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Federal Courts - Declaratory Judgment - A Federal Court May Grant Declaratory Relief from a State Statute Allegedly Unconstitutional as Applied if State Prosecution Is Threatened, but Not Pending

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necessitating further clarification by the Court. A possible solution to the problem of trade secret protection and its relationship to the policies of federal patent law is the enactment of uniform legislation which would answer the need for a nationwide system of protection, and, at the same time, avoid some of the vagaries of present state laws.[102]

Joseph A. Eagan, Jr.

FEDERAL COURTS — DECLARATORY JUDGMENT — A FEDERAL COURT MAY GRANT DECLARATORY RELIEF FROM A STATE STATUTE ALLEGEDLY UNCONSTITUTIONAL AS APPLIED IF STATE PROSECUTION IS THREATENED, BUT NOT PENDING.

Steffel v. Thompson (U.S. 1974)

Threatened twice with arrest for violation of a Georgia criminal trespass statute,[1] petitioner sought declaratory and injunctive relief in the United States District Court for the Northern District of Georgia, asserting that the statute as applied to him violated his fourteenth amendment due process right to freedom of speech.[2] On October 8, 1970, petitioner and others were engaged in the distribution of handbills, which criticized American involvement in Vietnam, upon the exterior sidewalk of a large shopping center. When the protesters failed to leave at the request of the center's manager,[3] police were summoned. Warned that they would be arrested if they continued to handbill, the group departed. However, petitioner and a friend returned 2 days later, and police again threatened them with arrest. Fearful of this prospect, petitioner left, while his companion, who remained, was arrested and charged with violation of the statute.[4]

102. This nationwide system of protection would have as its advantage the avoidance of confusion and conflict among the various state laws. *See* Klein, *The Technical Trade Secret Quadrangle: A Survey*, 55 NW. U.L. REV. 437 (1960); Stedman, *Trade Secrets*, 23 O. ST. L.J. 4 (1962); Note, *The Trade Secret Quagmire — Proposed Federal Solution*, 50 MINN. L. REV. 1049 (1966); Comment, *Theft of Trade Secrets: The Need for a Statutory Solution*, 120 U. PA. L. REV. 378 (1971).

1. GA. CODE ANN. § 26-1503 (1968).

2. Becker v. Thompson, 334 F. Supp. 1386, 1387-88 (N.D. Ga. 1971). The petitioner claimed state deprivation of his federal rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), invoking the jurisdiction of the district court pursuant to 28 U.S.C. § 1343 (1970). His prayer for declaratory relief was premised upon the Federal Declaratory Judgment Act, *id.* §§ 2201-2202, while his request for an injunction was based upon the federal three-judge court statute, *id.* § 2281.

3. The center had maintained regulations against distributing handbills since 1965. Becker v. Thompson, 459 F.2d 919, 920 (5th Cir. 1972).

4. Steffel v. Thompson, 415 U.S. 452, 456 (1974).

The district court dismissed the claims of petitioner and others because it could find no active — and hence, no justiciable — controversy between the parties.[5] Abandoning the action for injunctive relief, petitioner appealed the district court's denial of declaratory relief to the Court of Appeals for the Fifth Circuit, which affirmed, holding that to obtain declaratory relief from the threat of state prosecution petitioner was required to demonstrate irreparable injury resulting from bad faith harassment by the state.[6] The Supreme Court of the United States reversed, *holding*: 1) that since petitioner faced a genuine threat of enforcement of a state criminal statute, the case presented an actual "controversy" as required by Article III of the Constitution; 2) that since no state prosecution was pending, declaratory relief was not precluded regardless of the propriety of injunctive relief; and 3) that it was irrelevant to the grant of declaratory relief whether the statute was attacked as being invalid upon its face or as applied. *Steffel v. Thompson*, 415 U.S. 452 (1974).

Under federal law, federal courts with proper jurisdiction have been provided two means by which to intervene in state matters: declaratory judgments[7] and injunctive relief.[8] The degree to which the Supreme Court has been willing to allow federal intervention by these means has been influenced by the doctrines of abstention which require federal courts to decline to hear cases raising questions of both state and federal constitutional law, thereby allowing the claims to be heard in state courts.[9] Described by one commentator as "creature[s] of twentieth century jurisprudence,"[10]

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5. The district court denied relief because it found no meaningful allegation that the state had or would act in "bad faith." 334 F. Supp. at 1389–90.

6. 459 F.2d at 923. The court based its decision upon what it believed were the tests articulated in Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971). 459 F.2d at 922–23. *See* notes 30–37 and accompanying text *infra*.

7. The Federal Declaratory Judgment Act (the Act) provides in part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

28 U.S.C. § 2201 (1970). The Act further provides that "[f]urther necessary or proper relief based on a declaratory judgment may be granted. . . ." *Id.* § 2202. *See* note 92 *infra*. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 100 (2d ed. 1970) [hereinafter cited as WRIGHT].

