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Federal Jurisdiction - *Steffel v. Thompson*, Declaratory Relief Against a Threatened State Criminal Prosecution Is Permissable Without a Showing of Great and Immediate Irreparable Harm Whether the Attack on the Constitutionality of the Statute Is on Its Face or as Applied

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FEDERAL JURISDICTION—Steffel v. Thompson, Declaratory Relief Against a Threatened State Criminal Prosecution Is Permissable Without a Showing of Great and Immediate Irreparable Harm Whether the Attack on the Constitutionality of the Statute Is on Its Face or As Applied

INTRODUCTION

On October 8, 1970, Richard Steffel and other individuals were distributing handbills protesting American involvement in Indochina on an exterior sidewalk of a private shopping center. They were asked to leave by shopping center employees, and the police were summoned when they declined to do so. The officers told them that they would be arrested if they did not stop handbilling. The group left to avoid arrest, but Steffel and a companion returned two days later and resumed the handbilling. The police were again summoned, and Steffel and his companion were once again told that failure to stop handbilling would result in their arrests. Steffel then left to avoid arrest.¹

Steffel filed a complaint² in the District Court for the Northern District of Georgia,³ alleging violation of the Civil Rights Act.⁴ The

1. Steffel's companion, Sandra Lee Becker, stayed and continued handbilling. She was arrested and subsequently arraigned on a charge of criminal trespass.
2. The complaint was initially styled as a class action. Named as plaintiffs were petitioner, petitioner's handbilling companion, Sandra Lee Becker, against whom a prosecution was pending for criminal trespass, and the Atlanta Mobilization Committee.
3. The complaint was filed against Thompson, the Solicitor of the Civil and Criminal Court of De Kalb County; the Chief of the De Kalb County Police; the owner of the shopping center; and the manager of the shopping center.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jurisdiction is conferred on the federal district courts in 28 U.S.C. § 1343 (1970). Section 1343 provides in part:
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
complaint requested a declaratory judgment that the Georgia criminal trespass statute was being applied in violation of Steffel's constitutional rights and an injunction restraining the defendants from enforcing the statute as applied to Steffel. The district court denied all relief and dismissed the action, finding no meaningful evidence that the state had acted in bad faith or would do so in the future. Therefore, without the rudiments of an active controversy between the parties, the court found an equitable basis for considering the claim to be lacking.

The Court of Appeals for the Fifth Circuit affirmed and held that where there is a threatened but not pending state criminal prosecution, federal injunctive relief should be denied unless irreparable harm,
measured by bad-faith enforcement or harassment, is shown.\textsuperscript{13} Furthermore, the court found that the same showing of irreparable harm must be made to justify federal intervention because the effect of declaratory relief is similar to that of injunctive relief.\textsuperscript{14}

The United States Supreme Court reversed,\textsuperscript{15} holding that federal declaratory relief is not precluded when a prosecution based upon an assertedly unconstitutional state statute has been threatened but is not pending. Furthermore, such declaratory relief may be granted even if a showing of bad-faith enforcement or other special circumstances has not been made. In addition, the Court held that the threats of prosecution alleged in these circumstances presented an "actual controversy" under article III of the Constitution and the Federal Declaratory Judgments Act.\textsuperscript{16}

**FEDERAL INTERVENTION FROM**

**EX PARTE YOUNG TO YOUNGER V. HARRIS**

The circumstances under which the federal courts may intervene in state judicial proceedings, especially state criminal proceedings, have been the subject of legislation and controversy since the beginning of the nation.\textsuperscript{17} In *Chisholm v. Georgia*,\textsuperscript{18} the Supreme Court held that a state could be sued by a citizen of another state in a federal court. The decision prompted the Congress to propose and the states to ratify the eleventh amendment to the Constitution in order to deprive the federal courts of jurisdiction in such cases.\textsuperscript{19} The power of the federal judiciary to protect an individual's constitutional rights through intervention into state court proceedings was recognized in *Ex parte Young*.\textsuperscript{20} In that case, the Supreme Court held

\textsuperscript{13} 459 F.2d at 922.
\textsuperscript{14} Id. Other federal courts have entertained applications for injunctive and declaratory relief in the absence of a pending state prosecution. See Thoms v. Hefferman, 473 F.2d 478 (2d Cir. 1973); Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Crossen v. Breckenridge, 446 F.2d 833 (6th Cir. 1971); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971).
\textsuperscript{18} 2 U.S. (2 Dall.) 419 (1793).
\textsuperscript{19} Perez v. Ledesma, 401 U.S. 82, 104-05 (1971) (Brennan, White & Marshall, J.J., concurring in part and dissenting in part). Although the eleventh amendment does not so explicitly provide, the Court in *Hans v. Louisiana*, 134 U.S. 1 (1890), held that the eleventh amendment also barred a suit against a state by a citizen of that state when the basis of the federal jurisdiction was a claim under federal law.
\textsuperscript{20} 209 U.S. 123 (1908). *Ex parte Young* was a habeas corpus proceeding brought by a state officer held in contempt for violating a circuit court injunction.
that the eleventh amendment did not bar a federal court injunction restraining a state officer\(^\text{21}\) who was seeking to enforce a statute which violated the United States Constitution.\(^\text{22}\)

