The Burger Court Opinion Writing Database

Younger v. Harris

401 U.S. 37 (February 23, 1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1970

Re: No. 2 - Younger v. Harris
No. 4 - Boyle v. Landry
(No. 7 - Samuels v. Mackell)
(No. 9 - Fernandez v. Mackell)
No. 41 - Dyson v. Stein (pc)
No. 83 - Byrne v. Karalexis (pc)

Dear Hugo:

Please join me in your opinions in the above cases.

Regards,

WEB

W.E.B.

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 10, 1971

Re: Cases Held for the "Dombrowski Group"

Dear Hugo:

It is my feeling that we should now allow the federal courts to wrestle with the Dombrowski problem in the light of your opinions for the Court in this sensitive area. Hence, I prefer not to grant or note jurisdiction in any of the cases presently pending. It may be that the lower courts will achieve what we want on their own, and that we can reach the desired result by merely affirming. In short, I would let the dust settle.

Although I agree with the bulk of your recommendations, for the sake of simplicity I will affirmatively indicate my vote on each case:

I agree with your proposed disposition of Nos.:

20
31
43
112
116
134
217
583
876
5013
5164
5412
5462
5952
500
5275.

As to the others, my votes follow:

No. 90. Vacate and remand for reconsideration in light of the Dombrowski group.

No. 102. The same, although I have some doubts about the time question.

No. 236. I agree we should consider this case on the merits and have tentatively decided to vote to note.

No. 289. Dismiss as untimely.

No. 290. The same.

No. 360. Vacate and remand for reconsideration in light of the Dombrowski group.

No. 484. Dismiss as moot.

No. 728. Hold for Vuitch.

No. 729. Dismiss and Deny.

No. 808. Hold for Vuitch.

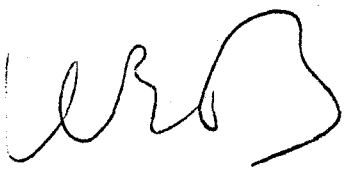
No. 844. Vacate and remand for reconsideration in light of the Dombrowski group.

No. 866. The same.

No. 847. Dismiss for want of jurisdiction, Gunn v. Univ. Committee.

No. 5539. Grant, vacate and remand for reconsideration in light of the Dombrowski group.

Regards,



Mr. Justice Black

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 16, 1971

Re: Cases Held for the "Dombrowski Group"

Dear Hugo:

As to the last three cases, I would Vacate and Remand Nos. 826 and 898, and Affirm No. 888.

Regards,

WEB

Mr. Justice Black

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: NOV 30 1970

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1970

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al. | On Appeal From the United States District Court for the Central District of California.

[December —, 1970]

Mr. Justice Black delivered the opinion of the Court.

Appellee, John Harris, Jr., was indicted in a California state court, charged with violation of the California Penal Code §§ 11400 and 11401, known as the California Criminal Syndicalism Act, set out below.[1] He then filed

[1] "§ 11400. *Definition*

" 'Criminal syndicalism' as used in this article means any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

"§ 11401. *Offense; punishment*

"Any person who:

"1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change; or

"2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

"3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1970

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al. | On Appeal From the United States District Court for the Central District of California.

[February 23, 1971]

Mr. Justice Black delivered the opinion of the Court.

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SUPREME COURT OF THE UNITED STATES

Nos. 2 and 4.—October Term, 1970

Evelle J. Younger, Appellant, v. John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.
John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants, v. Lawrence Landry et al.	On Appeal From the United States District Court of the Northern District of Illinois.

[December —, 1970]

Mr. Justice Douglas, dissenting.

The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dombrowski* v. *Pfister,* 380 U. S. 479. There we recognized that in times of repression when interest with powerful spokemen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.

Dombrowski represents an exception to the general rule that federal courts should not interfere with state criminal prosecutions. The exception does not arise merely because prosecutions are threatened to which the First Amendment will be the profferred defense. *Dombrowski* governs statutes which are a blunderbuss by themselves or when used *en masse*—those that have an

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 2 and 4.—October Term, 1970 Circulated: ——

Recirculated: 12-3

Evelle J. Younger, Appellant, v. John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.
John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants, v. Lawrence Landry et al.	On Appeal From the United States District Court of the Northern District of Illinois.