8. The primary federal injunction statute providing for the enjoinment of state statutes is contained in 28 U.S.C. § 2281 (1970), which requires that such a question be heard by a three-judge district court. *See generally* WRIGHT, *supra* note 7, §§ 48–51. An injunction, unlike a declaratory judgment, threatens state officials who fail to obey the federal court with the sanction of contempt. *See* Note, *Federal Relief Against Threatened State Prosecutions: The Implications of* Younger, Lake Carriers, *and* Roe, 48 N.Y.U.L. REV. 965, 972 (1973) [hereinafter cited as *Federal Relief*]; Note, *I used to Love You But It's All Over Now: Abstention And The Federal Courts' Retreat From Their Role As Primary Guardians of First Amendment Freedoms*, 45 S. CAL. L. REV. 847, 849 (1972) [hereinafter cited as *The Federal Courts' Retreat*].

9. *See generally* WRIGHT, *supra* note 7, § 52.

10. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 537 (1970).

the philosophical underpinnings of the doctrines have been what the *Steffel* court termed "the relevant principles of equity, comity, and federalism."[11]

From its inception,[12] abstention has undergone three stages of doctrinal development. Its first, occurring in the 1940's, was represented by two major judicial theories: the *Pullman* doctrine[13] and the *Burford* doctrine.[14] While the former provided for greater compromise between federal and state courts, in that federal courts were allowed to retain jurisdiction whereas in the latter they had to dismiss the action, both doctrines stressed the principle that state courts should be allowed to resolve essentially state matters. In accord with this general proposition, the Supreme Court expressed its reluctance to intervene in state criminal proceedings in a series of cases during this period.[15] It contended that where special circumstances might compel federal intervention in the form of injunctive relief, a showing had to be made by the complainant that he faced an immediate threat of numerous prosecutions such that he would sustain "exceptional and irreparable injury . . . if those threats were carried out . . . ."[16]

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11. 415 U.S. at 462. The principles of federalism underscore the dictate of comity that once a court has acquired jurisdiction of a cause, another court should not interpose its processes. The issue of states' rights may make a federal court even more hesitant to interfere because of the equitable policy of nonintervention in matters of criminal law. *See* Note, *Federal Injunctions Against State Criminal Proceedings*, 4 STAN. L. REV. 381, 383, 387 (1952).

12. Although abstention was formally articulated in the 1940's, the principle had already existed that equity and comity barred federal courts' intervention in state criminal prosecutions. *See* Note, *supra* note 11, at 381–84.

13. The so-called *Pullman* doctrine, considered the first articulation of the abstention doctrine, was set forth in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), where the Supreme Court held that federal courts should refrain from exercising jurisdiction if the state law in question was unclear and the decision of a federal question could be avoided. *Id.* at 499–500. *See* Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 How. L.J. 51, 76 (1967). The doctrine dictated that while federal courts should abstain from hearing the case, they could retain jurisdiction. Thus, if, after review by the state court, a federal question were found still to exist, the plaintiff could return to federal court. *See The Federal Courts' Retreat, supra* note 8, at 849–51. *See generally* WRIGHT, *supra* note 7, at 196–99.

In general, these doctrines remain viable. Federal courts often abstain to avoid a premature constitutional decision if the state court can render a narrow construction. *E.g.*, Harman v. Forssenius, 380 U.S. 528 (1965) (dicta). Or to avoid making tentative decisions of issues of state law. *E.g.*, Reetz v. Bozanick, 397 U.S. 82 (1970).

14. This doctrine was stated in Burford v. Sun Oil Co., 319 U.S. 315 (1943) and was more absolute than that in Texas v. Pullman, 312 U.S. 496 (1941), since the federal court was to *dismiss* both federal and state claims. *See* note 13 *supra*. If a federal right was found prejudiced, the party would have to seek review of the state decision in the Supreme Court of the United States. This procedure was held appropriate when the state interest was particularly strong. *See The Federal Courts' Retreat, supra* note 8, at 851–52. *See also* WRIGHT, *supra* note 7, § 52, at 199–200.

15. Watson v. Buck, 313 U.S. 387, 400 (1941) (absence of showing of specific threat to plaintiff); Beal v. Missouri Pac. Ry., 312 U.S. 45, 50 (1941) (mere threat of single prosecution); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95–96 (1935) (danger of irreparable loss must be great and immediate).

16. Watson v. Buck, 313 U.S. 387, 400 (1941).

In the landmark decision of this period, *Douglas v. City of Jeanette*,[17] the Court denied plaintiffs, Jehovah's Witnesses, the injunction they sought to restrain threatened prosecution under a state statute which allegedly abridged their first amendment rights.[18] The Court stressed the exceptional nature of federal intervention and stated that a person is not immune from good faith prosecution of his alleged criminal acts.[19] State courts were deemed the arbiters of state law; hence, the Court held that an injunction should not be granted if the federal rights allegedly violated could be vindicated in the defense of a single state court proceeding.[20]

Responsive to national concern with civil rights, the Court indicated a second stage of development with its decision in *Dombrowski v. Pfister*.[21] There, it enjoined a threatened criminal prosecution for violation of an unconstitutionally vague statute whose language produced a "chilling effect" upon the freedom of expression of civil rights workers.[22] The Court found that the usual single state proceeding would be inadequate where the statute was facially unconstitutional in such a way that no single defense could remove the defect[23] and where bad faith application of the statute discouraged protected first amendment activity.[24] Thus, under the aegis of the Court's reasoning, an individual could establish irreparable injury by

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17. 319 U.S. 157 (1943).

