

Appealability of Abstention Orders

It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*¹

This precept, unlike others penned by Chief Justice Marshall concerning federal jurisdiction, has not weathered the demands of federalism and the complexities of constitutional adjudication. Periodically, however, the dust is brushed aside and this passage re-emerges only to find that those who disturb its repose hasten to add that there is “no such rule today.”² Such a conclusion, without question, is based upon a reading of the Supreme Court’s decisions which established the abstention doctrine³ under which a federal district court, while retaining jurisdiction,⁴ may decline to proceed until the parties have had an opportunity to obtain a decision on questions of state law from the state courts.⁵ Thus, the commentator’s

¹*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (emphasis supplied).

²C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 218 (3d ed. 1976) [hereinafter cited as WRIGHT].

³*Younger v. Harris*, 401 U.S. 37 (1971) (absent bad faith, harassment, or a patently invalid state statute, abstention appropriate where federal jurisdiction invoked for purpose of restraining state criminal proceedings); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (abstention proper in certain diversity actions to allow state court to resolve unsettled question of state law); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (dismissal on abstention grounds appropriate to avoid needless conflict with state’s administration of its internal affairs); *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention appropriate to avoid decision of federal constitutional question where case may be disposed of on questions of state law).

⁴Application of the abstention doctrine “does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise.” *Harrison v. NAACP*, 360 U.S. 167, 177 (1959); *accord*, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). Cases involving *Younger* abstention are not considered in the Note because dismissal of the federal action is mandated in such cases. *See MTM, Inc. v. Gonzalez*, 420 U.S. 799, 806 n.1 (1975) (concurring opinion).

⁵This permits the federal judgment to be based upon “a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.” *Harrison v. NAACP*, 360 U.S. 167, 178 (1959).

observation is addressed solely to that part of Marshall's statement which bespeaks a duty to exercise jurisdiction. That jurisdiction, however, is not boundless. The federal courts, both trial and appellate, are courts of limited jurisdiction—their power and authority over cases are derived solely from the Constitution⁶ and the Congress.⁷ Although there is some scholarly and judicial support for the view that the constitutional grant of judicial power is self-executing,⁸ the prevailing view is that it is “dependent for its distribution and organization, and for the *modes of its exercise*, entirely upon the action of Congress.”⁹

Clearly the judge-made¹⁰ doctrine of abstention could not have enlarged the scope of that jurisdiction nor sounded the death knell of the rule proscribing the federal judiciary's usurpation of jurisdiction. But is there cause for concern about judicial respect for this second rule in conjunction with appellate review of abstention orders?¹¹

Although it might be argued that appealability of abstention orders is a foregone conclusion,¹² the following considerations suggest

⁶U.S. CONST. art. III, § 2; WRIGHT, *supra* note 2, § 8.

⁷U.S. CONST. art. III, § 1; WRIGHT, *supra* note 2, §§ 10, 11.

⁸WRIGHT, *supra* note 2, § 10, at 27.

⁹*Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845) (emphasis supplied); *accord*, *Lockerty v. Phillips*, 319 U.S. 182 (1943).

¹⁰*England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

¹¹Not all district court orders are appealable. Jurisdiction of appeals from certain classes of interlocutory orders, 28 U.S.C. § 1292 (1970), and from all final decisions of the district courts is conferred on the courts of appeals, except where direct review may be had in the Supreme Court, 28 U.S.C. § 1291 (1970).

¹²One writer recently observed that this matter “is not definitively settled,” but suggested that:

The inequities to litigants in not being able to have erroneous orders of abstention overturned may well render abstention orders “final” and appealable under 28 U.S.C. § 1291. . . . Moreover, in cases in which interlocutory injunctions are requested . . . , an order of abstention might be reviewable under 28 U.S.C. § 1292(a)(1) as a refusal of an interlocutory injunction. . . . The same reasoning could allow Supreme Court review of three-judge decisions [under 28 U.S.C. § 1253]. And, of course, certification under 28 U.S.C. 1292(b), and mandamus or prohibition under 28 U.S.C. § 1651, would in any event be available in cases to which they are applicable.

Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA L. REV. 1071, n.123 (1974) [hereinafter cited as *Abstention in Constitutional Cases*].

The American Law Institute's proposal regarding abstention includes no express provision for review of abstention orders. The All Writs Statute, 28 U.S.C. § 1651, was thought to afford an adequate remedy where entry of the order constituted an abuse of discretion. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 291-92 (1969) [hereinafter cited as *ALI STUDY*]. Professor Field sought to explain the ALI's position by suggesting that it concludes from case law that abstention orders are not reviewable. *Abstention in Constitutional Cases*, *supra* at 1107 n.123. However, to this writer's knowledge, of all the appeals taken from such orders to the courts of appeals, only one has been dismissed for want of

that careful scrutiny of this matter is warranted. First, a federal court has the power to render a judgment only if the case before it is within its jurisdiction. Second, because any proceeding outside the limits prescribed by Congress is coram non iudice and any decision or order rendered therein is a nullity,¹³ the federal courts are obliged to notice want of jurisdiction. Third, while the Supreme Court has yet to address the issue of the appealability of abstention orders per se, recent decisions of that court and revision of the Three-Judge Court Act have set the stage for an increase in the number of abstention orders¹⁴ and appeals therefrom. Concomitant with the latter is the problem facing appellate courts of determining whether their jurisdiction may be exercised over such orders¹⁵ and, if so, the proper mode or modes for doing so.¹⁶

jurisdiction. *Public Employees Local 1279 v. Alabama*, 453 F.2d 922 (5th Cir. 1972). See text accompanying notes 145-47 *infra*. The Supreme Court may have declined jurisdiction over a direct appeal from an abstention order entered by a three-judge court. *Daniel v. Waters*, 417 U.S. 963 (1974). See note 177 *infra*.

¹³*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 719 (1838).

¹⁴During the era of the Warren Court (1953-1969), application of the abstention doctrine was narrowly limited. *Freda v. Lavine*, 494 F.2d 107, 109 (2d Cir. 1974). This prompted one writer to suggest that with the retirement of Mr. Justice Frankfurter in 1962 the abstention doctrine had been left a judicial orphan. Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 604 (1967). Recent Supreme Court decisions suggest that there has been a rejuvenation of the full implications of the doctrine. *Reid v. Board of Educ.*, 453 F.2d 238, 242 (2d Cir. 1972), *citing* *Askew v. Hargrave*, 401 U.S. 476 (1971) and *Reetz v. Bozanich*, 397 U.S. 82 (1970); see *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6 (1975). Congress not only appears to have been cognizant of this fact, but also to have relied upon it in enacting legislation which largely eliminates the requirement for three-judge courts. S. REP. NO. 94-204, 94th Cong., 2d Sess. 3-4 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3160, 3162-63 [hereinafter cited as S. REP. NO. 94-204]; see note 184 *infra*. In commenting upon the Court's recent clarification of the application of the abstention doctrine in *Askew* and *Reetz*, the Senate Committee on the Judiciary noted that "[t]his pattern of decisions clearly precludes the sort of precipitous intrusion in the State legal processes by a single Federal judge that the original Three-Judge Court Act sought to control." S. REP. NO. 94-204, at 8.

¹⁵During the mid-1960's the courts of appeals referred to cases as having applied the abstention doctrine notwithstanding the fact that the district courts had dismissed the action. *E.g.*, *United Steel Workers v. Bagwell*, 383 F.2d 492 (4th Cir. 1967). When this is the case, the question of appellate review presents no real problem, for dismissal, with or without prejudice, clearly constitutes a "final decision" from which an appeal may be taken pursuant to 28 U.S.C. § 1291 (1970). *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949).

In 1967 the Court conceded that it "is better practice, in a case raising a federal statutory claim, to retain jurisdiction, rather than to dismiss." *Zwickler v. Koota*, 389 U.S. 241, 244 n.4 (1967). Because the *Zwickler* rule has been followed even where no federal questions had been raised, see, *e.g.*, *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971); *Coleman v. Ginsberg*, 428 F.2d 767, 770 (2d Cir. 1970), appellate jurisdiction over many abstention orders will no longer clearly lie under section 1291.

¹⁶Appealability of abstention orders will be considered under 28 U.S.C. § 1291 (1970), see text accompanying notes 37-96 *infra*; 28 U.S.C. § 1292(a)(1) (1970), see text

Initially this Note will consider *Louisiana Power & Light Co. v. City of Thibodaux*¹⁷ and *Idlewild Bon Voyage Liquor Corp. v. Epstein*,¹⁸ the cases in which the Supreme Court was first confronted by and first considered, although only tangentially, the appealability of abstention orders. Resolution of this issue by the appellate courts will then be examined. Finally, *Idlewild's* teachings will be reconsidered in light of recent Supreme Court dicta.

I. IDLEWILD: AN ENIGMA

The issue of appealability of abstention orders was first raised by the petitioner in *Louisiana Power & Light Co. v. City of Thibodaux*,¹⁹ a case in which the Fifth Circuit reversed an abstention order entered by the district court in an expropriation proceeding after holding that it was appealable under 28 U.S.C. § 1292[(a)](1).²⁰ In granting certiorari the Court excluded this threshold issue from its scope of review.²¹ To do so required it to disregard a statement made by one who had been a member of the Marshall Court.

However late [an objection that the court has no jurisdiction] may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. . . . If the

accompanying notes 97-142 *infra*; 28 U.S.C. § 1292(b) (1970), *see* text accompanying notes 143-72 *infra*; and 28 U.S.C. § 1253 (1970), *see* text accompanying notes 173-79 *infra*. Should appeal be improper, the All Writs Act, 28 U.S.C. § 1651 (1970), may provide an alternative means of reviewing a district court's action where there has been an abuse of discretion. *See* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) [hereinafter cited as *Supervisory and Advisory Mandamus*].

¹⁷360 U.S. 25 (1959), *rev'g* 255 F.2d 774 (5th Cir. 1958).

¹⁸370 U.S. 713 (1962).

¹⁹Petition for a Writ of Certiorari at 2, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). The city felt that "the significance of the issue of appealability" had been greatly exaggerated and urged the Court to exclude it from review should it grant the petition. Brief in Opposition to Petition for Certiorari at 4, 10. It reasoned that even if the court of appeals should not have assumed jurisdiction under 28 U.S.C. § 1292, it could have reached the same result by granting a writ of mandamus. *Id.* at 10.

²⁰*City of Thibodaux v. Louisiana Power & Light Co.*, 255 F.2d 774, 776 (5th Cir. 1958), *rev'd*, 360 U.S. 25 (1959). *See* text accompanying notes 98-108 *infra*.