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Short thought

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 4.—OCTOBER TERM, 1970

2/8/71

Evelle J. Younger, Appellant, v. John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.
John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants, v. Lawrence Landry et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[February —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

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345

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 4.—OCTOBER TERM, 1970

Evelle J. Younger, Appellant, v. John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.
John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants, v. Lawrence Landry et al.	On Appeal From the United States District Court for the Northern District of Illinois.

2/9/71

[February —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dombrowski* v. *Pfister*, 380 U. S. 479. There we recognized that in times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

7th DRAFT

SUPREME COURT OF THE UNITED STATES

Douglas, J.

NOS. 2 AND 4.—OCTOBER TERM, 1970

2/11/71

Evelle J. Younger, Appellant, v. John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.
John S. Boyle, Chief Judge of the Circuit Court of Cook County, Illinois, et al., Appellants, v. Lawrence Landry et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[February —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 9, 1971

Dear Hugo:

In the Dumbrowski cases being held perhaps the easiest for both of us is to list the cases in which I agree with your recommendation:

No. 31 Affirm

No. 112 Concur in affirmance

No. 236 Not a Dumbrowski

No. 289 Dismiss out of time

No. 290 Dismiss out of time

No. 729 Dismiss

No. 5013 Concur in vacating and remanding

No. 5952 Affirm

Please note that I take no part in:

No. 360

No. 583

No. 847

No. 5275

WOD
W. O. D.

Mr. Justice Black

cc: The Conference

January 6, 1970

Re: Nos. 2, 4, 7, 9, 41 and 83 - Younger and Companion Cases
No. 60 - Perez (Your Dissenting Opinion)

Dear Hugo:

I now write to let you know that I shall join your opinions in Nos. 2, 4, 7, 9, 41 and 83.

With respect to your dissent in No. 60, Perez, I am bothered by the jurisdictional question flushed by Brother Douglas, as well as in footnote 2 of your opinion. Pending my further consideration of the problem, I defer returning on your dissent.

Sincerely,

J.M.H.

Mr. Justice Black

CC: The Conference

2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

March 15, 1971

Re: Cases Held for the Dombrowski Group

Dear Hugo:

I agree with your recommendations for the following:

Nos. 31, 90, 112, 217, 583, 729, 808, 847, 876, 5013, 5164, 5412, 5462, 5952, 500, 5275, 5539.

For the rest, my views are as follows:

No. 20 -- Like Potter, I think we should affirm, but possibly with clarifying per curiams when, under Younger, et al., we are clear in our own minds that the lower court erroneously reached the merits and upheld the statute.

No. 43 -- Since, as your addendum points out, this is an instance of a "non-pending" state case within the meaning of Younger, et al., it would be most confusing to lower courts to ship it back under a general "vacate" formula. In spite of the doubts concerning the presence of Dombrowski-type harassment, this case still looks like the best vehicle for plenary consideration of the propriety of federal intervention in a "non-pending," "non-harassment" context. I would note.

No. 102 -- The time defect is not jurisdictional, and the irony of insisting on compliance with the Rule when it took us a year to get the ca off our docket is a bit too much for me. It appears to be a "non-pending "harassment" situation and the substantive issue cannot be dealt with summarily. I would note.

No. 116 -- Affirm, possibly with clarifying per curiams (See No. 20 above).

No. 134 -- Affirm, possibly with clarifying per curiams (See No. 20 above).

No. 236 -- I would note.

No. 289 -- Again the lateness is not jurisdictional and the case has been sitting here for close to a year. Vacate and remand.

No. 290 -- This fellow got all the relief he requested below and therefore cannot appeal. I would simply dismiss for lack of jurisdiction.

No. 360 -- This is a clear case of a "non-pending," "non-harassment" suit; therefore, it would be most unfortunate to confuse the lower courts by vacating in light of the Younger, et al., group. On the other hand, Brother Douglas is out of the case, and the jurisdictional issue is obviously going to be a close one in this Court. I say hold it for No. 43 as the best available vehicle for plenary consideration of the application of the Younger, et al., policies to federal intervention where no state proceeding is pending.

No. 484 -- I suppose we must vacate and remand for a determination as to mootness.

No. 728 -- Hold for Vuitch.

No. 844 -- Vacate and remand.

No. 866 -- Vacate and remand.

No. 888 -- My tentative view is to dismiss for lack of jurisdiction with cites to Perez v. Ledesma and Moody v. Flowers.