There was widespread opposition to the power of an individual federal district court judge to issue injunctions against the enforcement of state statutes. The Congress responded in 1910 with the passage of the Three-Judge Court Act.\(^\text{23}\) There also were responses by the Supreme Court,\(^\text{24}\) mainly through the extension of the principle of federal non-interference. This principle is closely related to the principle of comity which requires the federal courts to respect the sovereignty of the states. Therefore, the federal courts must not interfere with the state's good-faith administration of its criminal laws.\(^\text{25}\)

*Ex parte Young* allowed federal intervention to enjoin state officers from enforcing unconstitutional state statutes when it was absolutely necessary to protect an individual's constitutional rights from irreparable harm. However, in *Fenner v. Boykin*,\(^\text{26}\) the Supreme Court restricted intervention by injunction to those "extraordinary circumstances where the danger of irreparable loss is both great and

\(^{21}\) Since the officer was acting beyond his authority, he was stripped of his official representation, and, hence, a suit against him was not against the state. *Id.* at 159-60.

\(^{22}\) In *Young*, the injunction was against a threatened rather than a pending state proceeding.

\(^{23}\) 28 U.S.C. §§ 2281-84 (1970). Section 2281 provides:

> An interlocutory or permanent injunction enforcing the operation of any order made by an administrative board or commission acting under State law shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such order unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

There were other congressional responses as well. See Johnson Act of 1934, 28 U.S.C. § 1342 (1970) (deprives the district courts of jurisdiction to enjoin operation of any order by a state administrative agency which affects public utility rates); Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1970) (prohibits an injunction against an assessment, levy or collection of any tax under state law when an efficient remedy may be had in the state courts). See *generally* WRIGHT, §§ 50-51.

\(^{24}\) There was an immediate response in the application of the exhaustion principle of *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Briefly stated, the rule is that, normally, a litigant should exhaust state remedies before challenging the state action in federal court. This doctrine does not apply in civil rights actions brought under 28 U.S.C. § 1343 (1970). See *McNeese v. Board of Education*, 373 U.S. 668 (1963).

\(^{25}\) The principle is closely related to the principle of federalism. Justice Black defined "Our Federalism" as "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

immediate."  

Ordinarily, there should be no interference with state officers. The accused should set up his defense in the state courts unless it plainly appears that this course would not afford adequate protection.

The next major decision by the Supreme Court was in *Douglas v. City of Jeannette*, where the Court denied injunctive relief against the future enforcement of a city ordinance which the Court had held unconstitutional that same day. Finding that the petitioners were not threatened with any harm other than that which was incidental to every state criminal prosecution, the Court refused to presume that the state would not acquiesce in the decision of the Court that the ordinance was unconstitutional. The principle of *Douglas* was widely followed, requiring "exceptional circumstances" and a clear showing that an injunction was necessary to afford adequate protection of constitutional rights without which the danger of irreparable loss was both "great and immediate."

Another doctrine which developed in this period is the abstention doctrine whereby the federal courts will refuse relief in deference to the state courts although jurisdiction is granted by the Constitution and the statutes. The concept of a judicially developed district court abstention was first clearly enunciated in *Railroad Commission of Texas v. Pullman Co.* There the Supreme Court spoke of a doctrine of abstention appropriate to our federal system; whereby, the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of state governments" and for the smooth working of the federal judiciary.

27. 271 U.S. at 243.
28. *Id.* at 243-44. For other cases regarding the requirement of "great and immediate harm" in threatened prosecutions, see Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Watson v. Buck, 313 U.S. 387 (1941); Williams v. Miller, 317 U.S. 599 (1942).
29. 319 U.S. 157 (1943). The petitioners had sought an injunction against the enforcement of a city ordinance prohibiting solicitation without a license and without payment of a license tax.
31. 319 U.S. 157, 163-64. The Court said that the petitioners could receive adequate protection in the state court proceeding with ultimate review by appeal to the Supreme Court if necessary.
32. *Id.* at 165. The statute was held unconstitutional as applied to the petitioners.
33. The phrase "exceptional circumstances" was first used in Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 95-96 (1935).
34. For a discussion of special or exceptional circumstances, see Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 Texas L. Rev. 535 (1970) [hereinafter cited as Maraist].
35. 312 U.S. 496 (1941).
36. *Id.* at 501. *See generally* Wright, § 52. Wright describes four distinct doctrines of abstention which have developed.
The abstention doctrine is closely related to the principles of equity, comity and federalism.37