²¹*Louisiana Power & Light Co. v. City of Thibodaux*, 358 U.S. 893 (1958). The Warren Court offered no explanation for excluding this jurisdictional question, but later stated that it granted certiorari "because of the importance of the question in the judicial enforcement of the power of eminent domain under diversity jurisdiction." 360 U.S. at 26.

law confers the power to render a judgment or decree, then the court has jurisdiction . . .²²

Because the Court's jurisdiction had been invoked under 28 U.S.C. § 1254, it was, in a sense, derived from that of the Fifth Circuit. If the latter lacked jurisdiction over the appeal from the abstention order,²³ does it not follow that the Supreme Court would have been without jurisdiction to reverse the judgment of the court of appeals?²⁴

In *Idlewild Bon Voyage Liquor Corp. v. Epstein*²⁵ the Supreme Court was again confronted by this question. Rather than appearing in the pristine form found earlier in *Thibodaux*, the issue of appellate jurisdiction in *Idlewild* was clouded by the compound nature of the order appealed from. Not only had the district judge abstained, he had also denied a motion to convene a three-judge court with leave, however, to renew the motion after the state court determined whether the challenged state statute was applicable to plaintiff.²⁶ Instead of addressing this matter squarely, the Court contented itself with the following observation: "The Court of Appeals properly rejected the argument that the order of the District Court 'was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292,' pointing out that [a]ppellant was effectively out of court."²⁷

Although the matter of appellate review of a district court's refusal to empanel a three-judge court has subsequently been clarified,²⁸ to this day the meaning of the Court's statement in

²²*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838) (Baldwin, J.) (emphasis supplied).

²³See text accompanying notes 101-08 *infra*.

²⁴Had the Court dismissed the appeal for want of jurisdiction and instructed the Fifth Circuit to do likewise, the outcome would have been the same—the parties would have been directed to the state courts for resolution of the state law issue.

²⁵370 U.S. 713 (1962) (per curiam). In *Idlewild*, petitioners sought to enjoin the state liquor authority from interfering with their business and to obtain a judgment declaring that the state statutes, as applied, were unconstitutional.

²⁶*Idlewild Bon Voyage Liquor Corp. v. Rohan*, 188 F. Supp. 434 (S.D.N.Y. 1960), appeal dismissed, 289 F.2d 426 (2d Cir.), request to convene three-judge court denied, 194 F. Supp. 3 (S.D.N.Y.), cert. granted sub nom. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 368 U.S. 812 (1961), remanded, 370 U.S. 713, acq., 212 F. Supp. 376 (1962) (abstention improper after lengthy procedural delays), *aff'd sub nom. Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

²⁷370 U.S. at 715 n.2, quoting *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d at 428.

²⁸When a single judge refuses to request convention of a three-judge court, but retains jurisdiction, review of his refusal is available in the court of appeals. *Schackman v. Arnebergh*, 387 U.S. 427 (1967), citing *Idlewild*. In commenting on *Schackman*, Professor Currie wrote that "[i]t was nice to know that *Idlewild* had upheld the power of the Court of Appeals, since the Court in *Idlewild* had not bothered telling us what it was doing." Currie, *Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court*, 37 U. CHI. L. REV. 159, 161 (1969).

Idlewild, insofar as it pertains to the appealability of abstention orders, remains an enigma.

One need look no further than *Daniel v. Waters*²⁹ for graphic evidence of the quandary in which a litigant may find himself upon the entry of an abstention order as to the court to which an appeal will lie, the statutory basis for appeal, whether the order is appealable as of right or at the discretion of both the trial and appellate courts, or whether he must petition for a writ of mandamus. In *Daniel* appellants challenged the constitutionality of a Tennessee statute and sought both declaratory and injunctive relief. Upon the entry of an abstention order by a three-judge district court they filed notices of appeal to the Supreme Court and to the court of appeals as well as a motion to intervene and complaint in state court proceedings involving the same statute in which they expressly reserved their federal constitutional claims for federal determination.³⁰ In their jurisdictional statement appellants argued that the abstention order was "in effect, a denial of [their] motion for a preliminary injunction" within the meaning of 28 U.S.C. § 1253.³¹ In their notice of appeal to the Sixth Circuit they asserted that the protective appeal was taken "pursuant to 28 U.S.C. § 1291(a)(1) [*sic*]."³²

Although the Supreme Court failed to note probable jurisdiction of the direct appeal, it entered the following order: "Judgment vacated and case remanded to the District Court so that it may enter a fresh judgment from which a timely appeal may be taken to the Court of Appeals."³³

After the three-judge court re-entered its order upon remand, appellants filed a second notice of appeal to the Sixth Circuit in which they asserted that the abstention order was a final order appealable under 28 U.S.C. § 1291, may be reviewable under 28 U.S.C. § 1292(a)(1), and is reviewable under 28 U.S.C. § 1292(b).³⁴ In the alternative, they requested that the appeal be treated as a petition for a writ of mandamus under 28 U.S.C. § 1651 should the court find the order unappealable.³⁵

A review of the decisions emanating from the various circuit courts of appeals reveals a contrariety of views on the subject of the appealability of an abstention order under 28 U.S.C. §§ 1291 and 1292.³⁶ Does this reflect a state of confusion and uncertainty, or do

²⁹515 F.2d 485 (6th Cir. 1975).

³⁰Statement as to Jurisdiction at 7, *Daniel v. Waters*, 417 U.S. 963 (1974).

³¹*Id.* at 15-16.

³²*Id.* app., at 31a. One must wonder whether this jurisdictional hybrid was a "typo," a Freudian slip, or a harbinger of the appeal to come.

³³*Daniel v. Waters*, 417 U.S. 963 (1974) (mem.).

³⁴Brief for Appellants at 7-8, *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975).

³⁵*Id.* at 9. See text accompanying notes 57-60 *infra* and note 126 *infra*.

³⁶Because the abstention doctrine has its roots in federalism, its application in the District of Columbia might be inapposite. *Sullivan v. Murphy*, 478 F.2d 938, 962

the precedents shape and define more than one road leading to the appellate courts?

II. THE MODES OF EXERCISING APPELLATE JURISDICTION

A. Section 1291—*The Final Judgment Rule*

The final judgment rule is embodied in the provision of the Judicial Code conferring on the courts of appeals "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court."³⁷

Although the Court has been unable to devise an all-encompassing definition of finality,³⁸ in most instances one may ascertain whether a particular order is or is not final either "from the nature of the order or from a crystallized body of decisions."³⁹ Nevertheless, there still remain those marginal orders "coming within what might be called the 'twilight zone' of finality."⁴⁰ When an appellate court is confronted with such an order, it must determine whether or not the order "falls on the 'finality' side of [the] twilight zone."⁴¹ In so doing the court is not only to give "the requirement of finality . . . a

n.35 (D.C. Cir. 1973). Thus, the likelihood that the court of appeals for the District of Columbia will have to consider the issue of the appealability of abstention orders appears remote.

³⁷28 U.S.C. § 1291 (1970). While the basic rationale of the final judgment rule is conservation of judicial resources, *DiBella v. United States*, 369 U.S. 121, 124 (1962) ("undue litigiousness and leaden-footed administration of justice" are discouraged by the insistence on finality and prohibition of piecemeal review), the requirement of finality also helps to ensure the correct disposition of a case on the merits and serves to maintain greater respect for the trial courts. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961) [hereinafter cited as *Appealability in the Federal Courts*].

³⁸*Dickinson v. Petroleum Conversion Co.*, 338 U.S. 507, 508 (1950). Generally a final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). However, an order or decision need not necessarily be the last which could possibly be made in a case to come within the meaning of section 1291. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).

While some definitions relate to the chronology of the proceedings, others focus on the rights of the litigants. See *Appealability in the Federal Courts*, *supra* note 37, at 353-54. A definition of finality which rests upon an order's concluding all rights that are the subject of the litigation, however, disregards those final orders which do not determine any rights between the parties, such as an order dismissing a complaint without prejudice. Such orders come within the meaning of section 1291 nonetheless. *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949).

³⁹WRIGHT, *supra* note 2, § 101, at 505.

⁴⁰*Gillespie v. United States Steel Corp.*, 379 U.S. at 152 (Black, J.).

⁴¹*Dickinson v. Petroleum Conversion Corp.*, 338 U.S. at 518 (Black, J., dissenting).

'practical rather than a technical construction,'⁴² but also to weigh competing considerations, the most important of which are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."⁴³

Should postponement of the exercise of jurisdiction inherent in abstention be equated with an "extended state of suspended animation,"⁴⁴ it might be argued that an abstention order is among those marginal orders falling on the finality side of the twilight zone. However, none of those courts which have assumed jurisdiction of an appeal from an abstention order under section 1291 have addressed the order in those terms. At the same time, none have found that relief had been finally denied by the district court.⁴⁵ None have undertaken an "evaluation of the competing considerations underlying *all* questions of finality."⁴⁶ Not one has explained why it should not heed the caveat that the final judgment rule precludes intrusion by appeal so long as the matter before the district court "remains open, unfinished or inconclusive."⁴⁷ Does it follow that all perceive the statement in *Idlewild* as a crystallization of the Court's position on this matter, notwithstanding its obvious lack of clarity?⁴⁸

It was apparently on this basis that the First Circuit held that an "abstention order is clearly appealable as a final order under 28 U.S.C. § 1291."⁴⁹ Its decision in *Druker v. Sullivan* was rendered in

⁴²*Gillespie v. United States Steel Corp.*, 379 U.S. at 152.

⁴³*Dickinson v. Petroleum Conversion Corp.*, 338 U.S. at 511.

⁴⁴*Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976). See note 73 *infra*.

⁴⁵For an order to be "final," it must have the effect of resolving litigation on the merits. *Williams v. Mumford*, 511 F.2d 363, 366 (D.C. Cir. 1975).

⁴⁶*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (emphasis supplied).

⁴⁷*Cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (order no longer open to reconsideration may be considered final for purposes of appeal). Having retained jurisdiction, the district court may vacate its abstention order should the state courts decline to hear the case, see *Fralin & Waldron, Inc. v. City of Martinsville*, 493 F.2d 481, 483 (4th Cir. 1974), or engage in "deliberate judicial footdragging," see *NAACP v. Gallion*, 290 F.2d 337, 342 (5th Cir. 1961).

⁴⁸If *Idlewild* is such a crystal, it would appear to have an internal flaw. "[N]o relief has been finally denied in federal court" where, under *Pullman* abstention, the district court retains jurisdiction while the state-law issues are adjudicated in state court. *MTM, Inc. v. Baxley*, 420 U.S. 799, 806 n.1 (1975) (concurring opinion), citing *Idlewild* as a case involving *Pullman* abstention. See text accompanying notes 180-82 *infra*.

⁴⁹*Druker v. Sullivan*, 458 F.2d 1272, 1274 n.3 (1st Cir. 1972), citing *Idlewild* and 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[4.-2], at 251 (2d ed. 1973), *aff'g* 334 F. Supp. 861 (D. Mass. 1971). Appellants in *Druker* sought a declaratory judgment that municipal ordinances imposing rent control on certain property were unconstitutional under the Supremacy Clause. The district court stayed proceedings pending state court determination of the validity of the action of the Rent Board. In *Druker* the First Circuit made no mention of the Supreme Court's failure to reject a Fifth Circuit holding that an abstention order was unappealable under the final judgment rule. See text accompanying notes 67-69 *infra* and text accompanying notes 19-21 *supra*.

1972. In succeeding years the Ninth, Seventh, and perhaps the Sixth Circuits became part of its rank and file; but not all circuits have joined the march.⁵⁰

In *Moses v. Kinnear*⁵¹ the Ninth Circuit appeared to align itself even more closely with *Idlewild* than had the *Druker* court when it adopted the following rule:

“If there is no action pending in a state court and the district court stays the action before it and directs the parties to go to the state court to obtain a ruling as to what the state law is, the stay is appealable as a final order under 28 USC § 1291. If injunctive relief is sought in the district court action, such a stay is also appealable as a denial of an injunction under 28 USC § 1292(a)(1).”⁵²

⁵⁰See text accompanying notes 62-72 *infra*.