Nos. 826 and 898 -- I would vacate and remand both.

Sincerely,

Mr. Justice Black

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1970

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.

[December —, 1970]

Mr. Justice Brennan, concurring in result.

I agree that the judgment of the District Court should be reversed. Appellee Harris had been indicted for violations of the California Criminal Syndicalism Act before he sued in federal court. He has not alleged that the prosecution was brought in bad faith to harass him. His sole contention is that the Criminal Syndicalism Act is unconstitutionally overbroad. This contention may be adequately adjudicated in the state criminal proceeding, and federal intervention at his instance was therefore improper.*

*The District Court erroneously interpreted *Zwickler* v. *Koota, supra,* as authorizing federal court consideration of a constitutional claim at issue in a pending state proceeding, whether or not the federal court plaintiff had presented his claim to the state court. It suffices here to note that in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court. The court below also thought it significant that appellee Harris had raised his constitutional claim in the state courts in a motion to dismiss the indictment and in petitions in the state appellate courts for a writ of prohibition. It was questioned at oral argument whether constitutional issues could properly be raised by the procedures invoked by Harris, and it was suggested that the denial of Harris' motions did not necessarily involve rejection of his constitutional claims. However, even if the California courts had at that interlocutory stage rejected Harris' constitutional arguments, that rejection would not have provided a justification for intervening by the District Court. Harris could have sought direct review of that

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1970

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.

[December —, 1970]

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 2.—October Term, 1970

Recirculated: 1-29-71

Evelle J. Younger, Appellant, v. John Harris, Jr., et al. | On Appeal From the United States District Court for the Central District of California.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in result.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 9, 1971

RE: Cases Held for Dombrowski Group

Dear Hugo:

Several of these held cases present questions not decided in any of the Younger cases. These are such questions as (1) What is the rule when the state criminal prosecution is started after the filing of the federal suit but is pending at the time of the federal hearing, (2) what is the rule when the state proceeding is not a criminal prosecution but a civil proceeding, for example, to enjoin exhibition of an allegedly obscene motion picture, or to obtain a judgment permitting destruction of allegedly obscene material and the like. I think we should take one or more of the cases to decide those questions. My own choices would be No. 360, Grove Press v. Flask or No. 217, Johnnie Reb's Book Shop v. Slaton. The same types of questions seem to me to be presented in other cases which I think could be held if No. 360 or No. 217 or both are taken. These are No. 583, Faircloth v. M & W

2

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1971

Cases Held for Dombrowski Group

Dear Hugo:

I've attempted to collate the returns concerning your proposed dispositions of the held cases, and to me, the profile looks like this:

No. 20 - Wright v. City of Montgomery:

Six to vacate and remand

Two (John and Potter) to affirm

One (WOD) no vote.

No. 31 - Cato v. Georgia:

Eight to affirm

One (Thurgood) to vacate and remand

No. 43 - Faircloth v. Lazarus:

Six to vacate and remand

One (Thurgood) to affirm

One (John) to note

One (WOD) no vote

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1971

Memorandum to the Conference

RE: Dombrowski Cases held over to April 16

I have tried to digest for my own use the situations in the held over cases so that I might decide how I should vote. For what they may be worth, I attach copies of the digest with a comment on each indicating my tentative conclusion.

W. J. B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 21, 1971

MEMORANDUM TO THE CONFERENCE

RE: Cases held for Younger, et al.

On April 1, I circulated my views of the dispositions I think should be made of these cases. My premise was that the Younger group had left open and had not decided the propriety of federal court action with respect to state criminal laws when (1) no prosecution was pending when the federal action was brought; (2) although not pending when federal suit was filed, a state prosecution pended at the time of the federal hearing; (3) only a state civil proceeding was pending either when the federal suit was filed, or at the time of the federal hearing.

No. 360 - Grove Press v. Flask is a (3) case. A civil nuisance proceeding was begun after the federal suit but was pending when federal hearing was held. My vote was to Note this case and to hold the following for its decision: No. 583 - Attorney General of Florida v. M & W Theatres, where civil injunction action was brought before federal suit was filed; No. 847 - Grove Press v. Orange, where federal court preceded civil cross-action of state officials in Theatre manager's state court suit; No. 876 - Mitchum v. Foster, where state civil proceeding pended when federal suit was filed; and Nos. 942 and 979 - Austin v. Meyer, where at time of federal hearing "there is at present no pending state court proceeding either civil or criminal."

