Journal of Criminal Law and Criminology

Volume 65 | Issue 4 Article 6

1975

Declaratory Judgments: Steffel v. Thompson, 415 U.S. 452 (1974)

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 65, No. 4
Printed in U.S.A.

DECLARATORY JUDGMENTS

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

The *Younger v. Harris* cases[1] left unclear whether the path opened by *Dombrowski v. Pfister*[2] for obtaining equitable relief in federal court was narrowed by limiting the circumstances in which a district court could grant such relief when state statutes were challenged as allegedly restricting the exercise of constitutionally protected activity.[3] The Supreme Court in *Steffel v. Thompson*[4] not only clarified *Younger* but permitted declaratory relief to plaintiffs threatened with a good faith state prosecution.

The propriety of federal court intervention into state judicial administration has been argued extensively since the landmark case of *Ex parte Young*[5] upheld the right of a federal court to enjoin state officials from enforcing an unconstitutional state law.[6] In order for a petitioner to convince the district court[7] not to abstain, he must meet the traditional equitable requirements[8] for injunctive relief or show that there is

> a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.[9]

---

[1] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971).

[2] Dombrowski v. Pfister, 380 U.S. 479 (1965).

[3] *See generally* Sedler, *Dombrowski In the Wake of Younger: The View From Without and Within*, 1972 WIS. L. REV 1 (1972); Note, *Implications of the Younger Cases For the Availability of Federal Equitable Relief When No State Prosecution Is Pending*, 72 COLUM. L. REV. 876 (1972); Case Note, *Federal Court Intervention in State Criminal Proceedings*, 85 HARV. L. REV. 301 (1971).

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

[5] *Ex parte* Young, 209 U.S. 147 (1908).

[6] The Court in *Ex parte Young* held that

> individuals who as officers of the state, are clothed with some duty in regard to enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected, an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action.

209 U.S. at 156.

This area of federal intervention was initiated through the civil rights legislation of the late 1800s and is exemplified today by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) (1948), giving the federal courts the power to consider action taken by individuals under color of law, custom, or usage. 28 U.S.C. § 1343(3) reads:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . (3) To redress the deprivation: Under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. § 1983 (1971) reads:

> 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 persons 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 any action at law, suit in equity, or other proper proceeding for redress.

For a more complete history of the expansion of federal judicial power to protect the constitutional rights of citizens see Zwickler v. Koota, 389 U.S. 241, 245–249 (1969).

[7] In cases which injunctive relief is requested 28 U.S.C. § 2281 is applicable. The statute reads:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statutes, shall not be granted by any district court judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[8] The two important traditional requirements for granting of injunctive relief are exhaustion of state remedies and demonstration of irreparable injury. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeanette, 319 U.S. 157 (1943); *Ex parte* Young, 209 U.S. 147 (1908).

[9] Maryland Casualty Co. v. Pacific Coal Co., 312 U.S. 270, 293 (1941). This is the generally

plus demonstrate that the policy against federal court interference with state enforcement of their laws is inapplicable.[10] The extent to which this policy of comity and federalism compels the federal district courts to abstain from hearing challenges to the constitutionality of state statutes[11] has been the major issue for federal petitioners seeking to obtain equitable relief from the enforcement of such laws.

Younger v. Harris made clear that a federal petitioner with a pending state prosecution had to show bad faith enforcement by state officials, or, in absence of bad faith, demonstrate that extraordinary circumstances were present establishing the necessary irreparable injury.[12] Justice Black writing for the majority in *Younger* emphasized that the usual requirement of irreparable injury was not sufficient for injunctive relief when the policy of comity was considered. The Court decided, referring to *Fenner v. Boykin*,[13] that the irreparable injury must be "both great and immediate" before interference with state criminal proceedings is appropriate.[14] According to *Younger*, a pending prosecution under a statute unconstitutional on its face was not sufficient for injunctive relief because the constitutional question could be raised at the state level. Also, the injury was not considered irreparable because it was no more than any other criminal defendant must incur.[15]

---

accepted test for the issuance of a declaratory judgment. Justice Brennan stated in his separate opinion in *Perez v. Ledesma:*

> Ordinarily a declaratory judgment will be appropriate if the case or controversy requirements of Article III are met, if the narrow special factors warranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute.