18. *Id.* at 159. Plaintiffs were arrested and prosecuted for distributing religious literature without a permit in violation of a city ordinance. *Id.* at 160.

19. *Id.* at 163.

20. *Id.* at 157. The Court further pointed out that the injury incident to good faith prosecution was not sufficient to interrupt state court proceedings. *Id.* at 164–65.

21. 380 U.S. 479 (1965).

22. *Id.* at 486–87. Plaintiffs had been arrested and indicted for violation of a statute which forbade involvement with a subversive organization. *Id.* at 493. Although a state court determined that the arrests had been illegal, state officials continued to threaten prosecution unless the members of the organization registered under Louisiana statutes. *Id.* at 487–88. Subsequently, plaintiffs, who were associated with a civil rights group, sought both a declaratory judgment that the state laws were unconstitutional and an injunction restraining state officers from prosecuting under those laws. *Id.* at 481–82.

As one commentator has observed, the federal courts had acknowledged, even prior to *Dombrowski*, the need in civil rights cases for injunctive relief against threatened state prosecutions. Maraist, *supra* note 10, at 548–52. *See, e.g.*, Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (district court declared state bus segregation statutes unconstitutional). *See also* Baggett v. Bullitt, 377 U.S. 360 (1964); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961) (exceptions created to the abstention doctrine permitting intervention in the area of civil rights and free speech).

23. 380 U.S. at 489–91. Plaintiffs had alleged that state officials threatened prosecution under statutory provisions other than those under which indictments had been brought. Thus, the entire statute would have to have been attacked in a piecemeal fashion with no near prospect of a state adjudication. *Id.* at 489.

24. *Id.* at 489–90. In this case, plaintiffs had asserted additionally that state officials threatened prosecution without any hope of success to inhibit plaintiffs' civil rights activities. *Id.* at 490.

asserting that the threatened prosecution produced a chilling effect upon the exercise of his first amendment rights.[25]

With *Dombrowski,* the Court shifted from a position of overriding deference to state courts and allowed federal courts "to assure the full protection of federal constitutional rights."[26] While the Court may have intended to require both facial unconstitutionality and bad faith, lower courts found the language unclear.[27] Consequently, the ambiguity of the *Dombrowski* test and its liberal posture towards federal intervention produced a considerable upsurge in requests for declaratory and injunctive relief at the lower federal court level.[28] Further clarification was needed as to whether facial unconstitutionality alone was an adequate basis for intervention or whether bad faith enforcement was a further prerequisite.[29]

In response, the Court entered the third stage with *Younger v. Harris*[30] and its five accompanying cases, "the February Sextet,"[31] which sharply restricted the reach of *Dombrowski* in holding that the facial unconstitutionality of a statute alone would not justify injunctive relief.[32] Assuming a more conservative stance upon abstention, the Court asserted that in the interests of federalism and comity, federal courts should refuse to intervene

25. Justice Brennan, writing for the majority, noted that to establish irreparable injury the individual had to be actually threatened; a mere assertion of possible prosecution was insufficient. *Id.* at 485, 490. It has been suggested that *Dombrowski* enlarged the scope of irreparable injury. *See* Comment, *Federal Injunctive Relief: What Remains After* Younger v. Harris?, 60 KY. L.J. 216, 222 (1971). *But see* Maraist, *supra* note 10, at 566.

26. Perez v. Ledesma, 401 U.S. 82, 119 (1971) (Brennan, J., concurring and dissenting).

27. *See* Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger *and Beyond,* 50 TEX. L. REV. 1324, 1327 (1972). The posture of the Court 6 years later, in Younger v. Harris, 401 U.S. 37 (1971), supports a narrow reading of the treatment of abstention in *Dombrowski. See* note 31 and accompanying text *infra. See also* Maraist, *supra* note 10, at 567.

28. *See* Maraist, *supra* note 27, at 1327.

29. In a subsequent case, Cameron v. Johnson, 390 U.S. 611 (1968), which appeared to narrow the scope of bad faith, the Court hinted that abstention would be improper if the statute were facially invalid. *Id.* at 615–17. Relying upon *Douglas,* the lower court had originally declined to declare a state anti-picketing statute unconstitutional. Cameron v. Johnson, 244 F. Supp. 846, 852 (S.D. Miss. 1964). The Supreme Court had reversed and remanded, instructing the lower court to reconsider in light of *Dombrowski.* Cameron v. Johnson, 381 U.S. 741 (1965). *Cameron* unlike *Dombrowski,* involved a pending prosecution. 390 U.S. at 613. *Compare The Federal Courts' Retreat, supra* note 8, at 883 *with* Maraist, *supra* note 10, at 570–71. *See* Carey, *Federal Court Intervention in State Criminal Prosecutions,* 56 MASS. L.Q. 11, 13 (1971); Note, *Implication of the* Younger *Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending,* 72 COLUM. L. REV. 874, 882 (1972).

30. 401 U.S. 37 (1971).

31. Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam); Dyson v. Stein, 401 U.S. 200 (1971) (per curiam); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

32. 401 U.S. at 50. Mr. Justice Black, writing for the Court, stated:

> [W]e hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions.

