Spring 1975

Declaratory Judgments: Federal Anticipatory Relief from State Criminal Statutes After Steffel v. Thompson

Christopher A. Bloom
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Criminal Procedure Commons, and the Legislation Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol50/iss3/8

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Declaratory Judgments: Federal Anticipatory Relief from State Criminal Statutes After Steffel v. Thompson

When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union . . . .

—Publius

In Steffel v. Thompson the Supreme Court addressed the question whether declaratory relief is precluded when a good faith prosecution for violation of a state criminal statute has been threatened but is not pending. Traditionally, declaratory relief had been thought available only in circumstances where injunctive relief could also be obtained, requiring a showing of bad faith enforcement or other special circumstances. But in Steffel the Supreme Court unanimously held:

[Regard]less 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 state criminal statute . . . .

While the Court clearly said that a declaratory judgment is available in these circumstances, the majority opinion did not discuss the effect of the federal declaratory judgment in subsequent litigation, leaving that subject to be debated in two concurring opinions.

Nevertheless, the full impact of the Steffel decision will depend upon the ultimate resolution of the problem of the effect of a declaratory judgment in subsequent litigation. This note will review Steffel, explore the general res judicata effects of declaratory judgments, and examine the possibility of using a declaratory judgment as the basis for injunctive relief.

1 The Federalist No. 82, at 514 (H. Lodge ed. 1888) (A. Hamilton) (small capitals in original).
3 Id. at 454.
6 415 U.S. at 475.
7 Id. at 478 (White, J., concurring); id. at 479 (Rehnquist, J., concurring).
The narrow problem which faced the Supreme Court in the Steffel case was whether, under the Declaratory Judgment Act, a federal forum was available to determine the constitutionality of a state criminal statute where no state prosecution had been instituted, and where injunctive relief was not requested.

The facts of the case showed that Steffel and other members of a group opposed to the Vietnam war had been distributing leaflets on an exterior sidewalk to an Atlanta shopping center. The police were summoned, and when they threatened to make arrests, the members of the group departed. Two days later Steffel returned to the shopping center with Sandra Lee Becker and again distributed leaflets. Once again the police were summoned and threatened them with arrest. Steffel stopped in order to avoid arrest, but Becker continued and was arrested for violating the Georgia criminal trespass statute. Becker immediately brought suit for declaratory relief from the threatened application of the state criminal trespass statute.

9 GA. CODE ANN. § 26-1503 (1972):
   (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.
Prior to Becker’s withdrawal, the district court dismissed the suit for declaratory and injunctive relief. Becker v. Thompson, 334 F. Supp. 1386 (N.D. Ga. 1971), and Steffel appealed. On appeal, a panel of the Fifth Circuit affirmed the district court’s dismissal of the declaratory judgment action. 459 F.2d 919 (5th Cir. 1972). The Supreme Court unanimously reversed the two lower courts, finding on the facts that the circumstances of the case were appropriate for federal declaratory relief. Steffel v. Thompson, 415 U.S. 452 (1974).
Aside from anticipatory relief, the only way an individual may challenge the constitutionality of a state criminal statute is to pursue "self-help"—that is, continue the conduct allegedly in violation of the statute and, if prosecuted, raise the unconstitutionality of the statute as a defense. Steffel and Becker made deliberate decisions as to the costs and benefits of their course of conduct. They had gone to the shopping center with lawyers, apparently anticipating arrest. Unlike Steffel, Becker chose the self-help remedy—arrest and prosecution in state court. Since there is a criminal penalty for violation of the statute, the cost of seeking constitutional vindication in this manner may be great. In fact, in many cases the cost of vindication through the self-help remedy may be so great that no individual will be willing to challenge a potentially unconstitutional statute, with the result that constitutionally protected conduct may be prevented.

11 "Cost" in this context is the chance of the penalty being imposed (the chance of the statute not being found unconstitutional) multiplied by the severity of the potential penalty. No matter how well qualified the individual's counsel is, the vagaries of constitutional law necessarily render advice on specific conduct uncertain. There is no situation where the individual can act in violation of the statute and be certain that no penalty will be imposed. Some chance of punishment remains even if counsel's advice is perfect, since the possibility exists of a procedural misstep or a discretionary refusal to review an erroneous lower court decision when appealed to the United States Supreme Court. So long as there is a chance that some penalty will attach for violation of the statute, there is a "cost" imposed on the person who violates it. See Birmingham, A Model of Criminal Process: Game Theory and Law, 56 Cornell L. Rev. 57 (1970). Professor Birmingham has constructed a game theory model that relates the various factors an individual considers when deciding whether to violate a criminal statute. In applying this model, the expected value of a given course of conduct to an individual is expressed as a function of five factors:

1. Utility to the individual of not violating the statute and not being punished.
2. Increase in utility to the individual from violating the statute without regard to punishment.
3. Loss in utility to the individual from punishment without regard to conduct.
4. Likelihood of punishment to the individual not violating the statute.
5. Likelihood of punishment resulting from violation of the statute.