401 U.S. 82, 121 (1971).

[10] This policy of non-intervention was first expressed in a 1793 Act which stated that no injunction could be granted to stay proceedings in any state court. 1 Stat. 335, c. 22, § 5. *Ex parte Young* affirmed in its language the policy of this Act. 209 U.S. at 162. Today the anti-injunction statute, found at 28 U.S.C. § 2283 (1948), is essentially like the 1793 Act with the allowance for some exceptions. The statute reads:

> 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.

This abstention policy, sometimes referred to as comity or federalism, is by no means only statutory. The anti-injunction statute is silent as to declatory judgments and cases of only threatened prosecutions where no proceeding has been instituted.

Generally, it is a policy of deference to the state courts to avoid duplication of proceedings, to reduce any competition for jurisdiction, and to keep at a minimum any tension between the systems by not interfering with a state's good faith administration of their criminal laws. The abstention doctrine is applied narrowly when the constitutionality of state statutes are challenged and is separate from the questions of case or controversy, standing, and ripeness which must be answered for every case. *See* O'Shea v. Littleton, 414 U.S. 488 (1974); Boyle v. Landry, 401 U.S. 77 (1971). The argument is that the state courts are committed to upholding the federal constitution and should be trusted to carry out this responsibility. *See generally* Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation,* 83 HARV. L. REV. 1870 (1970). The increased federal court involvement with challenges to state statutes has stemmed from the Congressional intent to protect civil rights as evidenced by the passage of 42 U.S.C. § 1983 (1871). The Court expressed this well in *Zwickler v. Koota:*

> In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissable merely because state courts also have the solemn responsibility, equally with federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the U.S. . . .'

[3] 289 U.S. at 248.

Justice Black, with a different perspective in *Younger,* defined comity as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44.

[11] *See* 28 U.S.C. §§ 2281 & 2284.

[12] 401 U.S. at 53. As an example of an extraordinary circumstance the Court quoted from Watson v. Buck, 313 U.S. 387 (1941):

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

313 U.S. at 402.

[13] 271 U.S. 240 (1926).

[14] Younger v. Harris, 401 U.S. 37, 46 (1971).

[15] *Id.* at 49. Justice Black wrote,

> we hold that the *Dombrowski* decision should not be regarded as having upset the settled

Samuels v. Mackell,[16] decided with *Younger,* equated the effect of a declaratory judgment with that of an injunction when a state court case was pending. Therefore, the principles of equity and comity required the same standards of bad faith enforcement on the part of state officials and irreparable injury "both great and immediate" before the district court would grant declaratory relief.[17]

The language of *Younger* and *Samuels* arguably implies that bad faith enforcement would be required for equitable relief when there is no pending state prosecution. This interpretation limits *Dombrowski*[18] to the fact situation presented in which bad faith was clearly demonstrated.[19] The federal plaintiff in *Dombrowski* alleged two major points. First, that the threatened prosecutions were brought in bad faith to discourage civil rights activities.[20] Second, that the statutes being challenged were overbroad and vague regulations of expression.[21] The Court in *Dombrowski* indicated that this second allegation established the threat of irreparable injury required by the traditional doctrines of equity.[22] The fact that the statutes were overbroad and vague meant the state courts could not effectively narrow the language in one single criminal prosecution. The Court concluded that in the area of freedom of expression an individual should not be subjected to the "uncertainties and vagaries" of criminal prosecution and that prior to a limiting construction individuals should not be prosecuted. The theory here was that the "chilling effect" on the petitioner's activity[23] compelled equitable relief to the same extent as bad faith enforcement. Justice Black, however, suggested that *Dombrowski* could have been decided on bad faith harassment alone, thereby accepting the overbreadth language in *Dombrowski* as dicta.[24]

Dombrowski and *Younger*[25] left several questions unanswered as to the propriety of federal intervention in different fact situations. Among these questions was whether the showing of bad faith was essential to the decision in *Dombrowski,* or could overbreadth on its face be alternatively the sole basis for this decision? Could an allegation of unconstitu-

doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute 'on its face' abridges First Amendment rights.