In the 1960's, the barriers to federal intervention were lowered. In *McNeese v. Board of Education*,38 the Supreme Court declared that the federal court's power is supplemental to that of the state's, and held that a claimant does not have to exhaust state remedies before seeking to vindicate his civil rights in the federal courts. In *Bagget v. Bullitt*,39 the Court held that federal injunctive relief is appropriate when the effect of the vague and overly broad statute was to suppress free expression, and special circumstances were present. However, the injunction sought was against the petitioner's discharge from employment and not against a state court proceeding. Furthermore, neither of these cases involved a threatened or pending criminal proceeding.

In 1965, the Supreme Court decided the landmark case of *Dombrowski v. Pfister*40 which held that declaratory or injunctive relief was proper against a threatened state criminal prosecution that was (1) in bad faith or intended to harass and deter the claimant from exercising his constitutional rights, or (2) in good faith but brought under a statute that was a facially overbroad or vague regulation of free expression.41 The detrimental effect of the latter has been described as a "chilling effect" on free expression. Thus, although the Court found that there were special circumstances and irreparable injury, the Court also suggested that a separate basis for federal intervention existed when rights of free expression were involved.

The language of *Dombrowski* was ambiguous and left several questions unanswered.42 The first clarification of *Dombrowski* came in *Zwickler v. Koota*,43 where the Court held that declaratory and in-

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38. 373 U.S. 668 (1963). The plaintiffs sought equitable relief, including registration of plaintiffs in racially segregated schools.
40. 380 U.S. 479 (1965). The appellant showed that there was an overbroad statute, that the threats of prosecution were a plan to harass him and that the state authorities were acting in bad faith by carrying out seizures and arrests without hope of obtaining a conviction.
41. Id. at 490-92. See generally Maraist, supra note 34.
42. See Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324, 1327 (1972). These questions included: (1) what standards should guide federal intervention in pending criminal prosecutions; (2) whether the standards for granting a declaratory judgment differ from those for granting injunctive relief; and (3) whether federal courts may intervene in threatened prosecutions more readily than in pending prosecutions.
43. 389 U.S. 241 (1967). The appellant sought both injunctive and declaratory re-
junctive relief are separate issues in cases of threatened state prosecutions. Although declaratory relief is discretionary, the Court found that the propriety of granting it should be considered even in the absence of the special circumstances required for an injunction.\textsuperscript{44}

In \textit{Cameron v. Johnson},\textsuperscript{45} the Court dealt with the issue of bad-faith enforcement and defined it as enforcement

\begin{quote}
with no expectation of convictions but only with the intent to discourage exercise of protected rights. The mere possibility of erroneous application of the statute does not amount "to the irreparable injury necessary to justify a disruption of orderly state proceedings."\textsuperscript{46}
\end{quote}

Furthermore, the state was not required to prove the appellants guilty in the federal proceeding to escape the finding that the state had no expectation of securing valid convictions.\textsuperscript{47}

Constitutional challenges to state criminal statutes after the \textit{Dombrowski} decision proliferated.\textsuperscript{48} \textit{Dombrowski} itself had sustained federal relief against future state prosecutions. However, in 1971, a group of cases referred to as the \textit{Younger Sextet},\textsuperscript{49} reached the Supreme Court. Here, the lower courts had gone beyond \textit{Dombrowski} and had granted injunction or declaratory relief against state criminal proceedings already under way.\textsuperscript{50} In the principal case, \textit{Younger v. Harris},\textsuperscript{51} the Court held that a "chilling effect" on free expression does not by itself justify a federal injunction.\textsuperscript{52} The Court pointed out that \textit{Dombrowski} was not a departure from prior principles, since the relief in \textit{Dombrowski} was justified because the traditional

\begin{thebibliography}{99}
\bibitem{} \textsuperscript{44} 389 U.S. at 253-55.
\bibitem{} \textsuperscript{45} 390 U.S. 611 (1968). The appellants challenged a Mississippi anti-picketing law as void on its face due to overbreadth and vagueness and sought declaratory and injunctive relief. The district court granted a declaratory judgment rejecting the constitutional attack before denying injunctive relief. The Supreme Court affirmed.
\bibitem{} \textsuperscript{46} \textit{Id.} at 621.
\bibitem{} \textsuperscript{47} \textit{Id.}
\bibitem{} \textsuperscript{48} Maraist, supra note 34.
\bibitem{} \textsuperscript{50} In Boyle \textit{v.} Landry, no state prosecution was pending. However, the decision is best viewed as based on lack of standing rather than a decision on the merits. See note 73 infra.
\bibitem{} \textsuperscript{51} 401 U.S. 37 (1971). Appellee Harris was indicted under the California Syndicalism Act. He filed a complaint in the district court, seeking an injunction to enjoin the district attorney from prosecuting him. He alleged that the statute was unconstitutional on grounds of overbreadth and vagueness and inhibited him in exercising his rights of free expression.
\bibitem{} \textsuperscript{52} \textit{Id.} at 53.
\end{thebibliography}
test of bad faith or harassment had been satisfied. The Court reaffirmed that the traditional requirement for a federal injunction in pending state prosecutions necessitated a showing of "great and immediate" irreparable harm. Generally this would require a showing of bad faith and harassment; however, the Court stated that there may be extraordinary circumstances where irreparable harm could be shown in the absence of these requirements.