Id. at 53.

in a pending state criminal proceeding unless there is made a clear showing of bad faith harassment.[33] However, the Court did not carefully delineate the scope of its policy against federal intervention.[34] Although it was clear from prior cases that injunctive relief was not available to halt threatened state prosecutions absent irreparable injury,[35] the Court explicitly left open the question of whether *declaratory* relief would be allowed in such a situation.[36] As a result, a number of federal courts, including the Fifth Circuit, interpreted *Younger* to preclude intervention in fact situations similar to that presented by *Steffel*.[37]

Deriving its bases from this historical context, the *Steffel* Court confronted some of the questions left unanswered by the *Younger* decisions. Justice Brennan, writing for the Court,[38] first faced[39] the issue of whether an "actual controversy" existed.[40] Distinguishing the facts of *Younger*, where three of the appellees had not even alleged threats of prosecution,[41]

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33. *Id.* at 49–53. In *Younger*, one appellee was indicted and prosecuted for a violation of the state syndicalism statute. Three other appellees intervened, asserting that the prosecution of their companions would inhibit their activities as members of the Progressive Labor Party. The Court held that the intervenors' allegations were not sufficient to require a federal court to intervene by enjoining the pending state prosecution. *Id.* at 41–42.

34. Mr. Justice Brennan, in one of the cases, Perez v. Ledesma, 401 U.S. 82 (1971), clearly outlined the distinctive characteristics of the declaratory judgment and contrasted its application with that of injunctive relief. *Id.* at 101–30 (Brennan, J., concurring and dissenting). Yet, the Court seemed to draw no distinction between declaratory and injunctive relief when no prosecution was pending. *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 40, 305 (1971).

35. *See* notes 21–25 and accompanying text *supra.*

36. 401 U.S. at 41; Samuels v. Mackell, 401 U.S. 66, 73–74 (1971).

37. One district court, relying upon language in Samuels v. Mackell, 401 U.S. 66 (1971), one of the companion cases to *Younger*, stated, "Where injunctive relief would be impermissible, declaratory relief should ordinarily be denied." Lewis v. Kugler, 324 F. Supp. 1220, 1223 (D.N.J.) (semble), *vacated and remanded,* 446 F.2d 1343 (3d Cir. 1971). *See* cases cited in *Federal Relief, supra* note 8, app. A at 988. Commentators also interpreted *Younger* in this manner. *See* Shevin, *Federal Intrusion in State Court Proceedings,* 1972 UTAH L. REV. 3, 8; *The Supreme Court, 1970 Term, supra* note 34, at 305.

What was found to be additionally confusing in Justice Black's opinion in *Younger* was the fact that he had relied upon *Dombrowski,* where prosecution had been only threatened, not pending. 401 U.S. 37, 47–56 (1971). *See* Carey, *supra* note 29, at 15; Comment, *Federal Jurisdiction: Federal Injunction and Declaratory Relief from State Statutes Regulating Expression* — Younger v. Harris *and* Samuels v. Mackell, 20 J. PUB. L. 581, 590, 595 (1971).

38. Concurring opinions were filed by Mr. Justice Rehnquist, 415 U.S. at 478, Mr. Justice Stewart, *Id.* at 475, and Mr. Justice White, *Id.* at 476. Mr. Chief Justice Burger joined in the two former opinions.

39. In its review of the prior history of the case, the Court summarily dismissed a possible procedural problem: whether a three-judge district court should have been convened pursuant to 28 U.S.C. § 2281 (1970). *See* note 8 *supra.* The Court stated that, as petitioner abandoned his request for injunctive relief on appeal, the court of appeals did not err in exercising jurisdiction. 415 U.S. at 457 n.7.

40. The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1970), requires the existence of an actual controversy before a federal court is permitted to grant declaratory relief. *See* note 7 *supra.*

41. 401 U.S. at 42. See note 33 *supra.*

the Court found petitioner's alleged threats to be other than "imaginary or speculative"[42] and noted that the prosecution of his companion demonstrated the validity of petitioner's fear of arrest.[43] Under these circumstances, the Court stated, one may challenge a statute that allegedly deters the exercise of constitutional rights without first exposing oneself to arrest.[44] The Court concluded its analysis of the controversy issue by reaffirming the basic test to be applied in considering a prayer for declaratory relief: whether there exists "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[45]

Next, the Court turned to the propriety of petitioner's request for declaratory judgment. While acknowledging the principles of comity and federalism presented in *Younger* and *Samuels v. Mackall*,[46] the Court stressed that those cases had been limited to situations wherein prosecutions were pending.[47] The Court reaffirmed the concepts articulated in those decisions: the principles governing abstention from injunctive relief also dictate abstention from declaratory relief, and in all but unusual circumstances, federal courts should abstain from enjoining state criminal prosecutions.[48] It would thus appear from the Court's reaffirmation of *Samuels* and *Younger* that to obtain declaratory relief when state prosecutions are pending, the complainant must demonstrate irreparable injury caused by a clear case of bad faith harassment.[49]

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42. 415 U.S. at 459. *quoting* Younger v. Harris, 401 U.S. 37, 42 (1971).

43. 415 U.S. at 459.

44. *Id., citing* Epperson v. Arkansas, 393 U.S. 97 (1968) (suit successfully brought to obtain declaration that state anti-evolution statutes were void).