⁵¹490 F.2d 21 (9th Cir. 1973). In *Moses* declaratory and injunctive relief were sought against the imposition of a state excise tax. The stay appealed from, however, was not the product of the district court's application of the judicially-fashioned abstention doctrine, but rather its conclusion that the action was statutorily barred by the Tax Injunction Act, 28 U.S.C. § 1341 (1970), where adequate state court remedies were available. Because the effect of such a stay is indistinguishable from that of an abstention order, it is not surprising that the Ninth Circuit relied on the same authority as had the *Druker* court to hold the order appealable under 28 U.S.C. §§ 1291, 1292.

Twenty-five years earlier one writer had suggested that Congress might draw upon the provisions of the Tax Injunction Act and the Johnson Act, 28 U.S.C. § 1342 (1970), in order to statutorily deny original federal jurisdiction in cases presenting a claim of federal invalidity in state legislative or administrative action where a “plain, speedy, and efficient remedy” is available in the state courts. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 229-30 (1948). By incorporating this suggestion in its proposals regarding abstention so as to “require or permit a stay in defined situations in which a state court determination is preferable to federal determination,” the American Law Institute sought to eliminate the principal flaws in the present scheme. By adopting clear standards for abstention, there would no longer be uncertainty as to when a state or a federal court is the proper forum; thus, cases would no longer be shuttled from one court to another. ALI STUDY, *supra* note 12, at 284-85.

⁵²490 F.2d at 24 (Jameson & Barnes & Choy, J.J.), quoting 9 MOORE'S FEDERAL PRACTICE ¶ 110.20 [4-2], at 251 (2d ed. 1973); accord, *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976) (*Pullman* abstention appropriate). Compare *Moses and Rancho Palos Verdes* with *Romero v. Weakley*, 226 F.2d 399, 400 & n.1 (9th Cir. 1955) (“All the parties also are agreed that the [abstention orders] are appealable. Apart from the agreement we hold these are appealable decisions. Alternatively, appellants sought a writ of mandamus. Our remanding order is, in effect, such a writ.”). *But cf.* *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns*, 537 F.2d 1058, 1061 (9th Cir. 1976) (Wright & Barnes & Browning, J.J.) (abstention order, as modified by three-judge court's denial of preliminary injunction, is appealable under 28 U.S.C. § 1292(a)(1); alternatively jurisdiction lies under the All Writs Act). Implicit in *Sea Ranch* is the holding that prior to its modification, the abstention order was unappealable under 28 U.S.C. §§ 1291, 1292(a)(1). Although he wrote neither opinion, Judge Barnes sat on the panels which decided *Moses* and *Sea Ranch*. After

Although the court of appeals held the order appealable "as a final order" and "as a denial of an injunction"—an interlocutory order in this instance—it does not follow that an order staying an action is final *and* interlocutory at one and the same time.⁵³ Because these terms are mutually exclusive, to hold that an order is final and therefore appealable under section 1291 precludes holding that it is an interlocutory order of a certain class and therefore appealable under section 1292(a)(1). The converse would obtain as well. Arguably then, before deciding whether a district court order is appealable, an appellate court must determine whether or not it falls on the finality side of the twilight zone, *i.e.*, whether the order is final *or* interlocutory. Once that determination is made, the appealability of a particular order will be governed not by the appellate court, but by the dictates of the jurisdictional provision itself.

The Seventh Circuit has consistently held that an abstention order is appealable under section 1291.⁵⁴ In its opinion in *Drexler v. Southwest Dubois School Corp.*⁵⁵ the court cited *Idlewild* as primary authority, as had those deciding *Druker* and *Moses*. In none of these opinions did the Court's statement appear, nor was there any attempt to explain its meaning. Only the Seventh Circuit sought to justify its holding.

Technically this case was not dismissed but merely stayed pending litigation in the state courts and it could be argued that the order is not appealable. However, we think it only logical to consider this order to be a final judgment within the

calling for the parties to brief the question of the appealability of the abstention order entered in *Rancho Palos Verdes*, the Ninth Circuit indicated that it was "satisfied from the response of counsel that the order was appealable." 547 F.2d at 1093 n.1, *citing Idlewild* and *Moses*.

⁵³To so hold would require striking the phrase "appealable as." While at first glance it would appear that the choice of phrasing is simple another way of stating that a stay is a final order and, as such, is appealable under section 1291, upon a second look, it becomes apparent that the reader's attention is being directed away from rather than toward the order itself. Having accomplished this, the writer is at liberty to declare that the order is "appealable as" both a final and an interlocutory order.

⁵⁴*Vickers v. Trainor*, 546 F.2d 739 (7th Cir. 1976) (abstention inappropriate); *Indiana State Employees Ass'n v. Boehning*, 511 F.2d 834 (7th Cir. 1974) (abstention inappropriate), *rev'd*, 423 U.S. 6 (1975) (abstention proper where state court construction of relevant state statutes, which may require hearing demanded, may obviate need for deciding constitutional question); *Drexler v. Southwest Dubois School Corp.*, 504 F.2d 836 (7th Cir. 1974).

⁵⁵504 F.2d 836 (7th Cir. 1974) (rehearing in banc) (abstention improper in civil rights action). Plaintiff, a nontenured teacher whose contract had not been renewed, brought an action under the Civil Rights Act, 42 U.S.C. § 1983 (1970). Noting that a paramount state interest was involved, the district court abstained pending resolution of state law issues by the Indiana courts.

meaning of 28 U.S.C. § 1291 and there is ample precedent to support this conclusion.⁵⁶

Idlewild and *Druker* provided Judge Celebrezze ample authority for his belief that an abstention order entered by a single district judge is appealable to the courts of appeals under section 1291.⁵⁷ However, for this dissenter to conclude that the Sixth Circuit had jurisdiction over the appeal in *Daniel v. Waters*, it was essential to find support for the proposition that an abstention order entered by a three-judge district court is not directly appealable to the Supreme Court.⁵⁸ As he read it, section 1291 not only confers jurisdiction on the courts of appeals, but limits it as well. "Section 1291 extends our jurisdiction to all district court appeals 'except where a direct review may be had in the Supreme Court.'"⁵⁹

The majority in *Daniel* refrained from discussing the basis of its jurisdiction. However, in considering whether the Supreme Court lacked jurisdiction over a direct appeal from the order, the court made a statement which parallels to some extent that appearing in the Court's *Idlewild* opinion. "[T]he abstention order . . . effectively shut the federal courthouse door upon plaintiffs in their search for timely vindication of their federal constitutional claims."⁶⁰ Does it follow that the Sixth Circuit would have held that the abstention order entered by a three-judge court was appealable under section 1291 had it considered the question?⁶¹

Neither the Third nor the Fourth Circuit has discussed the appealability of abstention orders. Instead, each has assumed jurisdiction of an appeal from such an order—the Third in *Howell v.*

⁵⁶504 F.2d at 838, citing *Idlewild*, *Moses*, and *Druker*. One must wonder whether the court considered the basis for exercising its jurisdiction when the appeal was initially taken. *Drexler v. Southwest Dubois School Corp.*, 492 F.2d 1245 (7th Cir. 1974) (affirmed without published opinion).

⁵⁷*Daniel v. Waters*, 515 F.2d 485, 494 n.2 (6th Cir. 1975) (dissenting opinion). See text accompanying notes 29-35 *supra*.

⁵⁸*Id.* The dissent found support for his conclusion that the court of appeals, rather than the Supreme Court, has jurisdiction over an appeal from a three-judge court's abstention order in his reading of the Court's order in *Daniel*, see text accompanying note 33 *supra*, and its holding in *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975). 515 F.2d at 493 & n.1*, 494. See note 177 *infra*.

⁵⁹515 F.2d at 494 n.2. In paraphrasing section 1291, Judge Celebrezze failed to mention its finality requirement. His acknowledgment that the order appealed from in *Daniel* merely postpones decision, *i.e.*, it falls short of adjudicating the merits of the case, suggests that it was not final. *Id.* at 493.

⁶⁰515 F.2d at 492.

⁶¹The proviso excepting those final decisions from the jurisdiction of the courts of appeals where direct appeal to the Supreme Court is available would have been no obstacle to the majority's assuming jurisdiction in *Daniel* under section 1291. From its finding that the challenged statute was patently unconstitutional, it follows that a three-judge court was unnecessary; thus, no direct appeal would lie under 28 U.S.C. § 1253.

*Citizens First National Bank*⁶² and the Fourth in *Fralin & Waldron, Inc. v. City of Martinsville*⁶³—without considering this threshold issue. It is not likely that either would follow *Druker*. Support for this premise is derived from a reference in the *Fralin* opinion to “this interlocutory appeal”⁶⁴ and from a recent Third Circuit decision in which the court held that a stay order was not a final order appealable under section 1291.⁶⁵

The Fifth Circuit has yet to follow the *Idlewild-Druker* line of cases; instead it has consistently held that an abstention order is not appealable under the final judgment rule.⁶⁶ In *City of Thibodaux v.*

⁶²385 F.2d 528 (3d Cir. 1967) (abstention inappropriate where questions involved were purely federal). In *Howell* the state banking commissioner sought to enjoin a national bank from operating a second branch bank on the ground that such was violative of state and federal law. The district court abstained pending institution of state court proceedings.

⁶³493 F.2d 481 (4th Cir. 1974) (Clark, J.) (abstention appropriate where determination of federal constitutional question and needless conflict with state's administration of purely state affairs might be avoided). The district court abstained in an action for declaratory judgment, injunctive relief, and damages against the city for its refusal to grant a special use permit.

⁶⁴*Id.* at 482. It seems unlikely that Mr. Justice Clark, sitting by designation on the panel which decided *Fralin* and on the Court which decided *Idlewild*, would use this term unadvisedly. *But see* *Amdur v. Lizars*, 372 F.2d 103, 105-06 (4th Cir. 1967). The *Amdur* court held that where an order staying proceedings pending termination of similar proceedings in another court amounts to a dismissal, it is appealable as a final order under section 1291. *Fralin* and *Amdur* are readily distinguishable. In *Amdur*, the district judge acknowledged that the practical effect of his order was a dismissal. The *Fralin* court, on the other hand, retained jurisdiction. Thus, Mr. Justice Clark noted that should the state courts decline to hear the case, “it will be soon enough to return to the federal court for disposition of the merits.” 493 F.2d at 483.

⁶⁵*Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537, 540 (3d Cir. 1975); *accord*, *Army v. Philadelphia Transp. Co.*, 266 F.2d 869 (3d Cir. 1959). *But see* *Joffe v. Joffe*, 384 F.2d 632 (3d Cir. 1967) (per curiam) (order similar to that in *Army* affirmed without discussion of its appealability), *cert. denied*, 390 U.S. 1039 (1968). In *Cotler* defendants were charged, *inter alia*, with violating section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j (1970). Their motion to stay federal proceedings during the pendency of state court actions arising out of the same operative facts was granted by the district court. Appellant's argument that “the indefinite stay . . . has the same practical effect as a final dismissal, and should . . . be treated as such” was rejected. 526 F.2d at 540. Regardless of the duration of the state court actions, the district court must ultimately determine the section 10(b) claim over which it had exclusive jurisdiction. The federal claim may be “old and feeble at the end of the state court litigation, but it will not be dead.” *Id.* The *Cotler* court did not attempt to distinguish *Joffe*, but concluded that the per curiam disposition there had not diminished the precedential value of *Army*.