In a companion case, Samuels v. Mackell, the Court held that when a state prosecution is pending, a request for a declaratory judgment should be granted by the federal court only if the requirements for an injunction are satisfied. The Court held that the imposition of identical standards for declaratory and injunctive relief when a state prosecution was pending was essential. The Court reasoned that declaratory judgment would result in the same interference with and disruption of state court proceedings as that attendant to an injunction.

In deciding Becker, the Fifth Circuit recognized that the Younger Court had expressly limited its decision to pending prosecutions. However, the Fifth Circuit was of the view that the reasoning in Younger, with its reliance on Fenner and Douglas, appeared to ignore any distinction between pending and threatened state prosecutions. Therefore, the court reasoned, Younger should be extended to threatened prosecutions as well. Furthermore, while recognizing that the Samuels decision was also limited to pending prosecutions, the Fifth Circuit held that the same test of bad-faith enforcement or harassment is a prerequisite for declaratory relief in a threat-

53. Id. at 48-49.
54. Id.
55. Id. at 53.
56. 401 U.S. 66 (1971). The appellants were indicted on charges of criminal anarchy. They alleged that the statute was an abridgment of free expression and that trial of the indictments would cause them irreparable harm. They sought both injunctive and declaratory relief.
57. Id. at 73.
58. Id.
60. 459 F.2d at 922. One judge concurring in the result felt that it was wrong to extend Younger to threatened prosecutions but felt that Dombrowski and Zwickler required a denial of relief since this was not a facially void statute and there was no bad-faith enforcement or harassment. Id. at 923-24. The Fifth Circuit has entertained an action for declaratory and injunctive relief in the absence of a pending suit when the constitutional attack on a statute was on the facial validity rather than as applied. See Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973). See also cases cited note 14 supra.
ened prosecution. Shortly after the Fifth Circuit's decision in Becker, the Supreme Court said in Lake Carriers' Association v. Mac Mullan that Younger and Samuels "were premised on considerations of equity practice and comity . . . that have little force in the absence of a pending state proceeding." Notwithstanding this statement, a petition for rehearing en banc was denied by the Fifth Circuit.

JUSTICIABLE CONTROVERSY IN THREATENED PROSECUTIONS

In reversing the decision of the Fifth Circuit, the Supreme Court in Steffen first considered the question of whether the petitioner's claim presented a justiciable case or controversy as required by the Declaratory Judgment Act. There can be no controversy if the individual bringing the action does not have a real personal interest affected by the statute he is challenging. If no such interest is present, the person is seeking a judgment in the abstract and, thus, does not have the standing required to bring the suit.

In Younger v. Harris, two appellees intervened, claiming that the prosecution of Harris would inhibit them from advocating the pro-

62. Id. The court recognized the "extraordinary circumstances" exception of Younger, 401 U.S. at 53-54, but found none present.
64. Id. at 509. See Perez v. Ledesma, 401 U.S. 82, 122-23 (1971) (Brennan, White & Marshall, J.J., concurring in part and dissenting in part), where it was said that where no prosecutions are pending, Zwickler v. Koota still governs, and the propriety of declaratory or injunctive relief should be considered separately.
65. Becker v. Thompson, 463 F.2d 1338 (1972). The Fifth Circuit stated that Lake Carriers was an abstention case and, therefore, the statement regarding Younger and Samuels was dicta.
66. 415 U.S. at 458-60.
67. Article III of the Constitution requires that federal courts render a decision only where the "dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968).
   In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, 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. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
   Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.
70. The gist of the question of standing is whether the litigant has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).
gram of their Progressive Labor Party. A third intervenor, a college instructor in history, claimed that the prosecution inhibited him in teaching the doctrine of communism in his classroom. The Court stated: "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases." The Court held that there must be a threat of prosecution before a genuine controversy could be said to exist.

In a companion case, *Boyle v. Landry*, the Court reaffirmed the threat requirement by holding that the requirements for an injunction had not been satisfied where none of the parties who brought the action had ever been prosecuted, charged or arrested under the particular statute being attacked as unconstitutional. The Court agreed with the appellants that it appeared that the appellees had merely "made a search of state statutes and city ordinances with a view to picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them."