45. 415 U.S. at 460, *quoting* Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). As petitioner's complaints had been directed towards American involvement in Southeast Asia, the Court expressed concern that the subsequent reduction of involvement in that arena might have terminated the controversy. 415 U.S. at 460. The issue was left for the district court upon remand. *Id.*

The Court observed that the actual controversy must exist "at all stages of review," not only at the filing of the complaint. *Id.* at 459 n.10, *citing* Roe v. Wade, 410 U.S. 113, 125 (1973); SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972); United States v. Munsingwear, Inc., 340 U.S. 36 (1950). The Court further supported its position by reference to the fact situation in Golden v. Zwickler, 394 U.S. 103 (1969), where the Court refused to declare a state handbilling statute unconstitutional since the target of appellee's literature had retired from office and it seemed improbable that that person would become a candidate for office in the future, *id.* at 109–10. 415 U.S. at 459–60.

46. 401 U.S. 66 (1971). In *Samuels*, which was one of the cases in the "February Sextext" (*see* note 31 and accompanying text *supra*), the plaintiffs were indicted upon charges of criminal anarchy and sought alternatively injunctive relief from prosecution or a declaration that the criminal anarchy statute was unconstitutional. 401 U.S. at 67–68. The Court affirmed the lower court's refusal to grant relief, holding that, as the prosecution had begun, the equitable principles governing injunctive relief also applied to declaratory relief. *Id.* at 73.

47. 415 U.S. at 461.

48. *Id.* 460–62.

49. *Id.* at 460. *See also* Allee v. Medrano, 416 U.S. 802, 820 (1974); Samuels v. Mackell, 401 U.S. 66, 73 (1971).

However, the Court asserted that when no state prosecution is pending the principles of federalism and comity have minimal force.[50] In such circumstances, no duplicate legal proceeding would result and there would be no unseemly interruption of state activity.[51] Moreover, if the federal court failed to intervene, it would place the plaintiff "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[52] Hence, the Court held that when no state prosecution is pending, the request for declaratory relief may be considered independent of the request for injunctive relief.[53]

Lastly,[54] the Court dealt with the argument that declaratory relief is inappropriate when a statute is attacked not as facially invalid, but as applied to the petitioner.[55] Disposing of the respondents' reliance for this proposition upon *Cameron v. Johnson*,[56] the Court distinguished that case as one in which prosecution had been pending.[57] The Court further reasoned that an attack upon a statute's application rather than upon its facial language, is much less disruptive of the state's administration of its criminal system.[58] It pointed out that a facial attack might result in a judgment invalidating the statute completely, thus prohibiting any prosecution until a saving construction is given.[59] When attacked as applied, the judgment implicitly would be limited to state prosecution of the petitioner. In its conclusion, the Court stated that while federal interest might be less when the statute was attacked only as applied, "The solitary individual who suffers

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50. 415 U.S. at 462.

51. *Id.*

52. *Id., citing* Dombrowski v. Pfister, 380 U.S. 479, 490 (1965).

53. 415 U.S. at 462–63, 468–69. The Court noted that the court of appeals erred by failing to distinguish between the propriety of injunctive and declaratory relief. *Id.* at 463, *quoting* Perez v. Ledesma, 401 U.S. at 104. The Court additionally cited Zwickler v. Koota, 389 U.S. 241 (1967), Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), as precedent for this distinction. 415 U.S. at 468–69. This is significant because it was questionable whether irreparable injury — a prerequisite to an injunction preventing threatened state prosecution (*see* notes 21–25 and accompanying text *supra*) — existed in *Steffel*. The Court stated that that issue was not before it, as the petitioner had abandoned his claim for injunctive relief on appeal. 415 U.S. at 463. However, the Court did observe that there had not been sufficient injury present in prior cases in which injunctions had not been granted against threatened state prosecutions, thereby leaving open the question of "whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to *forego* constitutionally protected activity in order to avoid arrest." *Id.* at n.12 (emphasis supplied by court) (citations omitted).

54. Following the issue of the propriety of the request for declaratory judgment the Court engaged in a lengthy discussion, inapposite here, of the history of federalism and the role of injunctive and declaratory relief. *Id.* at 463–71.

55. *Id.* at 473.

56. 390 U.S. 611 (1968).

57. 415 U.S. at 473–74. *See* note 29 *supra*.

58. 415 U.S. at 474.

59. *Id., citing* Gooding v. Wilson, 405 U.S. 518, 520 (1972); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971).

a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others."[60]

The key question left unresolved in *Steffel* was the degree of imminence of prosecution that must be asserted by a federal plaintiff to satisfy the actual controversy requirement.[61] In characterizing the threats of arrest to the petitioner as neither "imaginary [nor] speculative,"[62] and petitioner's concern with prosecution as not "chimerical,"[63] the Court articulated a negative standard for finding threatened prosecution which was not clarified by the cases upon which it relied: The appellees in *Younger* had not been threatened with prosecution at all; rather, they had intervened in the federal suit, claiming that the prosecution of a companion had chilled their exercises in first amendment expression.[64] Further, the Court in *Younger* had stated that a controversy could be said to exist if the intervenors had alleged threatened prosecution *and* the district court had found this to be true by admission of the state "or any other evidence."[65] Finally, the other cases relied upon by the *Steffel* Court suggested that while a state's assertion that prosecution is likely is sufficient,[66] allegations that prosecution might occur sometime in the future are inadequate.[67]