⁶⁶*Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293 (5th Cir. 1974); *Public Employees Local 1279 v. Alabama*, 453 F.2d 922 (5th Cir. 1972); *City of Thibodaux v. Louisiana Power & Light Co.*, 255 F.2d 774 (5th Cir. 1958); *cf.* *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973) (proceedings stayed pending final action by ICC). *But cf.* *Hines v. D'Artois*, 531 F.2d 726 (5th Cir. 1976) (order staying employment discrimination case pending final EEOC determination on the same charge appealable under section 1291).

*Louisiana Power & Light Co.*⁶⁷ the court of appeals cited *Baltimore Contractors, Inc. v. Bodinger*⁶⁸ as authority for its holding that an abstention order is not a final decision within the meaning of section 1291. In *Baltimore Contractors* the Supreme Court had held that an order refusing to stay a suit for an accounting pending arbitration was "an interlocutory order" and as such "could not be called a final decision under § 1291."⁶⁹ Because the Court considered that orders granting or denying a stay of proceedings were interlocutory rulings, it was of no moment that the order appealed from in *Thibodaux* stayed the district court action until the Louisiana Supreme Court had been afforded an opportunity to interpret a previously unconstructed state statute upon which the city's expropriation order was based.

In a decision rendered shortly before *Druker*, the Fifth Circuit boldly asserted that "[i]t is undisputed that the [abstention] order appealed from is not a final one."⁷⁰ In striking contrast is its opinion in *Gray Line Motor Tours, Inc. v. City of New Orleans*,⁷¹ a post-*Druker* decision. In *Gray Line* the majority did not expressly reject the final judgment rule as a means of assuming jurisdiction over an abstention order, but it did so implicitly.⁷²

Judge Goldberg, the dissenting member of the *Gray Line* court, abandoned the Fifth Circuit's traditional stance on this issue and joined forces with *Druker* and its ilk.⁷³ In doing so he noted that

⁶⁷255 F.2d 774 (5th Cir. 1958). See text accompanying note 20 *supra*.

⁶⁸348 U.S. 176 (1955).

⁶⁹*Id.* at 179.

⁷⁰*Public Employees Local 1279 v. Alabama*, 453 F.2d at 924 (appeal dismissed for want of jurisdiction) (emphasis supplied). Abstention was ordered in this declaratory judgment action challenging the constitutionality of an Alabama statute. After denying a motion for reconsideration of its abstention order, the district court certified the cause for appeal under 28 U.S.C. § 1292(b) (1970). See text accompanying notes 144-46 *infra*.

⁷¹498 F.2d 293 (5th Cir. 1974) (abstention appropriate where issue of state law which had never been decided by state courts might be dispositive of second of plaintiff's allegations). Plaintiff alleged that burdens imposed by the city on it in the operation of its business constituted interference with interstate commerce and that gross receipts tax was invalid under state law and violated the United States Constitution and a federal statute. The district court granted the city's motion for summary judgment on the first claim, but postponed consideration of the second until the state courts had an opportunity to consider the legality of the tax under state law.

⁷²On appeal, the majority held that the partial summary judgment on the first claim was not final within the meaning of section 1291 and was, therefore, unappealable in the absence of a Rule 54(b) certification, FED. R. CIV. P. 54(b). *Id.* at 295. To conclude that, in the language of Rule 54(b), the order "adjudicates fewer than all the claims," necessitated the majority's first holding that the entry of the abstention order as to the second claim was not tantamount to a final decision.

⁷³498 F.2d at 300 (Goldberg, J., dissenting); cf. *Hines v. D'Artois*, 531 F.2d 726 (5th Cir. 1976) (Goldberg, J.) (order staying employment discrimination case pending final determination by EEOC on same charge appealable as final decision under

"*Idlewild's* teaching, gleaned by both courts and commentators, instructs us⁷⁴ that where, as in the present case, no state court action is pending at the time of a federal court's determination to abstain, the abstention order is a final decision appealable under 28 U.S.C. § 1291."⁷⁵

Unlike others who have cited *Idlewild* as authority, Judge Goldberg incorporated portions of the opinions of both the court of appeals and the Supreme Court in his dissenting opinion. First to appear is an excerpt from the opinion of the Second Circuit.

Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await. There was nothing to be done in federal court because the action there had for all intents and purposes concluded. Appellant was effectively out of court—⁷⁶

Appellees' argument that this order was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292 is not well taken. No parallel state actions were pending and there was no state adjudication to await. There was nothing left to be done in the federal courts because the action there had been for all intents and purposes concluded. Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances. There is no bar on this ground to appealability. See *Glen Oaks Utilities, Inc. v. City of Houston*, 5 Cir., 1960, 280 F.2d 330.⁷⁷

section 1291). In *D'Artois*, Judge Goldberg concluded that a practical construction of the requirement of finality requires that "when a plaintiff's action is effectively dead, the order which killed it must be viewed as final. Effective death should be understood to comprehend any extended state of suspended animation." *Id.* at 730. The Fifth Circuit's decision in *D'Artois* suggests that it too may soon be part of the *Idlewild-Druker* fold.

⁷⁴[Author's footnote]. Judge Goldberg had cause to choose the word "us." He apparently became aware that there were those who would take issue with the Fifth Circuit on this matter after having sat on the panels which decided *Public Employees Local 1279 v. Alabama*, 453 F.2d 922, 924 (5th Cir. 1972) ("It is undisputed that the [abstention] order appealed from is not a final one."), and *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1090 (5th Cir. 1973) ("Plainly, the [order staying the proceedings pending final ICC action] is not appealable as a final order under 28 U.S.C. § 1291.").

⁷⁵498 F.2d at 300 (Goldberg, J., dissenting), citing *Druker* and 9 MOORE'S FEDERAL PRACTICE ¶ 110.20[4.-2], at 251 (2d ed. 1973).

⁷⁶*Id.*, quoting the Second Circuit's *Idlewild* opinion.

⁷⁷*Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d at 428.

After indicating that the Supreme Court "explicitly approved this holding,"⁷⁸ he quoted a portion of its opinion.

The Court of Appeals properly rejected the argument that the order of the District Court [was not final].⁷⁹

The Court of Appeals properly rejected the argument that the order of the District Court "was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292," pointing out that "[a]ppellant was effectively out of court." 289 F.2d at 428.⁸⁰

But what is "this holding"?

Before attempting to answer that question, notice must be taken of the nature of the object of the *Idlewild* appeal. The order confronting the Second Circuit denied a motion to empanel a three-judge court and abstained from considering a renewal of such a motion until the state court had ruled on whether the challenged statute was applicable to plaintiff.

In its opinion the court of appeals appeared to address each segment of the order separately. As to appealability of the abstention order, only upon a careful reading of the quoted excerpt does the court's holding emerge: where an abstention order is entered in an action seeking only declaratory and injunctive relief, it operates as a denial of the latter and is, therefore, appealable under section 1292(a)(1).⁸¹ The court's choice of words⁸² and the authority cited⁸³ make this conclusion inescapable. Furthermore, the court's observation that "[t]here is no bar on *this* ground to appealability"⁸⁴ precludes interpretation of the opinion as having held that the abstention order was also appealable under section 1291, for this comment clearly suggests that the court had, in fact, considered that provision as a possible avenue of appeal, but rejected it.

A different result obtained as to the basis for the court's assuming jurisdiction over the other component. Finding that the convening of a three-judge court is mandated where state activity is challenged on

⁷⁸498 F.2d at 300 (dissenting opinion).

⁷⁹*Id.*, quoting the Supreme Court's *Idlewild* opinion.

⁸⁰*Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. at 715 n.2. *But see Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 n.19 (1974).

⁸¹289 F.2d at 428 (by implication). *See* text accompanying note 77 *supra* and notes 120-23 *infra*.

⁸²"Appellant was effectively out of court—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances." 289 F.2d at 428.

⁸³*Glen Oaks Util., Inc. v. City of Houston*, 280 F.2d 330 (5th Cir. 1960). *See* text accompanying notes 117-19 *infra*.

⁸⁴289 F.2d at 428 (emphasis supplied).

constitutional grounds⁸⁵ and where the district judge finds that a substantial federal question exists,⁸⁶ the Second Circuit apparently concluded that denial of plaintiff's motion to impanel such a court, when conjoined with an order operating as a denial of a preliminary injunction, had the effect of dismissing the complaint.⁸⁷ Implicit in this is the holding that such a denial is appealable under section 1291.

It is clear that the Supreme Court held that the court of appeals had jurisdiction over the appeal from the district court order, but it can hardly be said that it "explicitly approved" either or both of the holdings proffered above. Evidence of such approval, if any, must be gleaned from the balance of the Court's per curiam opinion.

Should there be any doubt that the Supreme Court regarded the district court's refusal to convene a three-judge court as a final decision within the meaning of section 1291, it should be dispelled by the following rebuke. "[T]he applicable jurisdictional statute . . . made it impermissible for a single judge to *decide the merits of the case*, either by granting or by withholding relief."⁸⁸ This conclusion is further reinforced by its observation that the criteria for convening such a court were "assuredly met" in *Idlewild*.⁸⁹ Thus, it may be said with some assurance that the Second Circuit's holding as to the appealability of this segment of the order under section 1291 bears the imprimatur of the Supreme Court.⁹⁰

⁸⁵*Id.*

⁸⁶*Id.* at 428-29. Implicit in the district court's decision was its finding that a substantial federal question existed. *Id.* at 429 n.2.

⁸⁷*Id.* at 428. *Cf.* *Gold v. Lomenzo*, 425 F.2d 959, 961 n.2 (2d Cir. 1970) ("Since the order denying a preliminary injunction is appealable to us, 28 U.S.C. § 1292(a), we need not decide whether the denial of a three-judge court, standing alone, would be sufficiently 'final' to enable us to review it under 28 U.S.C. § 1291."). Although the Second Circuit found the order in *Idlewild* to be appealable under 28 U.S.C. §§ 1291, 1292, it held that it had no jurisdiction to entertain the appeal. 289 F.2d at 429.

⁸⁸370 U.S. at 715 (emphasis supplied). The district judge's recognition that abstention involved postponement of jurisdiction, not its abdication, and that a single judge to whom application has been made to convene a three-judge district court could not consider substantive issues presented by the complaint, clearly indicates that he did not perceive his order to be a decision on the merits. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 188 F. Supp. at 436-37. Was it imperative that the Court conclude that the district judge had, by the entry of his order in *Idlewild*, decided the case on the merits in order to hold that the order was appealable under section 1291 and thus establish a jurisdictional base for its having granted the petition for writ of certiorari to the Second Circuit since it chose not to take formal action on the petition for a writ of mandamus?

⁸⁹370 U.S. at 715. The standards to be applied by a single district court judge in deciding whether a three-judge court should be convened are: "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Id.*

⁹⁰*But see* *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 n.19 (1974). *See* text accompanying notes 180-82 *infra*.