401 U.S. at 53.

The Court, in Douglas v. City of Jeannette, 319 U.S. 157 (1943), advanced the theory that the injury in a circumstance such as in *Younger* is that which is "incidental to every criminal proceeding brought lawfully and in good faith" and to withdraw the "determination of guilt from the state courts" would not afford the petitioners "any protection which they could not secure by prompt trial and appeal pursued to this Court." 319 U.S. at 164.

[16] 401 U.S. 66 (1971).

[17] *Id.* at 73.

[18] The Court in *Dombrowski* avoided confrontation with the anti-injunction statute, 28 U.S.C. § 2283, by concluding that the statute did not "preclude injunctions against the institution of state court proceedings, but only bars stays of suits already instituted." 380 U.S. at 484 n. 2.

[19] 380 U.S. at 485–88.

[20] Id. at 490.

[21] *Id.*

[22] *Id.* at 491.

[23] The Court said:

> For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. . . . If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. . . . we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

380 U.S. at 486–487.

See Zwickler v. Koota, 389 U.S. at 252; *Ex parte* Young, 209 U.S. at 147.

[24] The Court in *Younger* said:

> The District Court, however, thought that the *Dombrowski* decision substantially broadened the availability of injunctions against state criminal prosecutions and that under that decision the federal courts may give equitable relief, without regard to any showing of bad faith, or harrassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment. . . . But as we have already seen such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under long established standards.

401 U.S. at 50.

[25] *See* note 1 *supra.*

tionality as applied be sufficient to outweigh the abstention policy in situations where the petitioner has no pending state prosecution? In addition, were the same equitable requirements for the granting of injunctive relief necessary for declaratory relief when the federal plaintiff had no pending prosecution in the state? Finally, assuming again that the federal plaintiff had no pending state prosecution and that equitable relief was appropriate, was a declaratory judgment preferable to an injunction because it was considered a less coercive remedy? [26]

Subsequent to *Younger* a number of cases [27] discussed some of these questions. In 1972 a federal petitioner, in *Lake Carriers Association v. MacMullan*,[28] challenged a Michigan law carrying a criminal penalty interpreted by the state attorney general as prohibiting the discharge of sewage, whether treated or untreated, in Michigan waters and as requiring vessels with maritime toilets to have adequate storage devices. The plaintiff alleged that this was beyond the police power and unconstitutionally vague. Justice Brennan, in his majority opinion, stated that the policy of comity behind the *Younger* and *Samuels* decisions had "little force in the absence of a pending state prosecutions." [29] He indicated that the exercise of court jurisdiction was appropriate if the standards for declaratory or injunctive relief were satisfied.[30] This conclusion, however, may be considered as dicta since the Court held that abstention was appropriate on other grounds.[31]

Roe v. Wade [32] and *Doe v. Bolton* [33] both granted declaratory relief to federal petitioners with no pending state prosecutions involved. Little discussion was offered on the abstention question. Arguably, the fact situation in *Roe* evidenced the possibility of grave and tangible injury which could be placed in Justice Black's "extraordinary circumstance" category.[34] In *Doe,* however, the Court granted declaratory relief in a special circumstance without even an allegation of threatened prosecution. The federal petitioners were physicians who had not been prosecuted nor threatened with prosecution under the anti-abortion statutes in question. The unique aspect of the statute, however, was that physicians were the only individuals against whom the statute applied. The threat of prosecution emerging from this circumstance was the reason for granting relief.[35] These post-*Younger* cases did not provide any definitive answers to the questions on district court abstention raised by *Dombrowski* and the *Younger* cases. In *Steffel v. Thompson,* the Supreme Court again reviewed several of these questions.

The major issue decided by a unanimous Court in *Steffel,* with Justice Brennan writing the majority opinion, was "whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending and a showing of bad faith enforcement or other special circumstances has not been made." [36] Petitioner invoked the Civil Rights Act, 42 U.S.C. § 1983, and requested a declaratory judgment pursuant to 28 U.S.C. § 2201–2202.[37] Peti-

[26] *See* Steffel v. Thompson, 415 U.S. 452 (1974); Perez v. Ledesma, 401 U.S. 82 (1972) (Brennan, J., separate opinion).

[27] Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolten, 410 U.S. 179 (1973); Lake Carriers Association v. MacMullan, 406 U.S. 498 (1972).

[28] Lake Carriers Association v. MacMullan, 406 U.S. 498 (1972).