The difference between the conduct of Becker and that of Steffel can be explained in terms of their different perceptions of the gain of utility from the conduct or of the loss of utility from the punishment.


13 Since the unconstitutionality of a statute "as applied" is harder to show, the perceived "costs" of a self-help constitutional challenge to a statute "as applied" is greater than a self-help challenge to a statute void on its face. Judge Tuttle, concurring in the Fifth Circuit panel's opinion, argued that if Steffel had challenged the Georgia statute as unconstitutional on its face, rather than unconstitutional "as applied," the federal court should be more willing to provide anticipatory relief in the form of a declaratory judgment. Becker v. Thompson, 459 F.2d 919, 923–27 (5th Cir. 1972). Tuttle's argument was rejected by the Supreme Court. 415 U.S. at 475. If the argument had been accepted, anticipatory relief would be denied when it is most valuable to the individual. Moreover, it would be denied under circumstances where a holding of unconstitutionality
Anticipatory Relief

Federal courts have long provided a forum for constitutional adjudication prior to actual violation of a statute, so that potentially unconstitutional statutes may be challenged without requiring individuals to act at their peril. The federal forum is available when the circumstances are appropriate to grant either injunctive or declaratory relief, or both. The injunctive remedy has been available since the Supreme Court held in *Ex parte Young* that a federal district court had inherent power to grant an injunction preventing state officials from enforcing unconstitutional state statutes. Congress and the courts subsequently restricted the availability of this relief in order to avoid impairing the states' ability to enact and enforce legitimate laws. Following *Ex parte Young*, Congress passed laws requiring the formation of three-judge district courts which alone were empowered to issue injunctions against enforcement of state statutes, and providing expedited direct appeals from these courts to the Supreme Court. The courts, mainly by practicing abstention and by requiring a showing of irreparable harm, have also limited the availability of injunctive relief.

The declaratory judgment remedy has been available only since 1934. Initially, the Supreme Court said that a declaratory judgment holding a state criminal statute unconstitutional was available only under circumstances where injunctive relief could also be obtained. The rationale was that if a declaratory judgment were allowed where an injunction would not be, a plaintiff prevailing in the declaratory judgment action could circumvent the requirements for an injunction by petitioning for the injunction as "[f]urther necessary or proper relief" based solely on the declaratory judgment. However, not all the re-

14 Courts variously have imposed three requirements:
1) Actual controversy between the litigants (*see* text at notes 44-61 *infra*),
2) Irreparable injury to the plaintiff (*see* text at notes 119-125 *infra*),
3) Principles of federalism (*see* text at notes 62-73 *infra*).
16 *Id*.
18 *Id.* § 1253.
19 *See* text at notes 122-28 *infra*.
requirements for an injunction have ever been applied to declaratory judgments. For example, although only a three-judge court may enjoin a state statute, the Supreme Court has held that a single district court judge could declare a state statute unconstitutional, because Congress did not apply the requirements of the three-judge court procedures for injunctive relief to declaratory judgments.24

As long as a declaratory judgment was available only in circumstances where an injunction was also available, both forms of relief were always requested. Thus, distinguishing between the two remedies was rarely important. In Steffel, however, the Supreme Court held that a declaratory judgment is available in circumstances where an injunction may not be, because a declaratory judgment has a "less intrusive effect on the administration of state criminal laws."25 Once the Court decided that a declaratory judgment was appropriate under these circumstances, the question that naturally arises is what effect the declaratory judgment will have in subsequent proceedings.