Inclusion of section 1292 in its quotation of the passage from the opinion of the court of appeals suggests that the Supreme Court similarly endorsed the Second Circuit's holding that the abstention order was appealable as an interlocutory order under that section. Approval of this holding, however, would have been tantamount to a sub silentio overruling of the *Enelow-Ettelson* rule⁹¹ and a concomitant extension of appellate jurisdiction under section 1292(a)(1), neither of which appears to have occurred as a result of *Idlewild*.⁹² In this regard, the fact that the Court spoke in terms of the lower court's "withholding relief"⁹³ rather than "refusing injunctive relief" may be significant, as may be the point at which it chose to end the quotation,⁹⁴ and the fact that the Court appeared to limit its scope of review to the propriety of the court's refusal to convene a three-judge court. The only direct reference to abstention in the Court's opinion is the comment that the district judge retained jurisdiction to afford the state courts an opportunity to pass upon the constitutional issues presented.⁹⁵ However, a holding that the district judge lacked jurisdiction to order abstention might be inferred from the following statement: "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether [the criteria for convening such a court were met]."⁹⁶

B. Section 1292—Interlocutory Orders

1. Appeals of Right Under Section 1292(a)(1)⁹⁷

a. Action-at-Law Avenue

The Fifth Circuit's view that abstention is an elaborate type of stay paved the way for appellate review of the abstention order entered in *City of Thibodaux v. Louisiana Power & Light Co.*⁹⁸ Having rejected section 1291 as an appropriate mode of exercising its appellate jurisdiction,⁹⁹ the court nonetheless concluded that the

⁹¹See text accompanying notes 105-07 *infra*.

⁹²To the dismay of some members of the Court the *Enelow-Ettelson* rule appears to be alive and well. See, e.g., *Rederi A/B Disa v. Cunard S.S. Co.*, 389 U.S. 852, 853-54 (1967) (Black, J., dissenting) *denying cert. to* 376 F.2d 125 (2d Cir. 1967) (order staying judicial proceedings pending arbitration not appealable). See text accompanying notes 105-07 *infra*.

⁹³The term "withholding" does not appear in 28 U.S.C. § 1292(a)(1) (1970).

⁹⁴Compare text accompanying note 77 *supra* with that accompanying note 80 *supra*.

⁹⁵370 U.S. at 714.

⁹⁶*Id.* at 715.

⁹⁷28 U.S.C. § 1292(a)(1) (1970). For an overview of the legislative history of this jurisdictional statute, see *Baltimore Contractors, Inc. v. Bondinger*, 348 U.S. 176, 181 (1955). See generally *Appealability in the Federal Courts*, *supra* note 37, at 367-75.

⁹⁸255 F.2d 774 (5th Cir. 1958) (Jones, J.), *rev'd*, 360 U.S. 25 (1959).

⁹⁹*Id.* at 776. See text accompanying notes 66-69 *supra*.

order was appealable as of right under the predecessor of 28 U.S.C. § 1292(a)(1). This section, which operates as an exception to the final judgment rule, confers on the courts of appeals jurisdiction of appeals from interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had in the Supreme Court.”¹⁰⁰

The fact that the order before it was “not an injunction in form”¹⁰¹ did not deter the court in its effort to bring this order within the penumbra of section 1292(1). Believing that abstention was inappropriate in an expropriation proceeding and that, in any event, the exceptional circumstances which would justify application of that doctrine were absent,¹⁰² the Fifth Circuit found itself in a dilemma—caught as it were between precedents on the one hand which would require it to reverse the district court’s abstention order¹⁰³ and those on the other which would preclude its reviewing that order.¹⁰⁴ A Second Circuit interpretation of the *Enelow-Ettelson* rule,¹⁰⁵ the settled rule governing the appealability of stay orders in federal courts, provided a narrow corridor through which escape was possible.

“Amid the existing confusion of decisions it is hard to proceed with assurance; but we take it as now settled that the grant, or denial, of a stay in an action that would have been a suit in equity before the fusion of law and equity is now not appealable under § 1292(1) of Title 28; but, if the order is in an action that would have been an action at law before that time, it is appealable.”¹⁰⁶

Because the district court had stayed an action at law, access to the appellate court was assured. This, in turn, enabled the Fifth Circuit to reverse the order of the trial court.

¹⁰⁰28 U.S.C. § 1292(a)(1) (1970).

¹⁰¹255 F.2d at 776.

¹⁰²*Id.* at 779. Mr. Justice Brennan, writing for the three dissenters, agreed with the Fifth Circuit on both points. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 32 (Brennan, J., dissenting).

¹⁰³255 F.2d at 777.

¹⁰⁴*Id.* at 776 n.5, *citing* *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176 (1955); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935).

¹⁰⁵*Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). Operation of this rule converts certain stay orders into orders granting or denying injunctions which are appealable under 28 U.S.C. § 1292(a)(1) (1970). 9 MOORE’S FEDERAL PRACTICE ¶ 110.20[4.-2], at 251 n.13 (2d ed. 1975).

¹⁰⁶255 F.2d at 777, *quoting* *Council of W. Elec. Technical Employees-Nat’l v. Western Elec. Co.*, 238 F.2d 892, 894 (2d Cir. 1956) (Hand, J.).

Four years later the Fifth Circuit acknowledged that the *Enelow-Ettelson* rule had a second element.

An order staying or refusing to stay proceedings in the District Court is appealable under § 1292 (a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim.¹⁰⁷

Because the abstention order in *Thibodaux* was not based on an equitable defense or cross-bill, but was merely an assertion by the district court of its equitable powers in furthering the harmonious relation between state and federal authority, it failed to satisfy the second of the jurisdictional requisites. Thus, it would appear that the court of appeals should not have considered the matters brought before it by way of appeal in *Thibodaux*.¹⁰⁸

b. *Injunction-Denied Road*

In *Gray Line Motor Tours, Inc. v. City of New Orleans*,¹⁰⁹ an action in which injunctive relief was sought, the Fifth Circuit found that the abstention order entered therein did not meet the two-prong *Enelow-Ettelson* test.¹¹⁰ In this instance, neither requirement was satisfied. Nonetheless, the court found an alternative avenue of appeal—the “injunction-denied” rule: where the abstention order itself has “the effect of denying a preliminary injunction,” it is subject to review under section 1292(a)(1).¹¹¹ This rule is closely akin to the constructive order doctrine.¹¹² Both adopt a functional approach to defining the term “injunction” for purposes of appeal under section 1292(a)(1). Both originated in the Fifth Circuit, the injunction-denied rule in *Glen Oaks Utilities, Inc. v. City of Houston*¹¹³ and the constructive

¹⁰⁷*Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir. 1962) (emphasis in original).

¹⁰⁸Recognizing this as a distinct possibility, respondent argued that the court of appeals “could, and should have, reached the same result by granting a writ of mandamus.” Brief in Opposition to Petition for Certiorari at 9, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (emphasis in original).

¹⁰⁹498 F.2d 293 (5th Cir. 1974). See note 71 *supra*.

¹¹⁰See text accompanying note 107 *supra*.

¹¹¹498 F.2d at 298. The Second Circuit applied this rule in *Idlewild*. See text accompanying note 81 *supra*.

¹¹²*Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537, 541 (3d Cir. 1975). The *Cotler* court coined the phrase “constructive order doctrine” to describe the Fifth Circuit’s treatment of a district court’s refusal to rule in certain cases as the functional equivalent of the denial of a preliminary injunction. Employing this fiction permits an appellate court to assume jurisdiction over an appeal from an order which was never entered by the lower court.

¹¹³280 F.2d 330 (5th Cir. 1960) (Jones, J.).

order doctrine in *United States v. Lynd*.¹¹⁴ While the *Glen Oaks* rule requires the entry of some form of order, the constructive order doctrine is predicated upon the district court's failure to rule on an application for injunctive relief.¹¹⁵ Courts embracing this doctrine have relied on the effect of the court's silence to justify their exercise of appellate jurisdiction: where no order has been entered by the district court, a plaintiff finds himself in the same position he would have been in had the court ruled against him on his prayer for injunctive relief.¹¹⁶ A similar rationale clearly underlies the *Glen Oaks* rule.

In *Glen Oaks*, plaintiffs prayed for a temporary restraining order and a permanent injunction. Judge Jones, writing for the court as he had in *Thibodaux*, held that the district court order staying the action was appealable under section 1292(a)(1) because it was "for all practical purposes, a denial of the temporary injunction which was sought."¹¹⁷ To so hold required Judge Jones to ignore a recent Fifth Circuit holding that an order denying a temporary restraining order is unappealable under section 1292(a)(1).¹¹⁸ But ignore it he did, as have the courts and commentators who have cited *Glen Oaks* as authority for the proposition that a stay granted in an action seeking only injunctive relief, including a *preliminary injunction*, is appealable under section 1292(a)(1) as the equivalent of a denial of the latter.¹¹⁹

Though not citing *Glen Oaks*, as it had ten years earlier in *Idlewild*, the Second Circuit once more employed the rule of that case to exercise jurisdiction over an appeal from an abstention order in *Weiss v. Duberstein*.¹²⁰ The court held that since the denial of plaintiffs' motion for summary judgment had the effect of "deny[ing]

¹¹⁴301 F.2d 818 (5th Cir. 1962) (Tuttle, C.J.).

¹¹⁵*Id.* at 822. Not every such refusal to rule is appealable under section 1292(a)(1). The standard for determining when the constructive order doctrine may be invoked was announced in *NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963). See note 131 *infra* and accompanying text.

¹¹⁶*Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d 537 (3d Cir. 1975) (declining to adopt constructive order doctrine but commenting on its rationale).

¹¹⁷280 F.2d at 333.

¹¹⁸*Connell v. Dulien Steel Prod.*, 240 F.2d 414 (5th Cir. 1957) (Tuttle, J.).

¹¹⁹See *Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293 (5th Cir. 1974); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086 (5th Cir. 1973); *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426 (2d Cir. 1961); 9 MOORE'S FEDERAL PRACTICE ¶110.20[4.-2], at 250 & n.7 (2d ed. 1975).

¹²⁰445 F.2d 1297 (2d Cir. 1971) (abstention improper); *cf. Sheldon v. Smith*, 547 F.2d 768 (2d Cir. 1976) (affirmed district court order denying preliminary injunction and abstaining without discussion of appealability of abstention order); *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976) (reversed abstention order entered in civil rights action seeking declaratory and injunctive relief without considering jurisdictional question).

the plaintiffs the temporary injunction which they sought, the portion of the order directing abstention is appealable under 28 U.S.C. § 1292(a)(1).¹²¹ The fact that the holding in *Weiss* parallels that implicit in the Second Circuit's *Idlewild* decision¹²² suggests that its reading of the Supreme Court's opinion in the latter case is at odds with that of the *Druker* court.¹²³

But what was the nature of the injunctive relief sought in *Weiss*; was it an action seeking more than a declaration that a state statute was unconstitutional? Because the order appealed from was entered by a single district judge rather than a three-judge court, as would have been required had plaintiffs sought "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution" of the challenged statute,¹²⁴ it would appear that the "temporary injunction" to which the court referred was identical to that sought in *Glen Oaks*—a temporary restraining order, the grant or denial of which is unappealable under section 1292(a)(1).