While it would thus seem that to satisfy the prerequisites of actual controversy the plaintiff must be able to corroborate his allegation of threatened prosecution, this issue might have been clarified by a more affirmative standard drawn by the Court from the facts in *Steffel*. Although the Court relied upon the police warnings,[68] the stipulations that arrests would follow continued activity,[69] and the prosecution of petitioner's companion,[70] it did not say whether the presence of all of these factors was necessary to permit a court to find the requisite actual controversy. Further, while the Court noted its approval of petitioner's challenge to specific provisions of the state statute[71] to support his allegation of threatened prose-

60. 415 U.S. at 474.

61. The Court applied the case and controversy test of Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). *See* text accompanying note 45 *supra*.

62. 415 U.S. at 459, *quoting* Younger v. Harris, 401 U.S. 37, 42 (1971).

63. 415 U.S. at 459, *quoting* Poe v. Ullman, 367 U.S. 497, 508 (1961).

64. 401 U.S. at 41–42. *See* note 33 *supra*.

65. 401 U.S. at 42.

66. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court was willing to grant a declaration that the state anti-evolution statutes were void, finding sufficient proof of controversy in the state's assertion that it would prosecute under the statute. *Id.* at 103.

67. In Poe v. Ullman, 367 U.S. 497 (1961), which involved an action seeking a declaration that a statutory prohibition against contraceptives was invalid, the Court, to avoid a premature constitutional decision, stated that the plaintiff must demonstrate some immediate danger of direct injury in the form of actual, impending prosecution. *Id.* at 507–09.

68. 415 U.S. at 459.

69. *Id.* at 456 n.4.

70. *Id.* at 459.

71. *Id.*

cution, it is unclear whether a designation of a particular statute by which the petitioner is threatened is necessary or merely preferable.

Although the Court did not clearly quantify the required degree of imminency of prosecution beyond noting that "it is not necessary that petitioner expose himself to actual arrest or prosecution . . . ,"[72] it is apparent that it will require him to have been exposed to *some* form of very imminent threat before it can find an actual controversy.[73] This raises the ancillary question of the status of the plaintiff who feels deterred, but is not threatened. Because the *Steffel* Court did not separate the concepts of standing and ripeness,[74] but chose rather to cast the case and controversy issue in terms of a continuing actual controversy, it may have rendered this issue conceptually more difficult for future courts. Separation of the concepts would seem to require that if real adversity of interest between the parties confers standing, it is the fact of threatened prosecution which ripens the cause of action.[75] Consequently, a putative plaintiff could be frustrated by the refusal of the state to ripen the cause of action.[76] The plaintiff would not be able to seek a declaratory judgment upon the basis of threatened prosecutions, unlike the petitioner in the instant case, but would have to expose himself to immediate arrest. He would then be truly

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72. *Id.*

73. *Id.* at 474.

74. The federal judicial power is limited by article III of the United States Constitution to "cases" and "controversies." U.S. CONST. art. III, § 2. The "case and controversy" requirement of article III is satisfied by an allegation that the plaintiff has suffered "injury in fact, economic or otherwise." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152–54 (1970).

For a case to be ripe for review there must be a real controversy in which specific relief is sought, and that controversy must be capable of resolution in the judicial process. *See generally* Flast v. Cohen, 392 U.S. 83 (1968); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

75. *See* Note, *Declaratory Relief in the Criminal Law,* 80 HARV. L. REV 1490, 1507–10 (1967).

76. The plaintiffs in Poe v. Ullman, 367 U.S. 497 (1961), whose case was dismissed for lack of threatened prosecution, returned to court 4 years later as criminal defendants. *See* note 67 and accompanying text *supra.*

Although the *Steffel* Court discussed Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), in its clarification of the distinction between injunctive and declaratory relief (*see* note 53 *supra*), it failed to mention *Doe* in its discussion of actual controversy. In the latter case, the Court found that the physician-appellants presented a justiciable controversy and did have standing despite the fact none of them had been threatened with prosecution. 410 U.S. at 188. However, the case might be distinguished because the *Doe* Court viewed the physicians as members of a class against whom the statute was directed. 410 U.S. at 188. The Court granted declaratory, but not injunctive, relief. *Id.* at 201–02.

One commentator has asserted that the requirements of a controversy are satisfied when a party challenges governmental action which is defended by an officer of the government. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.01, at 126 n.39 (1958).

placed between the Scylla and the Charybdis of which Mr. Justice Brennan spoke.[77] Had the Court stated the standing requirement and indicated the degree of imminence of prosecution necessary to confer ripeness, lower courts would arguably have a firmer basis for granting declaratory relief prior to arrest.