The Concurring Opinions in Steffel

Justice Rehnquist, in a concurring opinion in Steffel joined by Chief Justice Burger, questioned "whether the granting of a declaratory judgment by a federal court will have any subsequent res judicata effect or will perhaps support the issuance of a later federal injunction."26 While he is content to let persons threatened with state criminal prosecutions seek a declaratory judgment and forgo the offending conduct,27 he does not think that in passing the Declaratory Judgment Act "Congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct."28 An arrest for the offending conduct prior to resolution of a suit for declaratory judgment "would constitute a pending prosecution and bar declaratory relief under the principles of Samuels."29 Also, according to Rehnquist, "A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions."30 Even if the petitioner is granted a declaratory judgment, the judgment should not be res judicata in a later state prosecution and evidently

Douglas rejected this rationale. Stewart and Blackmun also rejected it in the companion case of Perez v. Ledesma, 401 U.S. 82, 89 (1971) (concurring).

25 415 U.S. at 469.
26 Id. at 479 (Rehnquist, J., concurring).
27 Id. at 478.
28 Id. at 480.
29 Id.
30 Id. at 482.
should have only stare decisis effect in subsequent federal proceedings.\textsuperscript{31} Moreover, an injunction should not be issued on the basis of the declaratory judgment;\textsuperscript{32} nor can the threatened individual who is in fact subsequently arrested return to federal court. Instead, Justice Rehnquist would leave him to "raise the federal declaratory judgment in the state court for whatever value it may prove to have."\textsuperscript{33}

Justice White, in a separate concurring opinion,\textsuperscript{34} squarely disagreed. In his opinion, "[T]here is every reason for not reducing declaratory judgments to mere advisory opinions."\textsuperscript{35} Thus, White asserts that a final declaratory judgment should be accorded res judicata effect in any later prosecution of the same conduct.\textsuperscript{36} Nor is he willing to agree with Rehnquist "that the federal court, having rendered a declaratory judgment in favor of the plaintiff, could not enjoin a later state prosecution . . . ."\textsuperscript{37} Finally, White thinks Samuels v. Mackell\textsuperscript{38} should not be applied to dismiss a pending federal action for declaratory relief solely because a state prosecution has subsequently been filed.\textsuperscript{39}

To resolve this conflict concerning the effect of the declaratory judgment in subsequent litigation, it is necessary to examine the nature of declaratory judgments.

Declaratory Judgments

In 1934, with the wave of legal reform stemming from the Depression, Congress passed the Declaratory Judgment Act,\textsuperscript{40} which confers upon federal courts the power to "declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought."\textsuperscript{41} At the time the act was passed it was considered a radical departure from traditional notions of American jurisprudence because it provided a remedy before an injury had occurred. The advantage of such a proceeding to an individual contemplating the performance of an act which may violate a state criminal statute, but

\begin{itemize}
  \item \textsuperscript{31} Id. at 482 n.3.
  \item \textsuperscript{32} Id. at 480–82.
  \item \textsuperscript{33} Id. at 482.
  \item \textsuperscript{34} Id. at 476 (White, J., concurring).
  \item \textsuperscript{35} Id. at 477.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} 401 U.S. 66 (1971) (where prosecution in state court preceded the action for federal declaratory relief, declaratory relief should ordinarily be denied).
  \item \textsuperscript{39} 415 U.S. at 478.
  \item \textsuperscript{40} Act of June 14, 1934, ch. 512, 48 Stat. 955 (now 28 U.S.C. §§ 2201–02 (1970)).
  \item \textsuperscript{41} 28 U.S.C. § 2201 (1970). In the 1934 version of the statute the word "prayed" was used instead of "sought." See Act of June 14, 1934, ch. 512, 48 Stat. 955.
which he believes to be constitutionally protected, is apparent.\textsuperscript{42}

Congress, however, was not strictly concerned with providing relief from state criminal laws when it passed the Declaratory Judgment Act. As Justice Rehnquist points out, "[The Act’s] primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred, rather than to palliate any controversy arising from Ex parte Young . . ."\textsuperscript{43}

\textbf{Actual Controversy}

The problem with the declaratory judgment is that it may be viewed as an "advisory opinion," which federal courts may not constitutionally render.\textsuperscript{44} In defining the constitutional limit, federal courts have established that an action must present neither a hypothetical controversy that may never become real,\textsuperscript{45} nor a past controversy where a recurrence is wholly conjectural.\textsuperscript{46} Where an injury has occurred, this inquiry is usually not relevant. However, in a declaratory judgment action, the purpose of which is to avoid injury, the existence of an actual controversy must be shown.