[29] *Id.* at 509.

[30] *Id.*

[31] *Id.* at 511–512.

[32] Roe v. Wade, 410 U.S. 113 (1973).

[33] Doe v. Bolton, 410 U.S. 179 (1973).

[34] Younger v. Harris, 401 U.S. 37, 53 (1971). *See* Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe,* 48 N.Y.U.L. REV. 965 (1973).

[35] The Court said:

> The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

410 U.S. at 188.

[36] 415 U.S. at 454.

[37] *See* note 6 *supra* for 42 U.S.C. § 1983.

28 U.S.C. § 2201 provides:

> 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

tioner had requested injunctive relief at the district court level but only appealed from the denial of a declaratory judgment.[38]

On October 8, 1970, the petitioner with others had been distributing leaflets protesting the United States involvement in the Viet Nam War on an exterior sidewalk of a Georgia shopping center. Employees of this shopping center requested them to leave. After refusing, the police were called in and threatened to arrest the group leafleting. Petitioner left only to return two days later to distribute leaflets again. After another police warning the petitioner left while a fellow protester was arrested on a charge of criminal trespass in violation of 26–1503.[39]

The district court denied all relief finding no bad faith and taking the broad language of *Younger* as requiring a showing of bad faith even when no state prosecution was pending.[40]

On the denial of declaratory relief, the Court of Appeals for the Fifth Circuit recognized that *Younger* was explicitly limited to pending state prosecutions, but reasoned that the language required bad faith to establish irreparable injury in cases with no pending state prosecution. The court then cited *Samuels* to support the conclusion that declaratory relief required the same degree of injury as injunctive relief.[41]

The Supreme Court in reversing the circuit court's decision held:

> that regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute on its face or as applied.[42]

Initially, the Court considered whether there was an actual controversy as required by Article III of the Constitution and the express terms of the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202. Justice Brennan asserted that the two threats of prosecution to the petitioner plus the prosecution of a companion established a genuine threat of prosecution. As in previous cases,[43] the Court emphasized that it was not necessary for petitioner to actually risk prosecution to challenge the validity of a state statute imparing his or her constitutionally protected rights. Nevertheless, the Court was uncertain whether there was ripe controversy since changes in the Viet Nam War policy may have lessened the petitioner's desire to leaflet. This issue was remanded to the district court for further consideration.[44]

The Court rejected the court of appeals rationale for deciding that a declaratory judgment was not appropriate. Justice Brennan said that the policy of comity and federalism did not apply to a federal petitioner with no pending state prosecution and then noted *Younger* and *Samuel's* explicit limitation to

---

force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides:

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.

[38] Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972).

[39] GA. CODE ANN. § 26–1503 (1972). The statute provides:

(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(b) A person commits criminal trespass when he knowingly and without authority:

(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

(2) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor.

[40] Becker v. Thompson, 334 F. Supp. 1386 (N.D. Georgia 1971).

[41] Becker v. Thompson, 459 F.2d 919 (5th Cir. 1972).

[42] 415 U.S. at 475.

[43] *See* Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); *Ex parte* Young, 209 U.S. 147 (1908).

[44] 415 U.S. at 460.

cases with pending prosecutions.[45] The Court said:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal system; nor can federal intervention in that circumstance be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[46]

Justice Brennan stated that if no remedy was offered in this situation, the petitioner must either face arrest or refrain from exercising his first amendment freedom of expression.[47]

The Court indicated that two significant factors were involved in considering the appropriateness of declaratory relief. One was its express authorization by Congress[48] and the other that it afforded a "less harsh and abrasive remedy than the injunction . . . ."[49] Justice Brennan argued that the states were dissatisfied with injunctive relief because it totally restricted them from future review[50] and that plaintiffs were reluctant to pursue injunctive relief because of the difficulties incurred in meeting the traditional equity requirement of irreparable injury. He emphasized that the Federal Declaratory Judgment Act[51] was enacted to serve as an alternative to injunctive relief and therefore involved different judicial considerations before relief was granted.[52]

[45] *Id.* at 461–462. The Court said:

> When no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief.

In *Younger* the Court said:

> We express no views about the circumstances under which federal courts may act when there is no prosecution pending in the state courts at the time the federal proceeding is begun.