The *Steffel* Court distinguished the petitioner from the intervenors in *Younger* because he had alleged threats of prosecution that were not "imaginary or speculative." He had been warned twice to stop handbilling or face arrest and likely prosecution. Under these circumstances, it was not necessary for the petitioner to expose himself to arrest in order to challenge a statute that he claimed was deterring him from exercising his constitutional rights. The *Steffel* Court, in granting standing to the petitioner, was entirely consistent with the prior authority of *Younger* and *Boyle* due to the specific threats of prosecution under the trespass statute. The Court then emphasized that the petitioner was challenging those specific provisions of state law which provided the basis for threats of criminal prosecution against him. The Court indicated the necessity of specific threats to enforce a particular statute as opposed to general threats to en-

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71. 401 U.S. at 42.
72. Id.
73. 401 U.S. 77 (1971). Although there is ambiguous language in *Boyle*, the opinion should probably be read as holding that the plaintiffs lacked standing rather than applying the *Younger-Samuels* requirements for an injunction. See WRIGHT, § 52 n.104 (Supp. 1972).
74. 401 U.S. at 81.
75. Id. For a further discussion of standing requirements see Spears, *supra* note 37, at 6-15, and Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972).
76. See text accompanying note 71 supra.
77. 415 U.S. at 459. The Court stated that the arrest and prosecution of petitioner's companion, Becker, was ample demonstration that petitioner's concern with arrest was not "chimerical." Poe v. Ullman, 367 U.S. 497, 508 (1961).
force the laws in order to confer standing on a citizen violating the statute.\footnote{78}

\textbf{EQUITY, COMITY AND FEDERALISM WHEN NO STATE PROSECUTION IS PENDING}

The Supreme Court in \textit{Steffel} noted that the question of intervention in the absence of a pending state prosecution had been reserved in \textit{Younger}\footnote{79} and \textit{Samuels}\footnote{80} in anticipation of the Court's recognition that the relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding.\footnote{81} The \textit{Steffel} Court said that federal intervention does not result in duplication or disruption of the state criminal justice system when no state prosecution is pending.\footnote{82} The Court noted the lack of disruption in state court proceedings when prosecutions have only been threatened. At this point, the state's full commitment of resources has not occurred. The policing and initial prosecuting functions will be disrupted, but the judicial functions of the state will not be. There is a much more obvious intrusion into the totality of the state's administration of its criminal justice system when a state court proceeding has been initiated prior to federal intervention. In addition, the lack of duplication of proceedings means there will be no delay in obtaining a final decision due to the necessity of the parties appearing in two forums simultaneously.

Furthermore, there are other reasons why comity and federalism have less vitality when there is no state prosecution pending. First, the claimant should be entitled to a free choice of forum, and it is incumbent upon the federal judiciary to give due respect to his choice of the federal forum for the hearing and decision of his federal constitutional rights.\footnote{83}

Second, there is reciprocity in the concept of comity or federalism. In other words, there is a sensitivity to the legitimate interests of both the state and national governments.\footnote{84} Therefore, deference should

\footnote{78. In Watson v. Buck, 313 U.S. 387, 399-400 (1941), the plaintiff alleged only a general threat to enforce the statute and the Court held that rendering a decision under such circumstances would be analogous to an advisory opinion. \textit{Id.} at 402. Boyle v. Landry, 401 U.S. 77, 81 (1971). See generally Spears, \textit{supra} note 37, at 6-15.}
\footnote{79. 401 U.S. at 41.}
\footnote{80. 401 U.S. at 73-74.}
\footnote{81. 415 U.S. at 462. \textit{See also} text accompanying note 63 \textit{supra}.}
\footnote{82. 415 U.S. at 462.}
\footnote{84. Younger v. Harris, 401 U.S. 37, 44 (1971).}
be given to the court, either state or federal, which first exercises juris-
diction over the controversy.85 The application of this principle will
effectuate the underlying purpose of avoiding conflict between two
courts concurrently asserting jurisdiction over the same controversy.86

The principle of comity is also recognized in the Anti-Injunction
Act87 which incorporates the concept into statutory law.88 The Act
bars the federal courts from granting an injunction to stay proceed-
ings in a state court unless the injunction is expressly authorized
by an Act of Congress or is necessary in aid of its jurisdiction, or to
protect or effectuate its judgments. However, the Court has recog-
nized the difference between threatened and pending proceedings
by holding that the statute does not preclude injunctions against the
institution of state court proceedings but only bars stays of suits al-
ready instituted.89