The possibility that a declaratory judgment might be no more than an advisory opinion caused Justice Brandeis to state, in several opinions,\textsuperscript{47} that "the [declaratory judgment] proceeding is not a case or controversy within the meaning of Article III of the Constitution,"\textsuperscript{48}

\begin{flushright}
\textsuperscript{42} During the debate in Congress over the Declaratory Judgment Act, one Senator expressed the idea of the declaratory judgment procedure metaphorically: "Under the [prior] law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." S. Rep. No. 1005, 73d Cong., 2d Sess. 3 (1934) (remarks of Rep. Ralph Gilbert). \textit{See also} note 11 \textit{supra.}


\textsuperscript{44} U.S. Const. art. III. The substantive decision in \textit{Steffel} might be seen as an advisory opinion because "the continuing existence of a live and acute controversy" was in doubt. 415 U.S. at 459 (emphasis in original). Nevertheless, the Court went on to decide the issues in \textit{Steffel}. In part, the Court may have chosen to decide the case in recognition of the length of time a new appeal would take. Cf. \textit{Roe} v. \textit{Wade}, 410 U.S. 113 (1973) (the challenge to an anti-abortion statute is not mooted even though the appeal takes more than nine months). The constitutional prohibition against advisory opinions as enunciated by the Supreme Court should be viewed as less than absolute, at least in its application to arguably moot controversies. It has been suggested that the mootness doctrine is often simply another way for the Supreme Court to avoid a problematic decision. \textit{Cf.} \textit{Note, The Mootness Doctrine in the Supreme Court}, 88 Harv. L. Rev. 373 (1974).

\textsuperscript{45} Dombrowski v. Pfister, 380 U.S. 479 (1965). \textit{See also} Steffel v. Thompson, 415 U.S. 452, 459 (1974) ("petitioner's concern with arrest has not been 'chimerical' . . . .")


\textsuperscript{48} Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289 (1928). Concurring in the result, Justice Stone disagreed with Justice Brandeis (who would later write his fa-
and hence is beyond the federal judicial power. Because the federal Declaratory Judgment Act was preceded by declaratory judgment acts in many of the states, the Supreme Court had ample opportunity to comment on the constitutionality of the then-proposed act. Shortly


49 E. Borchard, Declaratory Judgments 251 (1934). Borchard says that Rhode Island (1876), Maryland (1888), Connecticut (1893, 1915) and New Jersey (1915) all had "little used and narrow statutes granting a limited power to render declaratory judgments . . . ." The first broad statute was in Michigan (1919). At first, the Michigan Supreme Court found the statute unconstitutional because it imposed on the Michigan courts a nonjudicial function (i.e., rendering an advisory opinion). Amway v. Grand Rapids R.R. Co., 211 Mich. 592, 179 N.W. 350 (1920). Nevertheless, other states adopted broad declaratory judgment statutes, for example: California (1921), Kansas (1921), Kentucky (1922), Virginia (1922). E. Borchard, supra, at 254 n.21. Except for Michigan, all the states held declaratory judgments constitutional. See, e.g., Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495 (1923); State ex rel. Hopkins v. Grove, 190 Kan. 619, 201 P. 82 (1921); Black v. Elkholm Coal Corp., 233 Ky. 588, 26 S.W.2d 481 (1930); Patterson's Ex'ers v. Patterson, 144 Va. 113, 131 S.E. 217 (1926). The Michigan Court overruled itself in Washington-Detroit Theater Co. v. Moore, 249 Mich. 673, 229 N.W. 618 (1930).

49 By 1934, when the federal act was passed, over one-third of the states had enacted declaratory judgment statutes, most of them modeled on the Uniform Declaratory Judgments Act (which was drafted by Professor Borchard in 1922). Cf. 9A Uniform Laws Annotated 1-2 (1957). Also, by 1934 the highest courts in 19 states had expressly held declaratory judgments constitutional. E. Borchard, supra, at 249.