401 U.S. at 41.

In *Samuels* the Court said:

> We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun.

401 U.S. at 73–74.

If comity was not at issue at all, however, this case would appear to depend only upon the meeting of the equitable standards for declaratory relief. As is implied by Brennan's opinion there must be some intrusion into state affairs even in nonpending situations because he discusses at length the less coercive nature of a declaratory judgment as opposed to injunctive relief. *See* text p. 489 *Infra. See also* Justice Brennan's separate opinion in Perez v. Ledesma, 401 U.S. 82 (1971).

[46] 415 U.S. at 462.

[47] The opinion stated:

> In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462.

[48] 415 U.S. at 463. *See* Perez v. Ledesma, 401 U.S. 82, 104 (1971) (separate opinion).

[49] 415 U.S. at 463.

[50] If a statute is enjoined from prosecution the state prosecutor can not bring any further action pursuant to that law. If he does, contempt charges can be brought against him. This type of relief in effect renders the law void. 415 U.S. at 465–470. Justice Brennan in his separate opinion in *Perez* wrote:

> An injunction barring enforcement of a criminal statute paralyzes the State's enforcement machinery: the statute is rendered a nullity. A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action.

401 U.S. at 82.

The Senate report stated:

> The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. . . .

S. REP. No. 1005, 73d Cong., 2d Sess., 2–3, (1934).

[51] 28 U.S.C. §§ 2201–2202 (1948). *See* note 37 *supra.*

[52] 415 U.S. at 469. *See* Zwickler v. Koota, 389 U.S. 241 (1967). The Court in *Zwickler* said:

> For a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.

One consideration was that the declaratory judgment was less intrusive upon the state administration of criminal laws. If a statute was enjoined from enforcement and a prosecutor then brought an action he would be subject to contempt proceedings and the action would cease as *res judicata*. State officials, however, could still bring an action subsequent to a declaratory judgment and no contempt proceedings would be possible.[53] Assuming the statute in question was not unconstitutional "in toto," state action was not totally precluded by a declaratory judgment. The Court suggested that the statute could be declared only partially unconstitutional thus allowing for a narrower construction by the state courts.[54]

389 U.S. at 254.

[53] 415 U.S. at 469–471. The Court said:

> If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would.

415 U.S. at 470.

> Though it (declaratory relief) may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.

415 U.S. at 471.

[54] If a statute is declared unconstitutional in part this represents the opinion of the Court as to the "legal status and rights" of the petitioner. If a state prosecutor feels in good faith that the court was incorrect or that the statute may be given a more limited view, the possibility of bringing action still remains. The statute could be narrowed through a prosecution without having to go through a separate civil proceeding to obtain a modification of the ruling. "The persuasive force of the court's opinion may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed. . . ." Perez v. Ledesma, 401 U.S. 82, 125 (1971) (separate opinion).

But see Samuels v. Mackell, 401 U.S. 66, 70 (1971) The Court said:

> Although the declaratory judgment sought by plaintiffs was a statutory remedy rather than a traditional form of equitable relief, the Court made clear that a suit for declaratory judgment was nevertheless 'essentially an equitable cause of action,' and was 'analogous to the equity jurisdiction in suits *quia timet* or for a decree quieting title.' . . . the legislative history of the Federal Declaratory Judgement Act of 1934 . . . showed that Congress had explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles.

In the absence of irreparable injury[55] a federal petitioner could obtain judicial determination of his rights through a declaratory judgment rather than face prosecution.[56] Even if the judgment was not handed down by the Supreme Court it still would act as a strong force if the state decided to prosecute, thereby serving the petitioner's needs by lessening any chilling effect. Justice Brennan suggested that there may be some *res judicata* effect also, but did not expand upon this point.[57]

Another consideration was that irreparable injury and exhaustion of state remedies were not required for declaratory relief. Otherwise, the Federal Declaratory Judgment Act would have been "pro tanto" repealed.[58] The traditional equitable standards would only apply to declaratory relief when a prosecution was

[55] The factor of a possible prosecution alone was not considered to be enough to establish irreparable injury thus precluding relief for many petitioners. *See* note 15 *supra*.

The Senate report on the Declaratory Judgment Act reads:

> The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of fear of incurring damages. So now it is often necessary, in absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity.

