, even a precedent based upon concessions can be used as a building block for a fuller and less compromised decision or statement of principles. The animus of *Dombrowski*, for all its concessions, permitted Justice Brennan in *Perez* to free himself of the shackles of the irreparable injury doctrine of *Douglas v. City of Jeannette* and the ill-founded tradition of using the language of equity to safeguard federal structure.

Speculation about the future is a matter of judgment; it is a gamble. A majority can fall apart, and then concessions can serve as a bridge to retrenchment—as did the no-prosecution-pending rule and the shift from injunctions to declaratory judgments. Even then, however, all is not in vain. Surely the retrenchment of the mid-1970s would have been all the more devastating without the intervening precedent; if, for example, the Burger Court could have built directly on *Douglas* without having to work out from under *Dombrowski*. Without using the equity language of *Douglas*, without the concessions of footnotes 2, 7, and 13, *Dombrowski* would have never been; without the concession to the no-prosecution-pending bar, the shift to declaratory judgments, and footnote 9, *Perez* would have never been; without *Perez* there would have been no *Steffel*; and without *Steffel*, decisions such as *Salem Inn* and *Wooley* would have been impossible, and not

193. *See* Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

a trace of *Dombrowski* would have remained in positive law—not a trace of Justice Brennan's views of federalism and their implication for federal anticipatory relief. The doors of the federal courts would be closed tighter than they are.

Finally, just as we cannot assess the work of the judicial statesman without benefit of hindsight, so we cannot evaluate it merely on the basis of its effect on contemporary decisions. Just as it would be wrong to assess *Dombrowski* solely from the perspective of 1965, it would be wrong to assess it solely in terms of 1977. We must also think about the future and speculate about the role *Dombrowski* might have in shaping it. As precedent *Dombrowski* lends to the ideals it expresses a strength and endurance beyond that which could attach if they had been merely stated as opinion. The very fact that those ideals have been actually implemented testifies to their practical validity, to their capacity to be realized, and to the commitment of those who would have them realized—a lesson not easily forgotten. Beyond all the axiomatic shifts from *Brown* to *Younger,* there continues to exist resistance to the retrenchment of the Burger Court—on the Court, in the bar, in the lower federal courts, and perhaps even more importantly, in the classroom. In those spheres *Dombrowski* is a source of conscience. It is an authoritative reminder of a judicial era that was and that could be.