(a)	(b)	(c)
583	360	942 & 979
866	847	1402
826		
898		
1010		

RE: Cases held for Younger, et al., cont'd.

I also said that I would Note No. 808 - Roe v. Wade, where no state suit of any kind, civil or criminal was brought, and that I would remand the following for reconsideration in light of No. 2 - Younger, and Nos. 7 and 9 - Mackell, No. 866 Spivak v. Shriver, No. 898 United Artists v. Thompson and No. 826, Thompson v. United Artists. I would hold No. 1402, Rodgers v. Danforth for No. 808.

Since the above memoranda were circulated, No. 1495, Col-An Entertainment Corporation v. Harper, has been listed for discussion at the conference of Thursday, April 22. There a federal suit for declaratory and injunctive relief was filed on October 14, 1970. No state proceedings existed until almost four months later when on January 28, 1971 a criminal obscenity information was filed and arrest and search warrants issued to arrest a theatre owner and projectionist for exhibiting an obscene film, and to seize that and other films and incidental materials. The search warrant was executed and large quantities of materials were seized. A single federal judge granted an interim injunction against closing of theatre. However, on March 2, 1971, a three-judge federal court set aside the restraining order and dismissed the federal suit, holding that, under the Younger group of cases decided in February, this was required since "At time of this hearing, there are pending state court prosecutions in which all constitutional questions of plaintiffs may be presented. Under these current decisions . . . declaratory relief here sought should not be granted."

I think the three-judge court's application of the Younger group to the situation is most questionable. In any event, the case squarely presents issues (1) and (2) mentioned in the first paragraph of this memorandum. I would therefore also Note this case and set it down for argument with Nos. 360 and No. 808.

If the conference decides against taking these cases, I should like time to write.

W.J.B. Jr.

SUPREME COURT OF THE UNITED STATES

No. 2.—October Term, 1970

Evelle J. Younger, Appellant, v. John Harris, Jr., et al. | On Appeal From the United States District Court for the Central District of California.

[February 23, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in the result.

I agree that the judgment of the District Court should be reversed. Appellee Harris had been indicted for violations of the California Criminal Syndicalism Act before he sued in federal court. He has not alleged that the prosecution was brought in bad faith to harass him. His constitutional contentions may be adequately adjudicated in the state criminal proceeding, and federal intervention at his instance was therefore improper.*

*The District Court erroneously interpreted *Zwickler* v. *Koota*, 389 U. S. 241 (1967), as authorizing federal court consideration of a constitutional claim at issue in a pending state proceeding, whether or not the federal court plaintiff had presented his claim to the state court. It suffices here to note that in *Zwickler* no state proceeding was pending at the time jurisdiction attached in the federal court. The court below also thought it significant that appellee Harris had raised his constitutional claim in the state courts in a motion to dismiss the indictment and in petitions in the state appellate courts for a writ of prohibition. It was questioned at oral argument whether constitutional issues could properly be raised by the procedures invoked by Harris, and it was suggested that the denial of Harris' motions did not necessarily involve rejection of his constitutional claims. However, even if the California courts had at that interlocutory stage rejected Harris' constitutional arguments, that rejection would not have provided a justification for intervening by the District Court. Harris could have sought direct review of that

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 2.*—October Term, 1970

Circulated: JAN 30 1971

Recirculated: _____

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al. | On Appeal From the United States District Court for the Central District of California.

[February —, 1971]

Mr. Justice Stewart, concurring.

The questions the Court decides today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals only with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court.

In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U. S. C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by § 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983.[1]

*Together with No. 4, *John S. Boyle et al.* v. *Lawrence Landry et al.*, on appeal from the United States District Court for the Northern District of Illinois; No. 7, *George Samuels et al.* v. *Thomas J. Mackell et al.*, and No. 9, *Fred Fernandez* v. *Thomas J. Mackell et al.*, on appeals from the United States District Court for the Southern District of New York; No. 41, *Frank Dyson et al.* v. *Brent Stein*, on appeal from the United States District Court for the Northern District of Texas, and No. 83, *Garrett H. Byrne et al.* v. *Serafim Karalexis et al.*, on appeal from the United States District Court for the District of Massachusetts.