S. REP. No. 1005, 73d Cong., 2d Sess., 2–3, 6 (1934).

[56] The Court said,

> engrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.

415 U.S. at 471.

[57] 415 U.S. at 470–471. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). In both *Doe* and *Roe* the Court did not consider whether injunctive relief was appropriate because they assumed the respective states' authorities would give "full credence" to the declaratory relief.

[58] *Id.* at 471. *See* Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937); Wulp v. Corcoran, 454 F.2d 826, 832 (1972).

pending and comity was the important policy requiring abstention.[59]

Justice Brennan rejected the argument that a declaratory judgment could only be granted when statutes were unconstitutional on their face. He indicated that abstention may be more appropriate when the statute is attacked as applied rather than on its face. He recognized, however, that fact situations such as in *Steffel* may compel declaratory relief when the challenge is to the application. This intimates that a well established threat of prosecution may have to be shown before declaratory relief will be granted when the statute is challenged only as applied.[60] The Court concluded that the petitioner here could appropriately be granted declaratory relief pending the determination of the ripeness issue by the district court on remand.

Steffel left a number of questions unanswered. There was no indication whether injunctive relief was appropriate when a federal petitioner had no pending state prosecution and no showing of bad faith was made. In other words, was injunctive relief possible when a federal petitioner was threatened by a good faith prosecution with statutes either overbroad and vague on their face as the language in *Dombrowski* implied,[61] or unconstitutional as applied which the holding of *Steffel* may infer? The issue of abstention is entirely separate from the question of whether the equitable standards for relief have been met.[62] Therefore, if the policy of comity and federalism are not at issue, the only question to be addressed is whether the standards for injunctive relief or the standards for declaratory relief have been satisfied, depending upon which remedy is requested. This would mean that the requirements of bad faith and irreparable harm are compelled for equitable relief only when a state prosecution is pending. This is supported by the language in *Steffel* which indicated that the principles of federalism and comity were not at issue when there was no state prosecution pending.[63] Therefore, it may follow that the only requirement for injunctive relief in cases without pending state prosecution would be the traditional equitable standards.[64]

In contrast, one could argue that the question of abstention was still at issue even when no state prosecution is pending because any form of equitable relief which passes judgment on a state statute is still a significant intrusion into state affairs.[65] Justice Brennan's extensive discussion of declaratory relief as a "mild" remedy in *Steffel* would lend support to an argument that declaratory relief is preferable to injunctive relief in a situation where no prosecution is pending. As previously discussed, one of the "mild" aspects of declaratory relief was that state officials were not pre-

[59] *Id.* at 472. *See* Samuels v. Mackell, 401 U.S. 66 (1971); Great Lakes Co. v. Huffman, 319 U.S. 293 (1943).

[60] Justice Brennan wrote, "The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others." 415 U.S. at 474–475.

[61] 380 U.S. at 486–487. *See* note 23 *supra.* This kind of implication involves rejecting Justice Black's limitation of *Dombrowski* to bad faith and accepting the overbreadth allegations in *Dombrowski* as reason alone for relief. *See* note 24 *supra.* The Court in *Zwickler v. Koota* wrote:

> These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.

389 U.S. at 252.

See Perez v. Ledesma, 401 U.S. 82, 118 (1971) (separate opinion).

[62] *See* note 52 *supra.*

[63] 415 U.S. 461–462.

[64] This line of reasoning assumes that the Declaratory Judgment Act was enacted primarily to prevent abuse of injunctive relief rather than to provide a less intrusive remedy for situations when state laws are in question. In other words, if the declaratory judgment was to provide protection when irreparable harm may not be established an injunction would still be appropriate when this kind of injury was shown. The Senate report stated:

> The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment.