The federal courts have relied in large part on the state courts to
vindicate essential federal rights under the Constitution.90 The Stef-
fel Court said that federal intervention cannot be interpreted as re-
flecting negatively upon the state court’s ability to enforce constitu-
tional principles when no state criminal proceeding is pending.91
When a state prosecution is pending, there is a forum currently
available for hearing the constitutional claim, even if only incidental
to the criminal prosecution. In addition, a refusal by the federal
court to grant relief would place the plaintiff in the dilemma of either
intentionally flouting state law or foregoing what he believes to be
constitutionally protected activity in order to avoid a criminal prose-
cution.92 Anticipatory federal relief through a declaratory judgment
also has the advantage of eliminating the “chilling effect” of the stat-
ute.93 This “chilling effect” could cause a substantial number of

85. See Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345 (1930)
[hereinafter cited as Warren].
86. Id. at 359-60.
A court of the United States may not grant an injunction to stay proceedings
in a state court except as expressly authorized by Act of Congress, or where
necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
88. See Wright, § 47. It has recently been held that the Anti-Injunction Act not
only embodies the principle of comity but is also “an absolute prohibition against en-
joining state court proceedings, unless the injunction falls within one of three specifically
defined exceptions.” Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers,
supra note 85, at 366-78; Wright, § 47.
91. 415 U.S. at 462.
92. Id.
93. Traditionally, the federal courts have been available for the vindication of fed-
people to abstain from conduct thought to be proscribed by the statute. Even persons confident that their contemplated conduct would be held to be constitutionally protected would be deterred by the prospect of becoming involved in a criminal proceeding. Individuals should be able to exercise or vindicate their constitutional rights without running the risk of becoming lawbreakers. Thus, anticipatory federal relief should be granted when no state prosecution is pending "because it is the principal function of the federal courts to vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them."

In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a threatened prosecution presents only a possibility of future prosecution, and therefore there will be no timely consideration of the federal question. Furthermore, the state may delay the prosecution and allow the penalties to accumulate or merely rely on the "chilling effect" of the statute. The delay in providing a forum may result in an infringement of the plaintiff's first amendment rights. If he acquiesces to the statutory proscription, the controversy may never ripen, and a state forum will not be available to him for vindicating his federal constitutional rights. An individual should not be forced to choose between abandoning what he believes to be his constitutional rights or violating the state law and suffering the consequences. Therefore, when there is no state proceeding pending, the considerations of equity, comity and federalism have little vitality; and the balance between deference to the state and potential harm to the individual weighs in favor of the federal plaintiff.

DECLARATORY AND INJUNCTIVE RELIEF
DISTINGUISHED IN THREATENED PROSECUTIONS

Having found that the considerations of equity, comity and federalism had little vitality, the Steffel Court held that, when no state court proceeding is pending, the federal court may properly consider the

96. Id. at 120.
97. Id. at 119.
propriety of granting declaratory relief independently of a request for injunctive relief.\(^9\) Therefore, when no state prosecution is pending, the only question is whether declaratory relief is appropriate. The fact that Congress has made the federal courts the primary guardians of constitutional rights\(^9\) and the express congressional authorization of declaratory relief become the factors of primary importance.\(^10\) The Steffel Court noted the controversy concerning an individual federal judge's power to enjoin enforcement of state statutes in the wake of Ex parte Young\(^11\) and the failure of the Three Judge Court Act\(^12\) and other congressional acts\(^13\) to eliminate the widespread hostility to the injunction procedure. Furthermore, the Court pointed out that plaintiffs were dissatisfied with the necessity of obtaining an injunction to test the constitutionality of state statutes since it placed the burden of demonstrating irreparable harm upon them.\(^14\)

The Steffel Court then looked to the legislative history of the Declaratory Judgment Act\(^15\) and found that Congress plainly intended declaratory relief to act as a milder and less abrasive alternative to the injunction\(^16\) for testing the constitutionality of state statutes in cases where injunctive relief would be unavailable.\(^17\) Congress intended to provide a procedure by which a claimant could obtain preventive relief.\(^18\) Furthermore, the Court noted that the legislative history made it even clearer that the declaratory judgment

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98. Id. at 462-63.
103. 415 U.S. at 465-66. See note 23 supra and accompanying text.
104. Id. at 466. See note 27 supra and accompanying text.
was designed to test state criminal statutes when an injunction would not be appropriate.\textsuperscript{109}

The \textit{Steffel} Court then noted that it was this legislative history that formed the basis for their decision in \textit{Zwickler v. Koota},\textsuperscript{110} which held that the appropriateness and the merits of the declaratory request must be decided by the federal district court “irrespective of its conclusion as to the propriety of issuing an injunction.”\textsuperscript{111} The \textit{Steffel} Court noted that different considerations\textsuperscript{112} enter into a federal court’s decision as to whether to grant declaratory relief from those in deciding whether injunctive relief would be appropriate.\textsuperscript{113} The different considerations included, as the legislative history showed, the realization that a declaratory judgment will have a less intrusive effect on the administration of state criminal laws.\textsuperscript{114} A declaratory judgment is merely a declaration of legal status and rights; it neither mandates nor prohibits state action.\textsuperscript{115}