Gray Line, *Weiss*, and *Idlewild* are but three examples of the modification of this section by judicial fiat, that is, by an appellate court's treatment of an order staying federal court proceedings as the functional equivalent of the denial of a preliminary injunction. Others are *Moses v. Kinnear*,¹²⁵ a case decided by the Ninth Circuit, and *Daniel v. Waters*,¹²⁶ a Sixth Circuit case. By focusing upon the purported effect of the district court order, these appellate courts have lost sight of the effect of their having done so: their failure to assume "the responsibility [incumbent upon] all courts to see that no unauthorized extension . . . of jurisdiction, direct or indirect, occurs in the federal system"¹²⁷ has resulted in their exercise of jurisdiction

¹²¹*Id.* at 1299.

¹²²See text accompanying note 81 *supra*.

¹²³See note 49 *supra* and accompanying text.

¹²⁴28 U.S.C. § 2281 (1970) (repealed 1976).

¹²⁵490 F.2d 21 (9th Cir. 1973). See text accompanying note 52 *supra*. *But cf.* *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n*, 537 F.2d 1058, 1061 (9th Cir. 1976). See note 52 *supra*.

¹²⁶515 F.2d 485 (6th Cir. 1975) (by implication). The court's statement that the order, "in effect [denied] preliminary injunctive relief" suggests that had the Sixth Circuit considered the basis of its jurisdiction, it would have relied on *Glen Oaks*. *Id.* at 492 (statement made in conjunction with discussion of Supreme Court's jurisdiction over direct appeal from abstention order entered by three-judge district court). See text accompanying notes 30-35 *supra* and 177 *infra*. In *Daniel* the Sixth Circuit vacated the district court's abstention order and remanded the case for entry of an order dissolving the three-judge court and an order granting preliminary injunctive relief. 515 F.2d at 492.

¹²⁷*Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). Because modification of appellate jurisdiction under section 1292 falls within the legislative domain alone, the Supreme Court lacks authority to approve or declare judicial modification of the provision conferring jurisdiction on the courts of appeals over certain interlocutory orders. *Id.*

over appeals from orders otherwise unappealable under section 1292(a)(1).

While it may be logical to consider that a stay of an action for injunctive relief operates as a denial of a preliminary injunction, even if usurpation of jurisdiction is not an issue, it does not follow that the entry of every such order should be automatically appealable.¹²⁸ As a threshold matter the appellate court should determine whether the trial court's entry of the stay order is tantamount to a "denial" of a preliminary injunction.¹²⁹ But courts intent upon assuming jurisdiction of appeals from abstention orders under section 1292(a)(1) have failed to do so.¹³⁰ To date, no standard has been propounded by which to make such a determination, although the standard used to screen appeals brought under the constructive order doctrine might be adapted for that purpose.

If the posture of the case is such that the plaintiff's rights have been so clearly established that a failure of the trial court to grant the injunctive relief would be set aside by an appellate court as an abuse of discretion, then for the trial court [to enter an abstention order in lieu of] an order either granting or denying the relief sought may be considered . . . to be such interlocutory order refusing relief as to come within the purview of Section 1292.¹³¹

These same courts appear similarly disinclined to address other problems inherent in the functional approach to appealability under the *Glen Oaks* rule, such as the need for practical assessment of each

¹²⁸*Cf.* NAACP v. Thompson, 321 F.2d 199, 202 (5th Cir. 1963) (Tuttle, C.J.) ("[I]t does not follow that every failure of a trial court to grant a temporary injunction is tantamount to a 'refusal' of such injunctive relief."). *Thompson's* author found it necessary to limit the applicability of the constructive order doctrine which he had a hand in creating in *United States v. Lynd*. See text accompanying notes 112-16 *supra*.

¹²⁹*Id.*

¹³⁰*See, e.g.,* Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975). Although plaintiffs sought preliminary and permanent injunctive relief against the enforcement of the challenged state statute in *Daniel*, they failed to allege immediate and irreparable injury or take any practical step toward obtaining a preliminary injunction. Motion to Dismiss or Affirm at 6-7, Daniel v. Waters, 417 U.S. 963 (1974). Because the district court found that "State determination of these matters then, will be completed well in advance of the effective date of the amendment and, therefore, well in advance of the contemplated constitutional infringements alleged," Jurisdictional Statement at 24a, respondents argued that the abstention order should not be considered a denial of a preliminary injunction; and even if it were, that under the circumstances, it could "not be seriously maintained that the denial of a preliminary injunction was improper," Motion to Dismiss or Affirm at 7.

¹³¹NAACP v. Thompson, 321 F.2d 199, 202 (5th Cir. 1963). The words appearing within brackets in the proposed standard for the *Glen Oaks* rule were substituted for the phrase "to fail to enter" in the Fifth Circuit's standard for the constructive order doctrine, as stated in *Thompson*.

case¹³² and for determining whether the exercise of appellate jurisdiction in such cases is congruent with the purpose underlying the adoption of section 1292(a)(1).¹³³

As a general rule an appellate court will forgo consideration of the merits of a case before it on interlocutory appeal, except to the extent necessary to decide the matter supplying appellate jurisdiction.¹³⁴ Those courts relying on *Glen Oaks* to assume jurisdiction over an appeal from an abstention order have dispensed with this rule. They have found it to be a rule of orderly judicial administration rather than a limitation on the court's power.¹³⁵ As a consequence, if any consideration is given to whether the district court should have granted a preliminary injunction, it is incidental to the court's discussion of whether abstention was appropriate.

c. *No Road*

Whether the Third and Fourth Circuits would find an abstention order appealable under section 1292(a)(1) is purely a matter for conjecture at this point. Only the Third Circuit has expressly rejected treating a stay order as the denial of injunctive relief,¹³⁶ and unlike those circuits which have embraced the *Glen Oaks* rule, this circuit has indicated that were it to adopt the functional approach at some future date, compliance with the historical *Enelow-Ettelson* action-at-law rule would still be essential.¹³⁷

From this it follows that the Third Circuit would dismiss an appeal from an abstention order entered in an action wherein the

¹³²Appellate analysis should entail consideration of whether preliminary evaluation of the merits of the prayer for injunctive relief or evaluation of whether such relief was warranted at any point in the proceedings was implicit in the district court's action. *Williams v. Mumford*, 511 F.2d 363, 370 (D.C. Cir. 1975); *Dellinger v. Mitchell*, 442 F.2d 782, 789 (D.C. Cir. 1971).

¹³³The legislative history of section 1292 does not reveal the underlying reasons for excepting certain interlocutory orders from the final judgment rule; nonetheless, the Court concluded that it was enacted to prevent "serious, perhaps irreparable" injury if not corrected without delay. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). Applying the "serious, perhaps irreparable" harm standard to abstention orders led one writer to conclude that there could ordinarily be no such showing as the result of the entry of such an order. "[I]f such orders are erroneously issued, there will not be irreparable injury, but rather the ordinary delays and expenses that result from reversible interlocutory orders." Note, *Appealability of Stay Orders in the Federal Courts*, 47 MINN. L. REV. 1099, 1109 (1963).

¹³⁴*Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970).

¹³⁵*Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 298 (5th Cir. 1974); see *Weiss v. Duberstein*, 445 F.2d 1297 (2d Cir. 1971); *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426 (2d Cir. 1961); cf. *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns*, 537 F.2d 1058 (9th Cir. 1976) (abstention order, as modified by denial of preliminary injunction, is appealable under section 1292(a)(1)).

¹³⁶*Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d at 541. See note 65 *supra*.

¹³⁷526 F.2d at 540-41.

relief sought sounds primarily in equity. *Howell v. Citizens First National Bank*¹³⁸ was such an action. On appeal the Third Circuit reversed the lower court order without considering whether it had jurisdiction to do so.

In *Fralin & Waldron, Inc. v. City of Martinsville*¹³⁹ the Fourth Circuit assumed jurisdiction of an "interlocutory appeal" from an abstention order entered in an action for a declaratory judgment, injunctive relief, and damages without discussion of the mode by which its power was being exercised. Since no reference was made to its jurisdiction's being invoked pursuant to section 1292(b),¹⁴⁰ can it be assumed that the court relied on section 1292(a)(1)? If so, did it utilize the action-at-law route or the functional analysis approach?

A partial answer to this inquiry may be found in an earlier Fourth Circuit opinion: where both legal and equitable claims are asserted, the action should be characterized as equitable, for purposes of the *Enelow-Ettelson* rule, unless the equitable relief sought is "merely incidental" to the legal cause of action.¹⁴¹ In *Fralin* there is no indication that the prayer for injunctive relief was incidental to the claim for damages. If it is assumed that it was not, the action would be characterized as equitable, and the abstention order would be unappealable under the *Enelow-Ettelson* rule.

This circuit has yet to consider the functional approach to exercising jurisdiction under section 1292(a)(1). Whether it would adopt the *Glen Oaks* rule should it find no other avenue available for reviewing an abstention order, as appears to be the case in *Fralin*, is an open question. It seems unlikely that Mr. Justice Clark would have pursued that course in *Fralin*, for he was a member of the Court when it noted that "it is better judicial practice to follow [*Enelow* and *Ettelson*,] the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments [to section 1292] as it may find proper."¹⁴²

¹³⁸385 F.2d 528 (3d Cir. 1967). See note 62 *supra*. Had the *Howell* court addressed this matter, it might have reviewed the order by way of a writ of mandamus rather than adopt the *Glen Oaks* rule. Cf. *Cotler v. Inter-County Orthopaedic Ass'n*, 526 F.2d at 541 (Where mandamus relief is available, "[r]eviewing the district court's action pursuant to 28 U.S.C. § 1651 seems preferable to adopting what would for this circuit be a new interpretation of § 1292(a)(1).").

¹³⁹493 F.2d 481, 482 (4th Cir. 1974) (Clark, J.). See notes 63-64 *supra* and accompanying text.

¹⁴⁰28 U.S.C. § 1292(b) (1970). See text accompanying notes 143-72 *infra*.

¹⁴¹*Chapman v. International Ladies Garment Workers' Local 581*, 401 F.2d 626 (4th Cir. 1968).

¹⁴²*Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 185 (1955). At the time the Court made this remark and acknowledged that it was "not authorized to approve or declare judicial modification of § 1292," *id.* at 181, a committee designated to consider the matter had already recommended to the Judicial Conference of the United States the bill which was to become 28 U.S.C. § 1292(b). S. REP. NO. 2434, 85th

2. Discretionary Appeals Under Section 1292(b)¹⁴³

Congress did amend section 1292 by adopting the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b). This provision, unlike section 1292(a), was cast so that appeal is committed to the discretion of both the district and the appellate court rather than being a matter of right.

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order¹⁴⁴

To date only the Fifth Circuit has demonstrated a readiness to utilize section 1292(b) for the purpose of reviewing an abstention order. After entering such an order in *Public Employees Local 1279 v. Alabama*,¹⁴⁵ the district judge certified the cause for appeal. Plaintiffs filed a notice of appeal within ten days but failed to petition the appellate court for permission to appeal, a fact which escaped the attention of that court until after oral argument. In dismissing the appeal on its own motion, the court noted that to perfect an appeal from such an unappealable order the prerequisites of section 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure must be met. Failure to file an application for leave to appeal within the statutory

Cong., 2d Sess. 5, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 5259. This bill was subsequently introduced in Congress at the request of the Administrative Office of the United States Courts and adopted without change.