49 Such cases arose under diversity jurisdiction or as federal questions appealed from a state court. Liberty Whse. Co. v. Grannis, 273 U.S. 70 (1927), was the first such case. It was brought under diversity jurisdiction in federal court seeking to have a Kentucky law regulating tobacco sales declared unconstitutional. Plaintiffs sued the Attorney General of Kentucky, who was prepared to indict them for violation of the Kentucky law. For reasons not altogether clear, plaintiffs sued for a declaratory judgment and not an injunction. Since there was no federal declaratory judgment procedure, plaintiffs had to ask the federal court to apply the state declaratory judgment act. In pre-Erie times such an attempt was bound to fail. It did. It is interesting that this case involved a fourteenth amendment challenge to a state criminal statute as in Steffel (the concern with property rather than personal rights is appropriately different). See also Liberty Whse. Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n, 276 U.S. 71 (1928) (later litigation by the same plaintiff). In Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928), the plaintiff Association sought to remove a cloud on title to the Auditorium Theater in Chicago. Plaintiff held 99- and 198-year leases to the building and the land respectively, but defendant owner, not an Illinois resident, refused permission to tear down the architectural landmark. Defendant removed to federal court, where he ultimately prevailed. Cf. Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).
before the federal Declaratory Judgment Act was passed, the Supreme Court overruled Justice Brandeis' assertion, holding that the federal judicial power could be constitutionally exercised in a declaratory judgment proceeding, "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy . . . ."\(^{51}\) As a result, under the federal declaratory judgment statute that was enacted, a declaratory judgment can only be obtained "in a case of actual controversy."\(^{52}\) Today, it is "asserted in the fullest confidence that declaratory judgment statutes are invulnerable to assault upon any constitutional ground . . . ."\(^{53}\)

It is difficult to determine when an "actual controversy" exists, particularly where an individual seeks to challenge a criminal law without violating it. In order for the court to avoid rendering an advisory opinion, the plaintiff must prove at least that he actually plans to engage in the prohibited conduct and that he will be prosecuted if he does so.\(^{54}\) It may be sufficient, in a first amendment challenge, merely to show that the plaintiff's exercise of protected rights is "chilled."\(^{55}\) Of course, without the commencement of a prosecution or the state's admission that it will prosecute,\(^{56}\) proof of an actual controversy is difficult to establish;\(^{57}\) but now, after \textit{Steffel}, it is clearly not impossible.\(^{58}\)

\(^{51}\) Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264 (1933) (appeal from denial by Supreme Court of Tennessee of a declaratory judgment). Appellant argued, \textit{inter alia}, that the state tax was an unconstitutional impediment to interstate commerce. The United States Supreme Court affirmed, noting that the case was sufficient to support an injunction.

\(^{52}\) 28 U.S.C. § 2201 (1970). The 1934 version read "in case of actual controversy." Act of June 14, 1934, ch. 512, 48 Stat. 955. The statutory requirement of "actual controversy" may be more restrictive than the constitutional requirements. The constitutional limit, however, has never been reached because of the self-contained restrictions of the statute. The existence of the latent constitutional issue has, no doubt, buttressed the statutory requirement.

\(^{53}\) I W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENT § 8 (1951). Any case that did not allege a sufficient controversy would face a statutory rather than a constitutional objection.

\(^{54}\) Younger v. Harris, 401 U.S. at 42. \textit{But cf.} note 44 supra.


\(^{58}\) 415 U.S. at 459:

Unlike three of the appellees in \textit{Younger v. Harris}, 401 U. S., at 41, petitioner has alleged threats of prosecution that cannot be characterized as "imaginary or speculative," \textit{id.}, at 42. He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that if he again handbills at the shopping center and disobey a warning to stop he
In *Steffel*, police officers repeatedly warned the plaintiff to discontinue his conduct, and they arrested his companion, Ms. Becker, for similar conduct. Steffel wanted to return and distribute leaflets, but the shopping center threatened to have him arrested if he did so. The police said they would make the arrest. Steffel seems to have come as close as one can to being arrested without criminal proceedings having been instituted. The Supreme Court found a sufficient controversy on the facts in *Steffel*. It remains to be seen how much less confrontation would be sufficient.

**Principles of Federalism**

When, as in *Steffel*, a declaratory judgment is used to challenge a state statute in federal court, the court must also be concerned with the relationship between the state and federal governments. In line with this concern for the principles of federalism, the Supreme Court held in 1971 that, absent bad faith harassment by the state, a declaratory will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been "chimerical," *Foe v. Ulman*, 367 U. S. 497, 508 (1961). In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. See, e. g., *Epperson v. Arkansas*, 393 U. S. 97 (1968). Moreover, petitioner's challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him. Cf. *Boyle v. Landry*, 401 U. S. 77, 81 (1971); *Watson v. Buck*, 313 U. S. 387, 399-400 (1941).