The Court pointed out that a declaratory judgment does not necessarily bar prosecutions under the statute as would a broad injunction\textsuperscript{116} and that the judgment may lead the state to reconsider its responsibility toward the statute. Therefore, it is a much milder form of relief than an injunction. Although persuasive, the declaratory judgment is not coercive, and noncompliance, even though inappropriate, is not contempt.\textsuperscript{117}

\begin{footnotesize}
\begin{enumerate}
\item The legislative history stated that a declaratory judgment would have been appropriate in \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925) and \textit{Village of Euclid v. Amber Realty Co.}, 272 U.S. 365 (1926), both of which involved constitutional challenges in federal courts to state statutes carrying criminal penalties, and also in \textit{Terrace v. Thompson}, 263 U.S. 197 (1923), which involved an anticipatory challenge in a federal court to the constitutionality of a state criminal statute. S. \textit{Rep. No. 1005}, 73d \textit{Cong.}, 2d \textit{Sess.} 6 (1934).
\item See notes 43 and 44 \textit{supra} and accompanying text.
\item \textit{Id.} at 254. Although \textit{Samuels v. Mackell}, 401 U.S. 66 (1971), did not mention \textit{Zwickler}, it had been thought that its importance had been diminished. \textit{Wright}, § 52 n.101 (Supp. 1972).
\item \textit{Id.} at 469. \textit{Roe v. Wade}, 410 U.S. 113, 166 (1973). In \textit{Roe}, the Court declined to decide whether the district court had properly denied plaintiffs injunctive relief restraining enforcement of the abortion statute where no prosecutions were pending. Instead, the Court affirmed the issuance of a declaratory judgment of unconstitutionality. 415 U.S. at 468. See note 106 \textit{supra} and accompanying text.
\item \textit{Id.} at 469. See note 106 \textit{supra} and accompanying text.
\item \textit{Id.} at 470. If the statute is found partially unconstitutional because of vagueness or overbreadth, and the statute is narrowly construed by the state courts, it will not be incapable of constitutional application. A declaratory judgment does not necessarily bar prosecutions under the statute. Thus, a state prosecutor may bring a prosecution under the statute and the state courts may give the statute a construction so as to yield a constitutionally valid conviction.
\end{enumerate}
\end{footnotesize}
The Court’s reliance on the legislative history of the Declaratory Judgment Act to demonstrate that Congress intended that declaratory relief be used as a less offensive procedure is well founded. The history demonstrates that the Act was designed for challenges to the constitutionality of state criminal statutes in situations where the conditions required for issuing an injunction could not be satisfied. However, the Court’s attempt to distinguish the effects of declaratory and injunctive relief is somewhat illusory since, in most instances, the practical effect of both remedies will be the same. There will still be disruption of the state’s administration of its criminal laws since the presumption is that state officials will abide by the decision of the federal court. Furthermore, the Declaratory Judgment Act provides that further necessary relief based on a declaratory judgment may be granted. Presumably, this further relief could include an issuance of an injunction by the federal court to “protect or effectuate its judgments.” The governing rules in this situation must still be developed. However, the traditional requirements for an injunction should be required in these circumstances.

Nevertheless, a declaratory judgment is a milder method for protecting constitutional rights and presents less likelihood of power confrontations between state and federal courts. In addition, a declaratory judgment that a statute is vague or overbroad would still allow prosecution of persons for conduct that clearly would not be constitutionally protected. This would give the state court an opportunity to give the statute a sufficiently narrow construction so as to yield a valid conviction. Furthermore, a state prosecutor proceeding against “hard core” conduct under a vague or overbroad statute does not risk the sanction of being found in contempt.