¹⁴³28 U.S.C. § 1292(b) (1970). See generally Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959); Note, *Section 1292 (b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975) [hereinafter cited as *Appeals Under § 1292 (b)*]; *Appealability in the Federal Courts*, supra note 37, at 378-82; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959) [hereinafter cited as *Discretionary Interlocutory Appeals*]; Note, *Proposals for Interlocutory Appeals*, 58 YALE L.J. 1186 (1949).

¹⁴⁴28 U.S.C. § 1292(b) (1970).

¹⁴⁵453 F.2d 922 (5th Cir. 1972). Plaintiffs in *Public Employees* sought a declaratory judgment that an Alabama statute was unconstitutional. The district judge ordered the federal proceedings stayed for a reasonable time to permit exhaustion of state administrative and judicial remedies. After denying plaintiffs' motion for reconsideration, he certified the abstention order for appeal under section 1292(b).

period was held to be a jurisdictional defect.¹⁴⁶ Consideration of the posture of the appeal at the time of its dismissal provides ample evidence, nonetheless, that in 1972 the Fifth Circuit was bent upon reviewing the abstention order under what it perceived to be its section 1292(b) jurisdiction.

No mention was made of whether the order was properly certified for appeal, *i.e.*, whether the order satisfied the statutory criteria for certification. However, by noting that the interlocutory order before it was "non-appealable,"¹⁴⁷ the court implicitly recognized that the first of the four standards had been met. The significance of such a finding is borne out by the Supreme Court's analysis of section 1292: "Section 1292(a) provides for an appeal as a matter of right from a number of specified types of interlocutory orders—in particular, interlocutory orders granting or denying injunctions,"¹⁴⁸ while subsection (b) was "intended to apply *only* to interlocutory orders, 'not otherwise appealable under' § 1292(a)."¹⁴⁹ It follows that one of the essential characteristics of an order from which an appeal will lie under section 1292(b) is its unappealability under subsection (a).

The Fifth Circuit's 1974 holding that an abstention order is appealable under section 1292(a)(1)¹⁵⁰ has cast doubts on whether it would or could now assume jurisdiction of an appeal from such an order under section 1292(b). That circuit's recent shift toward section 1291 as a basis for assuming jurisdiction of an appeal from a stay order¹⁵¹ may obviate the need for its deciding which of section 1292's mutually exclusive subsections is applicable when it is again confronted with an appeal from an abstention order. The same may not be true of those courts of appeals which have assumed jurisdiction of similar appeals under section 1292(a)(1), but have yet to follow *Druker's* lead.

Resolution of this matter could conceivably be accomplished by holding: (1) that all abstention orders are appealable under section 1292(b), a holding which would require overruling cases relying on the *Glen Oaks* rule, or (2) that abstention orders entered in actions seeking only injunctive relief, including a preliminary injunction, are appealable under the *Glen Oaks* interpretation of section 1292(a)(1), while those entered in declaratory judgment actions or actions at law are appealable under section 1292(b). Should the first alternative be adopted, appeals from all abstention orders would, at least to a

¹⁴⁶*Id.* at 924.

¹⁴⁷*Id.*

¹⁴⁸*Tidewater Oil Co. v. United States*, 409 U.S. 151, 167 (1972).

¹⁴⁹*Id.* at 166 (emphasis in original).

¹⁵⁰*Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 298 (5th Cir. 1974). See text accompanying note 111 *supra*.

¹⁵¹*Hines v. D'Artois*, 531 F.2d 726 (5th Cir. 1976). See note 73 *supra*.

certain point, be treated similarly. Adoption of the second approach would result in disparate treatment of appeals and create insurmountable problems when both legal and equitable relief is sought.

Assuming *arguendo* that the courts of appeals make the necessary accommodation to satisfy the requirement that the order is "not otherwise appealable under this section," the order itself must still satisfy the three remaining criteria set forth in section 1292(b) to be properly certified for appeal.¹⁵² The first of these is that the "order involves a controlling question of law." A Ninth Circuit definition of "controlling question of law"—whether the district judge erred or abused his discretion in staying the proceedings¹⁵³—appears, at first blush, to lend itself to certification of an abstention order. To employ such a definition, however, requires a court to disregard the legislative history of this "judge-sought, judge-made, judge-sponsored enactment."¹⁵⁴ "It is not thought . . . that mere question as to the correctness of the ruling would prompt the granting of the certificate."¹⁵⁵ Moreover, it would, in effect, alter the wording of this provision by substituting "is the" for "involves a."

No definition need be interposed between the standard itself and an abstention order to bring the latter within the purview of the former for a controlling question of state law is central to every case in which the abstention doctrine has been invoked. At the same time it must be recognized that from its inception this doctrine has been linked with the exercise of discretion¹⁵⁶ whereby the federal

¹⁵²The district judge must certify that the order satisfied these three criteria. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974). Where that determination entailed consideration of all relevant and no improper factors, it is inappropriate for the court of appeals to reconsider the matter. *Appeals Under § 1292(b)*, *supra* note 143, at 617. However, where the requirements for conferring jurisdiction are not met, an appellate court should not attempt to exercise its jurisdiction under section 1292(b). *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 707 (5th Cir. 1961) (Jones, J., dissenting).

¹⁵³*Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964). *See generally Appeals Under § 1292(b)*, *supra* note 143, at 618-24; *Discretionary Interlocutory Appeals*, *supra* note 143, at 352.

¹⁵⁴*Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702 (5th Cir. 1961).

¹⁵⁵S. REP. NO. 2434, 85th Cong., 2d Sess. 6, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5260-61.

¹⁵⁶Discretion has been referred to as one of the "brightly blooming blossoms on the path of abstention" by virtue of the frequent appearance of the term in opinions discussing that doctrine. Pell, *Abstention—A Primrose Path by Any Other Name*, 21 DE PAUL L. REV. 926, 933 (1971) [hereinafter cited as *Primrose Path*]. It should be noted that the Court has, on occasion, qualified this term, *e.g.*, "wise discretion," *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941), "fair and well-considered" discretion, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 30. While "a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law," *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), it is not to automatically apply the abstention doctrine when confronted by an issue of state law as to which there is some doubt. *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

courts “restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.”¹⁵⁷ Courts analyzing the use of the term “law” have concluded that a law/fact distinction was implied and for that reason had held that matters committed to the discretion of the district court are immune from review under section 1292(b) since they present mixed questions of law and fact.¹⁵⁸ Adopting this position would preclude appellate review of abstention orders under this provision.

Inherent in the Ninth Circuit’s approach to determining whether an order was properly certified is a second flaw. By equating the trial court’s ruling with the requisite “controlling question of law,” this court arrives at essentially the same point as the writer who describes the second of the remaining statutory criteria as the “requirement that there be a substantial ground for difference of opinion about the *challenged order*.”¹⁵⁹ The plain language of the jurisdictional statute makes it clear that the *controlling question of law* is the focal point of this standard, not the order itself.

An abstention order is, in essence, an acknowledgement by the district court that there is “a controlling question of state law as to which there is substantial ground for difference of opinion.” Unlike certification of the order under section 1292(b), the abstention order itself operates as an informal and indirect means of certifying a doubtful state law question to the highest court of that state¹⁶⁰—“the only tribunal whose interpretation could be controlling.”¹⁶¹ In this regard it can be said that an abstention order is designed to achieve the same objective as a section 1292(b) appeal, but by different means

¹⁵⁷*Railroad Comm’n v. Pullman Co.*, 312 U.S. at 501.

¹⁵⁸*Appeals Under § 1292(b)*, *supra* note 143, at 618 n.57. *But see* *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755-57 (3d Cir. 1974) (orders committed to the district court’s discretion are subject to review under section 1292(b) where the district judge considered improper factors or failed to consider all those relevant to his decision).

¹⁵⁹*Compare Appeals Under § 1292(b)*, *supra* note 143, at 624, *with* *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964) (“[T]he district judge was correct in his opinion that the question of law [— whether the district judge erred in staying the proceedings—] is one ‘as to which there is substantial ground for difference of opinion.’ ”). *Accord*, *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974).

¹⁶⁰Certification procedures are available in several states either by statute or court rule. *See generally* *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 nn.7 & 8 (1974); *Primrose Path*, *supra* note 156, at 946-47; *Lillich & Mundy, Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A.L. REV. 888 (1971). Indiana has adopted a variation of the Uniform Certification of Questions of Law Act. Unlike the Uniform Act, the Indiana statute precludes certification by the United States district courts. *Compare* Uniform Certification of Questions of Law Act, *reprinted in* 18 U.C.L.A.L. REV., *supra* at 913-15 *app. with* IND. CODE § 33-2-4-1 (Burns 1975).

¹⁶¹*Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 30.

and for different reasons.¹⁶² The report of the Senate Committee on the Judiciary bears this out. "[T]he appeal from interlocutory orders thus provided should and will be used only in exceptional cases . . . where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided . . ." ¹⁶³

Because matters in the district court's discretion are seldom reversed on appeal and thus seldom "materially advance the ultimate termination of the litigation," they are not thought to be subject to review under section 1292(b).¹⁶⁴ The same result should obtain with regard to abstention orders notwithstanding the fact that reversal is not uncommon; in most instances all that is determined on appeal is the forum in which the state law issue is to be resolved—a decision which appears to fall short of satisfying the last of the statutory criteria for certification.

The not infrequent reversal of abstention orders on appeal stems from the circuits' application of a standard for evaluating the district court's action which does not comport with that ordinarily used, that is, a trial court's exercise of discretion may be set aside only if it is arbitrary or where no reasonable man would adopt the lower court's position.¹⁶⁵ Not all are in agreement that such a distinction should be made.

To the extent that determination of the correctness of abstention or nonabstention is truly a matter of discretion rather than a mechanical application of judicially established rules of thumb, some of which apparently have come along after the act . . . the ordinary rules pertaining to evaluation of discretionary action should apply.¹⁶⁶

Appellate courts have generally recognized that district courts exercise a broad range of discretion in ruling on motions for a stay of proceedings pending litigation in another tribunal.¹⁶⁷ This is not the case where abstention is involved. Some blatantly admit having

¹⁶²It has been suggested that by adopting section 1292(b) Congress sought to provide a means by which unnecessary district court proceedings could be avoided. *Appeals Under § 1292(b)*, *supra* note 143, at 609, 611. Neither alleviation of hardship to litigants nor appellate supervision of district courts was thought to justify appeal under this section. *Id.* at 609, 612 & n.28, 631.

¹⁶³S. REP. No. 2434, 85th Cong., 2d Sess. 6, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5260.

¹⁶⁴*Appeals Under § 1292(b)*, *supra* note 143, at 618 n.57.

¹⁶⁵*Particle Data Laboratories, Inc. v. Coulter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969).

¹⁶⁶*Primrose Path*, *supra* note 156, at 934. Judge Pell sits on the United States Court of Appeals for the Seventh Circuit.