[1] See also *Cameron* v. *Johnson*, 390 U. S. 611, 613–614 n. 3; *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 2.*—October Term, 1970

Evelle J. Younger, Appellant, *v.* John Harris, Jr., et al.	On Appeal From the United States District Court for the Central District of California.

[February —, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, concurring.

The questions the Court decides today are important ones. Perhaps as important, however, is a recognition of the areas into which today's holdings do not necessarily extend. In all of these cases, the Court deals only with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is contemporaneously pending in a state court.

In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute, 28 U. S. C. § 2283. Thus we do not decide whether the word "injunction" in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is "expressly authorized" by

*Together with No. 4, *John S. Boyle et al.* v. *Lawrence Landry et al.*, on appeal from the United States District Court for the Northern District of Illinois; No. 7, *George Samuels et al.* v. *Thomas J. Mackell et al.*, and No. 9, *Fred Fernandez* v. *Thomas J. Mackell et al.*, on appeals from the United States District Court for the Southern District of New York; No. 41, *Frank Dyson et al.* v. *Brent Stein*, on appeal from the United States District Court for the Northern District of Texas, and No. 83, *Garrett H. Byrne et al.* v. *Serafim Karalexis et al.*, on appeal from the United States District Court for the District of Massachusetts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 12, 1971

Re: Dombrowski Cases

Dear Hugo,

I agree fully with your recommended disposition of Nos. 31, 43, 112, 583, 728, 876, 5412, 5952, 500, 5275, and 888. I also agree with your recommendations in several other cases, with the following observations:

No. 102, Goodman v. Wheeler. The jurisdictional statement was filed almost a month late. I would dismiss for untimeliness.

No. 217, Johnnie Reb's Book & Card Shop v. Slaton. The district court may have said enough about the merits that we should cite Samuels in affirming, so that it will be clear we take no position on the merits.

Nos. 289 & 290, Wade v. Buchanan, and Buchanan v. Wade. We could reverse No. 289 with a cite to Boyle and affirm No. 290 with a cite to Samuels, since the district court should not have reached the merits in either case. Or dismiss both for untimeliness.

No. 729, Hodgson v. Minnesota. If No. 728 is held for Vuitch, as you suggest it might be, we might want to hold this companion case for Vuitch as well.

No. 5462, Porter v. Kimzey. In affirming, we might wish to include a citation to Samuels and Younger.

In Nos. 20, 116, 134, 217, 290, 5013, and 5164, as in Samuels, district or circuit courts erroneously reached the merits but arrived at the correct result of denying relief. You would remand in several of these cases. I would affirm with a

citation to Samuels, which should make it adequately clear that we take no position on the holdings on the merits. In No. 5013, affirmance could also include a cite to Younger and Boyle since some, if not all, of the appellants had lost standing.

I would dispose of the remaining cases as follows:

No. 90, Barlow v. Gallant. Vacate and remand for reconsideration in light of the Dombrowski group.

No. 236, Campbell v. Lewis. I think this case was properly held for the Dombrowskis and would vacate and remand for reconsideration in light of Boyle and the standing aspect of Younger.

No. 360, Grove Press, Inc. v. Flask. Vacate and remand for consideration in light of Dombrowski group.

No. 484, Byrne v. PBIC, Inc. Vacate and remand for consideration of the question of mootness.

No. 808, Roe v. Wade. My order of preference would be (1) vacate and remand in light of Boyle; (2) hold for Vuitch.

Nos. 844 & 866, ABC Books, Inc. v. Benson, and Spivak and Shriver. There are enough elements of a possible harassment case present that I would vacate and remand.

No. 847, Grove Press, Inc. v. Bailey. Vacate and remand for consideration in light of Dombrowski group.

No. 5539, Embry v. Allen. The same.

Nos. 826 & 898, Thompson v. United Artists Theatre Circuit, Inc., and United Artists Theatre Circuit, Inc. v. Thompson. The same.

Sincerely yours,

P.S.

Mr. Justice Black

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1970

Re: No. 2 - Younger v. Harris

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

Byron

B.R.W.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 10, 1971

Re: Dombrowski Cases

Dear Hugo:

From the various circulations on these cases, it would seem that almost all of them are to be discussed. But for what they are worth, my views are as follows:

I would note No. 360 and hold for it Nos. 484, 583, 847, 866, 876, 898 and possibly 728.