The second lacuna in the opinion is the Court's failure either to distinguish the dividing line between the two stages of the threatened-pending dichotomy, or to indicate at what stage it considered proceedings to be pending. Initially, it must be noted that the Court's choice of the dichotomy is significant because it was this characterization that had clarified the considerable confusion resulting from *Younger*.[78] However, if this approach were to be useful, the Court should have at least indicated what it intended by those terms. Possible guidance might be found in *Perez v. Ledesma*,[79] a case frequently quoted in this portion of the opinion,[80] where Mr. Justice Brennan asserted that "[o]rdinarily, [the] question may be answered merely by examining the dates upon which the federal and state actions were filed."[81] However, since the *Steffel* Court did not specifically embrace this standard, and since state courts have found cases to be "pending" in a spectrum of circumstances,[82] it would appear that no generally accepted standard exists.

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77. 415 U.S. at 462. Had the Court established that a case is *ripe* when prosecution is threatened, a future plaintiff would be able to avoid the paradox of being denied access to the court for lack of ripeness only to be later denied a declaratory judgment because the state had initiated prosecution. Unfortunately, by not addressing this question the Court also left unresolved the status of Zwickler v. Koota, 389 U.S. 241 (1967), *rev'd as moot sub nom.* Golden v. Zwickler, 394 U.S. 103 (1969). While the Court affirmed the case for its articulation of the propriety of declaratory relief, it did not examine an additional issue raised by *Zwickler:* whether declaratory relief might be available in the absence of threatened prosecution if the petitioner is chilled in the exercise of his first amendment rights. 389 U.S. at 252–54. Although *Zwickler* can be distinguished by the fact that the attack therein was upon the facial validity of the statute, the language of the case as a whole, as one commentator noted, was broader than its holding. *See The Federal Courts' Retreat, supra* note 8, at 858.

78. *See* notes 34–37 and accompanying text *supra.*

79. 401 U.S. 82 (1971).

80. 415 U.S. at 466–68.

81. 401 U.S. at 103.

82. *See, e.g.,* Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973) (after indictment); Rialto Theatre Co. v. City of Wilmington, 460 F.2d 281 (3d Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973) (when arrest takes place); Modern Social Educ., Inc. v. Preller, 353 F. Supp. 173 (D. Md. 1973) (application of a law officer for a search warrant). However, one lower court thought it possible that the Court intended to leave the question open, observing, "[I]t is highly unlikely, given the disparity among the criminal processes of various states, that the Supreme Court meant to enunciate a rigid rule for determining when a state criminal prosecution is in fact pending." Independent Tape Merchant's Ass'n v. Creamer, 346 F. Supp. 456, 460–61 (M.D. Pa. 1972). *See also, The Supreme Court, 1970 Term, supra* note 34, at 308. Furthermore, as a number of lower courts have used the date of indictment to identify "pending" prosecutions (*see, e.g.,* McSurely v. Ratcliff, 282 F. Supp. 848, 853 (E.D. Ky. 1967), *appeal dismissed,* 390 U.S. 412 (1968) (per curiam)), the availability of declaratory relief may turn upon a race to the courthouse. If the prosecutor can

Arguably, the Court might have chosen a less artificial standard for granting declaratory relief from unconstitutional state criminal statutes. It might have chosen, for example, to focus upon the effect of the statute upon the individual's conduct. However, this would have meant a reaffirmation of a "chilling effect" standard, articulated in *Dombrowski* and *Zwickler v. Koota*,[83] and criticized in *Younger*. Since the *Younger* Court focused upon the state's action rather than upon the individual's reaction, it would seem that the "chilling effect" concept has been purposely abandoned.[84] Thus, while theoretically significant, the *Steffel* threatened-pending characterization provides little concrete guidance to federal courts for distinguishing the two stages, and leaves them to make that determination upon an ad hoc basis.[85]

The third issue which the Court left unresolved was the question of the effect and enforcement of the declaratory judgment upon subsequent state proceedings. With respect to this issue, Justices White and Rehnquist, in separate concurring opinions,[86] debated whether a federal court could enjoin a state criminal prosecution against the federal-plaintiff-now-state-defendant.[87] Justice Rehnquist argued that since the declaratory judgment was a milder form of relief than an injunction, enforcement of the former should not be by means of the latter.[88] Further, he maintained that prosecution after a declaratory judgment would not be sufficient evidence of bad

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obtain an indictment before the individual can lodge a complaint, the individual will lose his chance for declaratory relief. This defeats one of the purposes of the federal declaratory judgment: to provide a means for court determination of rights without the risk of a state criminal proceeding. *See* 401 U.S. at 199 n.12.

83. 389 U.S. 241 (1967).

84. This seems particularly true in light of the concurring opinion of Mr. Justice Stewart, joined by Mr. Chief Justice Burger, which emphasized that *Steffel* did not authorize declaratory relief to one who feels merely "chilled" by the existence of a statute. 415 U.S. at 475. For a discussion criticizing the threatened-pending distinction *see* Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930).

85. There is considerable practical significance for the putative plaintiff as well. If prosecution is deemed to be pending, rather than threatened, the individual would have to attempt to vindicate his constitutional rights in the course of a state criminal proceeding rather than being able to obtain a federal declaratory judgment. While the former remedy may be deemed adequate, it might not be the preferable route.

86. 415 U.S. at 476–85.

87. The majority's opinion only touched upon the issue of the effect and enforcement of the declaratory judgment, when it stated:

> Finally, the federal court judgment may have some *res judicata* effect, though this point is not free from difficulty and the governing rules remain to be developed with a view to the proper workings of a federal system. What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt.