¹⁶⁷*Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d at 298.

made "inroads on the freedom of the district courts to refer the parties to another forum."¹⁶⁸ The First Circuit's comment in *Druker* that it saw "no substitute for a close analysis of the challenged state law" clearly indicates the extent of those inroads.¹⁶⁹ Indeed, a reading of the cases leads one to believe that in almost every instance there has been a de novo review of the matter by the court of appeals.¹⁷⁰ If supervision of the district courts is not a justification for a section 1292(b) appeal, as one writer concludes,¹⁷¹ certification of an abstention order under that provision would appear to be improper, notwithstanding an appellate court's desire to consider and decide the question for itself.¹⁷²

C. Section 1253—Direct Appeals from Decisions of Three-Judge Courts

Unlike the preceding sections of the Judicial Code, which contemplate an appeal from a district court order to an intermediate appellate court, section 1253 confers on the Supreme Court jurisdiction of a direct appeal "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."¹⁷³

On a number of occasions the Supreme Court has exercised its jurisdiction over an appeal from an abstention order entered by a three-judge court notwithstanding the fact that the order neither granted nor denied injunctive relief.¹⁷⁴ With but one exception the Court failed to address the question of its jurisdiction;¹⁷⁵ in none did it

¹⁶⁸*Id.*

¹⁶⁹*Druker v. Sullivan*, 458 F.2d at 1274.

¹⁷⁰*Primrose Path*, *supra* note 156, at 934.

¹⁷¹*Appeals Under § 1292(b)*, *supra* note 143, at 608, 612 & n.28, 631.

¹⁷²"The desirability of deciding a question is not one of the jurisdictional tests [under section 1292(b)]." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d at 707 (Jones, J., dissenting).

¹⁷³28 U.S.C. § 1253 (1970).

¹⁷⁴*Daniel v. Waters*, 417 U.S. 963 (1974) (vacated abstention order); *Koehler v. Ogilvie*, 405 U.S. 906 (1972) (affirmed abstention order); *Sweet Briar Institute v. Button*, 387 U.S. 423 (1967) (reversed abstention order); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (vacated abstention order); *NAACP v. Bennett*, 360 U.S. 471 (1959) (vacated abstention order); *Bryan v. Austin*, 354 U.S. 933 (1957) (vacated abstention order where cause had become moot); *Government & Civic Employees Organizing Comm. v. Windsor*, 347 U.S. 901 (1954) (affirmed abstention order).

¹⁷⁵The Court postponed consideration of the question of its jurisdiction under section 1253 until the hearing on the merits at which time it concluded that a three-judge court was not required; thus jurisdiction of the appeal was vested in the Sixth Circuit. Because appellant had perfected an appeal to that court, the Supreme Court assumed jurisdiction of the appeal pursuant to 28 U.S.C. §§ 1254(1), 2101(e) by treating his jurisdictional statement as a petition for writ of certiorari prior to judgment in the

note probable jurisdiction under section 1253. This practice did not go unnoticed by the courts or the commentators and contributed significantly to the assumption that abstention orders entered by three-judge courts were appealable under section 1253, while those entered by a single district judge were appealable under section 1292(a)(1).¹⁷⁶

Although there were signs as early as 1974 that abstention orders were no longer directly appealable to the Supreme Court,¹⁷⁷ this matter was not definitively settled until a year later when the Court handed down its decision in *MTM, Inc. v. Baxley*.¹⁷⁸ In *MTM* the Court held that it is without jurisdiction to consider an appeal under section 1253 where an order of a three-judge court, such as an abstention order, does not rest upon resolution of the merits of the constitutional claim.¹⁷⁹

court of appeals. *Turner v. City of Memphis*, 369 U.S. 350 (1962). This approach presupposes that the Sixth Circuit would have had jurisdiction of the appeal in the first place. The Court's opinion in *Turner* is silent as to the means by which appellant-petitioner might have invoked the jurisdiction of that court had it not summarily disposed of the appeal.

¹⁷⁶To provide support for the proposition that the order appealed from in *Idlewild* was "of the sort ordinarily appealable" note was made of the fact that the Court considered the merits in *NAACP v. Bennett*, 360 U.S. 471 (1959), without discussing the abstention order's appealability. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d at 430 n.1 (dissenting opinion).

The Court's action in *Bryan v. Austin*, 354 U.S. 933 (1957), prompted the following comment:

Although the appeal in *Bryan* arose under section 1253, the Court's disregard for the technical arrangement of claims should be equally applicable to section 1292(a)(1). Both sections are similar, for they both permit appellate review of orders granting or denying interlocutory injunctions. Logically, the same result as to the appealability of stay orders should be reached under both statutes.

Note, *Appealability of Stay Orders in the Federal Courts*, 47 MINN. L. REV. 1099, 1106-07 (1963).

¹⁷⁷See *Daniel v. Waters*, 417 U.S. 963 (1974); text accompanying notes 30-35 *supra*. *Daniel* appears to be the first case in which the Supreme Court declined to exercise its jurisdiction over a direct appeal from an abstention order entered by a three-judge court. *Daniel v. Waters*, 515 F.2d 485, 493 n.1 (6th Cir. 1975) (dissenting opinion). The dissent noted that the order fell short of adjudicating the constitutional merits of the challenged statute and neither granted nor denied injunctive relief. *Id.* at 493. The majority interpreted the Court's order as an indication that its section 1253 jurisdiction was not properly invoked. This followed from its conclusion that the challenged statute was patently unconstitutional, therefore, a three-judge court was not required. *Id.* at 492.

¹⁷⁸420 U.S. 799 (1975). *MTM* has been cited as authority for the proposition that where a three-judge court does not base its order of abstention on "resolution of the merits of the constitutional claims," appeal lies to the court of appeals rather than the Supreme Court. *Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns*, 537 F.2d 1058, 1061 (9th Cir. 1976); *Daniel v. Waters*, 515 F.2d at 493 n.1* (dissenting opinion).

¹⁷⁹420 U.S. at 803-04.

III. IDLEWILD REVISED

In *Gonzalez v. Automatic Employees Credit Union* the Supreme Court acknowledged that it had "to retrace its steps" in *Idlewild* to hold, as it did, that review of a single judge's refusal to convene a three-judge court may be had in the court of appeals and not in the Supreme Court.¹⁸⁰ The Court did not similarly apprise the reader of its retracing its steps in *Gonzalez*. However, the statement made therein regarding the modes by which that jurisdiction may be exercised stands in sharp contrast to that made twelve years earlier in *Idlewild*.

Where a single judge refuses to request the convention of a three-judge court, but retains jurisdiction, review of his refusal may be had in the court of appeals, see *Idlewild* [and *Schackman v. Arnebergh*], either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U.S.C. § 1292(b).¹⁸¹

The Court of Appeals properly rejected the argument that the order of the District Court [refusing to convene a three-judge court but retaining jurisdiction] "was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292," pointing out that "[a]ppellant was effectively out of court."¹⁸²

Implicit in the Court's latest pronouncement is its recognition that the order entered in *Idlewild* "'was not final and hence unappealable under 28 U.S.C. §§ 1291, 1292[(a)(1)].'" Thus, courts and commentators can no longer cite that case as authority for the proposition that abstention orders are appealable as of right under either or both of these provisions. Furthermore, nothing in the *Gonzalez* dictum suggests that that portion of the order directing abstention comes within the appellate court's scope of review under section 1292(b) or section 1651. The Court's repeated failure to comment on the appealability of that portion of the order served to reinforce the conclusion that a single district judge lacked jurisdiction to abstain when a three-judge court was requested and the criteria for convening such a court were satisfied.¹⁸³

¹⁸⁰419 U.S. 90, 95 & n.13, 100 n.19 (1974).

¹⁸¹*Id.* at 100 n.19.

¹⁸²*Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. at 715 n.2.

¹⁸³See *Apel v. Murphy*, 526 F.2d 71, 73 (1st Cir. 1975); *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d at 429. Because the existence of such jurisdiction turned upon the propriety of the refusal to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, it would have been unnecessary for the court of appeals to consider the appropriateness of abstention should it reverse for the convening of such a court. Should the lower court's decision on this matter have been affirmed, however, it would seem improper for the appellate court to have taken one step further in the case, that is, to consider whether the issue of state law warranted abstention. *Gonzalez* provides no support for a contrary conclusion.

With the repeal in 1976 of 28 U.S.C. § 2281 the requirement for convening a three-judge court in cases seeking to enjoin the enforcement of a state statute on the ground that it is unconstitutional has been eliminated, except in reapportionment cases.¹⁸⁴ From this it follows that a single district judge is no longer without jurisdiction to abstain where application of the *Pullman* abstention doctrine is appropriate.

IV. CONCLUSION

The Supreme Court's holding in *MTM* made it clear that abstention orders are not directly appealable to that court under section 1253. Their appealability to the circuit courts of appeals, however, remains unsettled. Although an abstention order does not finally deny relief in federal court, is not, in most instances, tantamount to a denial of a preliminary injunction, and does not satisfy the requisites for a certified interlocutory appeal, an appeal from such an order has yet to be dismissed for want of jurisdiction. Nonetheless, review of such orders by way of appeal appears to constitute a usurpation of jurisdiction which is not given.¹⁸⁵ Furthermore, "[s]uch review is ordinarily undesirable. A principal reason for the delays experienced under existing abstention practices has been that parties have years of litigation merely to determine in which court the case will be litigated."¹⁸⁶ In any event, when application of the doctrine constitutes an abuse of discretion, appellate relief from the abstention order should be available under the All Writs Act.¹⁸⁷

In light of the fact that *Idlewild* no longer provides *any* authority for assuming jurisdiction under sections 1291 or 1292(a)(1), the courts of appeals may not be as reluctant to question their jurisdiction over such appeals in the future. Those finding none may even

¹⁸⁴Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119 (1976). See S. REP. NO. 94-204, *supra* note 14, for the legislative history of this enactment.

¹⁸⁵*But see* Daniel v. Waters, 417 U.S. at 963. In *Daniel* the Court vacated the district court's abstention order and remanded the case for the entry of "a fresh judgment from which a timely appeal may be taken to the Court of Appeals," notwithstanding appellants' having timely filed a protective appeal with the Sixth Circuit. Is the proper interpretation of the Court's order that "no three-judge District Court was necessary," Daniel v. Waters, 515 F.2d at 492, "that [the Sixth Circuit], rather than the Supreme Court, should review the merits of the three-judge District Court's abstention order," *id.* at 493 (dissenting opinion), or that an appealable order—a denial of the preliminary injunction which was sought, an interlocutory order certified for appeal under section 1292(b), or a dismissal of the action—should be entered by the district court upon remand?

¹⁸⁶ALI STUDY, *supra* note 12, at 291.

¹⁸⁷28 U.S.C. § 1651 (1970). See generally *Supervisory and Advisory Mandamus*, *supra* note 16.

acknowledge that “whether the local-law problem counseled abstention” is a question properly left to those most familiar with that law—the district judges.¹⁸⁸ “They know about *Pullman* [and its progeny] as well as most of [those on the Supreme Court]. It was a new doctrine when announced. It is word that has long been part of the warp and woof of federal law.”¹⁸⁹

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¹⁸⁸Harris County Comm’rs Court v. Moore, 420 U.S. 77, 91 (1975) (Douglas, J., dissenting). Mr. Justice Douglas’ comment, although made by way of dissent to a holding that the district court should have abstained, should be equally applicable to most cases in which abstention is ordered.

¹⁸⁹*Id.*