With respect to No. 484, listed above, civil proceedings had been pending in the State Supreme Court. That court had issued an injunction prohibiting performance unless certain scenes were cut. Federal action was then begun without coming here. Of course, the case may be moot.

As for No. 728, also listed above, I would either affirm on the ground that I would not second-guess a three-judge court on its determination that there was no case or controversy at the time the federal action was filed, or hold for No. 360, which would decide what a federal court should do when a state proceeding is instituted at a time when a prior federal action is no farther along than deciding whether there is a case or controversy.

I would affirm No. 236; affirm No. 102; vacate and remand Nos. 289 and 290 on the Dombrowski cases; and possibly note No. 808.

With respect to No. 808, it seems to me that one ground for invalidating the Texas abortion statute was the Ninth Amendment. Vuitch will not reach this. However, No. 1010, Rosen v. Louisiana Board of Medical Examiners, a case involving a proceeding to suspend a doctor's license, rejected both the vagueness and Ninth Amendment arguments

and may well have a better record on which to consider these issues. There is at least some expert medical testimony in Rosen, something perhaps lacking in No. 808. Rosen is currently out on CFR. I would be inclined to hold No. 808 until we act on No. 1010.

Otherwise, I am content with your suggested dispositions.

Sincerely,

Mr. Justice Black

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 28, 1970

Re: No. 2 - Younger v. Harris

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 15, 1971

Re: Cases Held for the Dombrowski Group

Dear Hugo:

My views in these cases are as follows:

Numbers	Views
20	Vacate and Remand
31	Vacate and Remand
43	Affirm
90	Note or Affirm
102	Affirm
112	Affirm
116, 134	Vacate and Remand
217	Note
236	Affirm
289	Dismiss as untimely
360	Note
484	Affirm if not moot
583	Hold for 360 and 217
728)	Hold 728 for Vuitch
729)	Dismiss 729
808	Hold for Vuitch
844	Dismiss (Gunn)

Numbers	Views
847	Hold for 360 and 217
866	Dismiss (Gunn)
876	Hold for 360 and 217
898	Hold for 360 and 217
5013	Vacate and Remand
5164	Vacate and Remand
5412	Affirm
5462	Note or Vacate and Remand
5952	Affirm
500	Vacate and Remand
5275	Deny
5539	Vacate and Remand or Grant
826	Dismiss
888	Affirm

Sincerely,

T.M.

Mr. Justice Black

cc: The Conference

December 28, 1970

Re: No. 2 - Younger v. Harris

Dear Hugo:

I would appreciate your joining me in your proposed opinion for this case.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

March 9, 1971

Dear Hughes, 5013. Vacate and remand with directions to dismiss as moot.

I agree with your recommendations as to Nos. 28, 31, 43, [illegible], 5412, 5462 and 5952.

As to the others, my tentative inclinations are as follows:

No. 90. Vacate and remand for reconsideration in the light of the Dombrowski group.

No. [illegible]. The same.

No. 236. Affirm.

No. 289. Vacate and remand for reconsideration.

No. 290. The same.

No. 360. The same.

No. 484. Vacate and remand for consideration of the issue of mootness.

No. 728. Affirm.

No. 729. Dismiss and deny. Actually, the case is moot because the criminal trial has been conducted and the defendant convicted.

No. 888. Held for No. 84, Yuitch.

No. 844. Vacate and remand for reconsideration in the light of the Mashell cases.

No. 866. Vacate and remand for reconsideration.

No. 876. Affirm.

No. 5013. Vacate and remand with directions to dismiss as moot.

No. 5039. Vacate and remand for reconsideration.

My tentative reaction is to dissent in Nos. 846 and 876, and to dismiss No. 888 for want of jurisdiction. I believe that the appeal in No. 846 is from that part of the District Court's order requiring the return of the one copy of the film.

Mr. Justice Black

cc: The Conference

March 12, 1971

Re: Additional "Dombrowski" Holds

Dear Hugo:

My tentative reaction is to affirm in Nos. 826 and 838, and to dismiss No. 888 for want of jurisdiction. I believe that the appeal in No. 826 is from that part of the District Court's order requiring the return of the one copy of the film.

Sincerely,

H.A.B.

Mr. Justice Black

cc: The Conference