69 See text accompanying notes 9-10 *supra*.

60 The prosecutor refused to commit himself to prosecution, saying he would determine whether or not he would prosecute on a case-by-case basis. See *Becker v. Thompson*, 334 F. Supp. 1386, 1388 (N.D. Ga. 1971).

61 A related concept is the doctrine of abstention to avoid premature constitutional adjudication. Abstention of this sort is invoked where the first and second criteria are satisfied—i.e., there is an actual controversy and no prosecution—but the federal court believes that the state statute could be construed by the state courts in a manner that would not encompass the plaintiff's constitutionally protected conduct. Cf. *Railway Comm'n v. Pullman*, 312 U.S. 495 (1940); *Steffel*, 415 U.S. at 457-58 nn.7, 8. In such a case, the federal court sometimes suspends consideration of the action for declaratory judgment pending an affirmative showing that the plaintiff's conduct is covered by the statute. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510-12 (1972). The question of whether plaintiff is clearly within the terms of the statute is the same inquiry as the immediacy of the threat of prosecution. Both ask the question whether there is an actual controversy. The question is not whether the prosecutor will prosecute, but whether that prosecution has a chance for success in state court. Nevertheless, if the plaintiff can show deprivation of a constitutional right, federal abstention from a declaratory judgment action on a state criminal statute as applied in favor of a state court determination of the application of state law is apparently not constitutionally or statutorily compelled, and after *Steffel* may no longer even be appropriate. In *Steffel*, the Court held that the federal interest in vindicating the individual who suffers a deprivation of his constitutional rights outweighed the state's interest in unencumbered enforcement of its laws. 415 U.S. at 473.
judgment is not available when a state prosecution has already begun. This restraint is not derived from the statute or, strictly, from the Constitution, as is the requirement of "actual controversy." Rather, it stems from notions of the appropriate exercise of the federal courts' discretion within the federal system. Where a good faith state prosecution is already underway against the federal plaintiff, there is a presumption that the state court will protect his federal rights without federal interference. Failing this, an appeal from the state courts is available. If the state proceedings are pursued in bad faith, for example, as where the state's objective is harassment, that presumption is exploded, and the federal courts need not abstain.

Where the prosecution is not in bad faith, federal adjudication would necessitate intervention in the state court proceedings either through issuance of a stay disruptive of state court proceedings or through duplicative and possibly inconsistent adjudications of the same issue. Neither alternative would ensure or accelerate proper resolution of the issues. But intervention would not be unconstitutional. Nowhere in the Constitution is the judicial power conditioned upon the presence of good or bad faith. Rather, the underlying considerations calling for restraint stem from the constitutional scheme of independent, separate state systems of law.

Ironically, at the time when it would be easiest to prove an "actual controversy," i.e., once the prosecutor has brought charges, the federal court must abstain. Through the interaction of the "actual controversy" requirement and the abstention doctrine, it would be possible to rule out all federal declaratory judgments against state criminal statutes as either presenting no controversy or as appropriate for abstention.

---

67 Perez v. Ledesma, 401 U.S. 82, 96 (1971) (Brennan, J., concurring and dissenting). This opinion was quoted at length in Steffel and may thus have been adopted by the Supreme Court.
69 Of course not in the case where the charges are brought in bad faith or to harass the plaintiff. See Dombrowski v. Pfister, 380 U.S. 479 (1965). See also note 66 supra.
In Steffel, however, the Supreme Court refused to foreclose declaratory relief in this manner. The Court found an actual controversy while also finding abstention inappropriate. Accordingly, unless the plaintiff is actually being prosecuted in state court for violation of the state statute, the federal court should not abstain from issuing a declaratory judgment:

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 justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. Accordingly, unless the plaintiff is actually being prosecuted in state court for violation of the state statute, the federal court should not abstain from issuing a declaratory judgment:

In deciding that the facts in Steffel were not appropriate for abstention from a federal declaratory judgment, the Supreme Court did not decide that the same facts were sufficient for injunctive relief. Justice Brennan, speaking for the Court, pointed out that injunctive relief must be considered separately from declaratory relief, since the considerations which relate to granting the one remedy are different from those which call for the other. Specifically, declaratory relief has a less intrusive impact on the administration of state criminal laws, and the clear statutory intent to provide a federal forum for the declaration of constitutional rights makes the showing of "irreparable harm"