415 U.S. at 470–71, *quoting* Perez v. Ledesma, 401 U.S. 82, 125–26 (1971).

88. 415 U.S. at 481–82 (Rehnquist, J., dissenting). For support of this position, *see,* Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870, 1878–79 (1970).

faith to enable a defendant to obtain an injunction under the *Younger* rationale.[89] Stressing policies of comity and federalism, Justice Rehnquist thought that such a defendant would have sufficient opportunity in the state court to assert the unconstitutionality of the statute, and that he could buttress his assertion with the federal court declaration.[90] Justice White disagreed, noting that Justice Rehnquist's views were not so much as implied by the *Steffel* Court.[91] He asserted that the declaration should be given res judicata effect and indicated that section 2202 of the Federal Declaratory Judgment Act[92] opened a path for injunctive enforcement.[93]

It is unfortunate that the Court's opinion did not address this problem. Justice Rehnquist presented considerations which might very well inhibit a federal court from granting declaratory relief. For example, a court might feel its declaration would not be complied with, absent an injunction. Consequently, having before it only a request for declaratory relief, the court might dismiss the petition. Acting sua sponte, the federal court might even look for irreparable injury and thereby apply an abstention doctrine inappropriate for declaratory relief.[94]

Ideally, the state courts would comply with a declaratory judgment, as this is the "norm and the desideratum."[95] However, where compliance has not seemed likely, federal courts have indicated a reluctance to grant further injunctive relief to enforce the declaration.[96] Further, there is confusion even as to the res judicata effect of declaratory judgments.[97] It is submitted that since the Court imposed stringent standards for the grant of declaratory relief, it should have armored that relief so the judgment could adequately protect the petitioner by giving the declaration res judicata effect or injunctive support.

In holding that declaratory relief could be granted even though the statute was attacked as applied,[98] the Court addressed the fourth issue of what is the proper balance between the state interest in effective enforcement of its criminal laws and the federal interest in protecting individual

89. 415 U.S. at 483.

90. *Id.* at 481.

91. *Id.* at 477 (White, J., dissenting).

92. 28 U.S.C. § 2202 (1970). Section 2202 provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adversary party whose rights have been determined by such judgment.

Id.

93. 415 U.S. at 478.

94. *See* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 17–18 (1964).

95. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 323 (1969). *See* Maraist, *supra* note 27, at 1337.

96. *See, e.g.*, Independent Tape Merchant's Ass'n v. Creamer, 346 F. Supp. 456, 461 (M.D. Pa. 1972).

97. Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts*, 46 S. CAL. L. REV. 803, 825 (1973).

98. 415 U.S. at 473–74.

constitutional rights. In this regard, the Court's treatment of *Cameron v. Johnson*[99] has the effect of extending the scope of federal interest beyond the facial invalidity of a statute. It is submitted that granting declaratory relief where it is claimed that a statute has been unconstitutionally applied neutralizes the effect of the Court's seemingly total retreat in *Younger* from the concept of the "chilling effect."[100] Here, by holding that a federal court need not find facial unconstitutionality as a basis for intervention in order to grant declaratory relief, the Court implicitly reaffirmed the distinction between injunctive and declaratory relief. The federal plaintiff seeking a declaratory judgment appears now to be released from the strictures of *Dombrowski* as interpreted by *Younger*.[101] Thus, the Court in *Steffel* reopened an avenue for preprosecutorial relief by giving a clear grant to federal courts to intervene.

While the balance has seemed to swing in favor of the federal courts,[102] it remains questionable how much the individual will benefit. Much depends upon the lower federal courts' interpretation of what constitutes an actual threat where prosecution is not pending, and how those courts interpret the effect of a declaratory judgment once given. While the *Steffel* Court clearly established its support of the threatened-pending distinction and the usefulness of the declaratory judgment as a means of preprosecutorial relief, it possibly attenuated its assertions by failing to clarify more precisely the circumstances under which declaratory relief should be granted and by what manner this relief should be enforced.

Thus, the decision in *Steffel* is elastic and very amenable to being contracted or expanded. While its ultimate significance will depend upon future interpretations, perhaps its present contribution is the reassertion by the Court of the principle that "[t]he right to test a statute by submitting to arrest is not a remedy."[103]

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99. *See* notes 56 & 57 and accompanying text *supra*.

100. The *Younger* Court asserted that mere inhibition of the exercise of constitutional rights was insufficient to justify federal intervention. 401 U.S. at 50–52.

101. In denying petitioner's request for declaratory relief, the Fifth Circuit interpreted *Dombrowski* and *Younger* to require federal court abstention in the absence of facial unconstitutionality or bad faith harassment, irrespective of any distinction between declaratory judgments and injunctions. 459 F.2d at 924–25 (Tuttle, J., concurring).

102. Arguably, federal courts have a special interest in the protection of federal rights. These courts have been referred to as "the primary guardians of constitutional rights. . . ." Perez v. Ledesma, 401 U.S. 82, 104 (1971) (Brennan, J., concurring and dissenting).

103. Aerated Products Co. v. Godfry, 363 App. Div. 685, 35 N.Y.S.2d 124, 126 (1942), *rev'd*, 290 N.Y. 92, 48 N.E.2d 275 (1943).