119. 28 U.S.C. § 2283 (1970). See note 87 supr for full text of Act. This is one of the exceptions to the prohibition against injunctions staying state court proceedings.
120. 415 U.S. at 470-71:
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. Id. at 480-84 (Rehnquist, J., & Burger, C.J., concurring).
121. This situation should probably be treated the same as when a state court proceeding is pending. See Samuels v. Mackell, 401 U.S. 66, 72 (1971). Following Dombrowski, most lower courts have used the existence of an indictment to determine when state proceedings are pending. However, one commentator has effectively argued that the first official action against an individual, such as issuance of a warrant or an arrest, is a more rational point of distinction. Note, Federal Jurisdiction and Procedure—Federal Court Intervention in State Criminal Proceedings, 85 Harv. L. Rev. 301, 308-09 (1971).
122. 415 U.S. at 470.
123. “Hard core” conduct may be defined as conduct which would be proscribed...
The Steffel Court also noted that requiring the satisfaction of the traditional prerequisites to the issuance of an injunction before granting a declaratory judgment would defeat the intent of Congress.\(^{124}\) The prerequisite of demonstrating irreparable harm has no equivalent in the law of declaratory judgments.\(^{125}\) The legislative history of the Federal Declaratory Judgment Act strongly supports the Steffel Court’s conclusion that a declaratory judgment may be granted in the absence of adequate grounds for injunctive relief.\(^{126}\) When a federal claim is premised on the Civil Rights Act,\(^{127}\) and no state prosecution is pending, principles of federalism compel, rather than preclude, intervention because Congress has assigned to the federal courts the paramount role of protecting federal constitutional rights.\(^{128}\)

The Steffel Court also held that the type of constitutional attack on the statute, whether “on its face” or “as applied,” is irrelevant when the federal court is deciding the appropriateness of declaratory relief.\(^{129}\) The respondents argued that when the constitutional attack on the statute is “as applied,” the state’s interest in unencumbered administration of its laws outweighs the interest of the federal courts in protecting the constitutional rights of a single individual. The respondents relied on the Court’s holding in Cameron v. Johnson,\(^{130}\) that state courts in which proceedings were pending should be given first opportunity to correct misapplication of the state criminal laws. The Steffel Court said that Cameron was not authority for the proposition that a federal plaintiff may not seek a declaratory judgment that the state statute is being applied in violation of his constitutional rights when no state court proceeding was pending. The potential interference with a state’s criminal laws is less significant when the constitutionality of a statute is attacked as applied.\(^{131}\)

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\(^{124}\) The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Fed. R. Civ. P. 57.


\(^{128}\) The Court distinguished that class of adjudications in which principles of federalism militate completely against federal intervention. In Great Lakes Co. v. Huffman, 319 U.S. 293 (1943), the Court held that declaratory relief against an unconstitutional state tax should be denied by the federal court. The Steffel Court distinguished anticipatory adjudication of tax cases as being in a unique class. 415 U.S. 472 n.20. See Perez v. Ledesma, 401 U.S. 82, 126-28 (1971) (Brennan, White & Marshall, JJ., concurring in part and dissenting in part). See also 28 U.S.C. § 1341 (1970).

\(^{129}\) 415 U.S. at 475.

\(^{130}\) 390 U.S. 611 (1968). See notes 45-47 supra and accompanying text.

\(^{131}\) 415 U.S. at 474.
A declaratory judgment that a statute is invalid on its face will certainly have a more significant potential for disrupting a state's administration of its criminal statutes than merely specifying a limited number of impermissible applications of the statute. A single individual who seeks vindication of his constitutional rights in a federal court is no less deserving of relief than one who suffers together with others.

CONCLUSION

The Steffel Court made it clear that the principles of equity, comity and federalism, which are compelling when a plaintiff seeks federal court intervention into a pending state prosecution, have little force when the state prosecution has only been threatened. When no state prosecution is pending, federal intervention does not result in the disruption or duplication of state court proceedings and cannot be interpreted as a negative reflection upon the state court's ability to enforce constitutional rights.

In addition, the Court held that the legislative history of the Declaratory Judgment Act plainly showed that Congress intended declaratory relief to act as a milder and less abrasive procedure to challenge state criminal statutes in cases where injunctive relief would be unavailable. When no state prosecution is pending, the only question is whether declaratory relief is appropriate.

Furthermore, different considerations enter into a federal court's decision as to whether to grant declaratory relief as opposed to those involved in deciding whether injunctive relief would be appropriate. A declaratory judgment has a less intrusive effect on the administration of state criminal laws. Therefore, the traditional requirement of "great and immediate irreparable harm" necessary for issuing an injunction should not be required for a declaratory judgment in the absence of a state prosecution. It is irrelevant in deciding the appropriateness of declaratory relief whether the constitutional attack is upon the facial validity of the statute or as it has been applied. A declaratory judgment that a statute is unconstitutional as applied will have a less disruptive effect on the state's administration of its criminal system than a declaratory judgment that the statute is invalid on its face.

The basic consideration must be the potential harm to the individual, who must choose between abandoning what he believes to be
his constitutional rights or violating the state law and suffering the consequences. Individuals should be able to exercise or vindicate their constitutional rights without running the risk of becoming lawbreakers. When no state proceeding is pending, the balance between deference to the state and potential harm to the individual weighs in favor of the federal plaintiff. Under these circumstances, the position of the federal courts, as the primary guardians of constitutional rights, compels intervention to protect the individual rights of all persons—those who want to obey the state laws as well as those prepared to defy them.

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