S. REP. No. 1005, 73d Cong., 2d Sess., 2–3, 6 (1934).

[65] Justice Brennan wrote in his separate opinion in *Perez,* "There is, of course, some intrusion into a state's administration of its criminal laws whenever a federal court renders a declaratory judgment upon the constitutionality of a state criminal enactment." 401 U.S. at 104.

cluded from bringing future action. It is not clear, however, whether the state is precluded from future action in the case of injunctive relief, thus throwing some doubt on any conclusion that declaratory relief is the preferable remedy. In *Dombrowski,* Justice Brennan indicated that after an injunction had been granted the state could obtain, in a non-criminal proceeding, a narrower construction of the enjoined statute which would permit future prosecution.[66] He added that after a limiting construction was obtained in order to modify an enjoined statute, it could be used to prosecute individuals for conduct occurring prior to the construction.[67]

Considering whether this decision opened a new and less restrictive path to federal court adjudication, Justice Stewart, with the Chief Justice concurring, stated that individuals who even "genuinely feel chilled" by a statute's existence would not necessarily obtain equitable relief. A genuine controversy and an objective threat of criminal prosecution was required. In *Steffel* this objective threat was shown by the two threats of prosecution towards the petitioner and the arrest of his companion for engaging in the same activity the petitioner had engaged in.[68]

Steffel did not decide any question of the subsequent effect of a declaratory judgment upon prosecutions brought pursuant to statutes declared unconstitutional. However, Justices White and Rehnquist debated the issue in their respective concurring opinions. Justice White concluded that a declaratory judgment should be *res judicata* in a prosecution of the federal plaintiff subsequent to his receiving declaratory relief in the federal courts. Justice White argued that a declaratory judgment should "have the force and effect of a final judgment or decree" [69] so as not to become an advisory opinion. He indicated that further state action could then be enjoined.[70]

Although not mentioned in Justice White's opinion, the explicit exception in the anti-injunction statute allowing injunctive relief to "protect or effectuate its judgment" supports his position.[71] Arguably, this exception is not fully subject to the policy of comity because it is a specific indication of the intent of Congress to enforce judgments of the judicial branch. This reasoning may also follow when the case is brought under 42 U.S.C. § 1983 because that statute has been held to be an explicit exception to 28 U.S.C. § 2283.[72]

Justice Rehnquist rejected the theory that a declaratory judgment was *res judicata* in subsequent state proceedings or that an injunction could be granted to support such declaration. He also rejected the idea that prosecution of a statute declared unconstitutional could be considered per se bad faith in order to meet the *Younger* test for injunctive relief.[73] He argued that this result disregarded Justice Brennan's conclusion that the declaratory judgment was a milder remedy which was less intrusive upon the state judicial process. Justice Rehnquist argued that if a declaratory judgment was *res judicata* for a subsequent prosecution pursuant to the already declared unconstitutional statute, the principle of *Samuels* would be totally circumvented and the policy of comity and federalism would be avoided merely by first getting declaratory relief.[74] The reason for not interfering with state pending prosecution was not based on "the closeness of the constitutional issue nor on the confidence which the federal court possesses in the correctness of its conclusions on the constitutional point" but on the principle of creating a better relationship with the state court system, said Justice Rehnquist.[75]

Steffel added significantly to the clarification of federal abstention by holding that where there was no pending state prosecution and a genuine threat of prosecution was shown pursuant to a statute unconstitutional on its face or as applied, federal abstention was not com-

[66] 380 U.S. at 491.
[67] *Id.* at 491 & n.7.
[68] 415 U.S. at 476 (Stewart, J., concurring).
[69] Id. at 477–478.
[70] This would be pursuant to 28 U.S.C. § 2202. *See* note 37 *supra.*
[71] 28 U.S.C. § 2282 (1948). *See* note 10 *supra.*
[72] Mitchum v. Foster, 407 U.S. 225, 237–238 (1972).
[73] 401 U.S. at 52–54.
[74] Justice Rehnquist wrote:
> It would all but totally obscure these important distinctions if a successful application for declaratory relief came to be regarded, not as the conclusion of a lawsuit, but as a giant step towards obtaining an injunction against subsequent criminal prosecution.

415 U.S. at 481 (concurring opinion).
[75] *Id.* at 481–482.

pelled and granting declaratory relief was appropriate. Future petitioners would be well advised to heed Justice Stewart's warning that a genuine threat of prosecution should be established, as was clearly shown in *Steffel*.[76] Any fact situation not as clear may jeopardize federal review especially where the challenge is to the statute as applied.[77]

[76] 415 U.S. at 476.

[77] *Id.* at 474, 476, & n.21. Justice Stewart, in his concurring opinion, stated: "Cases where such a genuine threat can be demonstrated will, I think, be exceedingly rare."