---

70 415 U.S. at 458-59, 475.
71 Id. at 475 n.22 (apparently a state declaratory judgment proceeding is not sufficient to warrant abstention).
72 Id. at 462.
73 Id. at 469, citing Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965). Primarily, however, Brennan relied on his separate opinion in Perez v. Ledesma, 401 U.S. 82, 111-15 (1971), which opposed the traditional notion that requirements for declaratory relief are the same as those for injunctive relief, as was suggested in Justice Black's majority opinion in Samuels v. Mackell, 401 U.S. 66, 73 (1971). In Steffel, Brennan, speaking for the Court, went on to say that declaratory relief was available and that the question whether injunctive relief is available "is a question we need not reach today since petitioner has abandoned his request for that remedy." 415 U.S. at 436. See also Zwickler v. Koota, 389 U.S. 241, 254 (1967).
74 415 U.S. at 469.
75 Id. at 471-72. The Court found this policy in the Civil Rights Act. 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343(3) (1970). In civil rights cases, state remedies need not be exhausted and hence, according to the Supreme Court, a declaratory judgment to redress constitutional rights should be allowed without awaiting a criminal proceeding.
required for injunctive relief not relevant. Therefore, the Court in Steffel held that on the facts presented, declaratory relief was available "regardless of whether injunctive relief may be appropriate." 

Declaratory Judgments and the Doctrine of Res Judicata

It is generally accepted that like any other final judgment, a declaratory judgment settling rights between parties is res judicata and, therefore, has collateral estoppel effects in subsequent litigation between those same parties. As Professor Borchard wrote: "The declaration is a conclusive determination of the rights of the parties and is res judicata." The doctrine of res judicata, however, is not without some generally recognized exceptions which apply to both declaratory and other final judgments. To date, the Supreme Court has not explained the manner in which the doctrine of res judicata applies to a federal declaratory judgment vindicating an individual's constitutional right to engage in certain activity despite the existence of a contrary state statute. As Justice Brennan has observed: "[T]he 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.

To determine whether the federal declaratory judgment should have any res judicata effect in subsequent litigation, it is necessary first to determine whether that judgment falls within one of the presently recognized exceptions to the res judicata doctrine. If it does not fit within one of these exceptions, the implications of creating a new exception must be explored.

Recognized Exceptions to the Doctrine of Res Judicata

In a case like Steffel, either the litigation between the same parties subsequent to the declaratory judgment action will be a state court criminal proceeding begun because state officials have decided to disregard the federal declaratory judgment and prosecute the plaintiff, or it will be a federal court action brought by the federal plaintiff to enforce the declaratory judgment and prevent state officials from subjecting him to state prosecution.

---

76 415 U.S. at 475.
78 E. Borchard, supra note 49, at 172 (1934).
State Criminal Prosecutions

Two problems are involved in applying the principles of res judicata to a federal declaratory judgment raised in a subsequent state court criminal proceeding. The first is that the effect of any type of federal judgment in a state court may be different from its effect in a federal court.80 The second is that many courts have recognized an exception to the principles of res judicata when a declaratory judgment, which is a civil judgment, is raised in a subsequent criminal proceeding.81

With respect to the effect of federal judgments raised in state courts, it should be noted that although states should give full force and effect to federal court judgments,82 they are not constitutionally compelled to do so by the full faith and credit clause.83 Nevertheless, there is some authority indicating that a state court is constitutionally required by the Supremacy Clause to give a federal judgment res judicata effect in its proceedings.84

As an exception to the general rule, though, three theories are advanced for not giving declaratory judgments any res judicata effect in subsequent criminal proceedings. First, the burdens of proof in civil and criminal proceedings are different.85 In an action for declaratory judgment, the burden is one of a preponderance of evidence, whereas in the state prosecution, the state must prove its case beyond a reasonable doubt. Allowing the state to plead a favorable federal declaratory judgment as res judicata would, of course, unconstitutionally reduce the burden of proof necessary to convict the individual being

81 46 Am. Jur. 2d Judgments § 620 (1969): "[A] judgment rendered in a civil action is not admissible in a subsequent criminal prosecution where the judgment is offered for the purpose of proving facts adjudicated thereby, although exactly the same questions are in dispute in both cases."
82 An American Law Institute report concluded that the state courts should give the same full force and effect to federal court decisions that they grant to the decisions of other states under the full faith and credit clause. A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts (1969).
83 By its terms the full faith and credit clause applies only to state courts. U.S. Const. art. IV, § 1. But see Stoll v. Gottlieb, 305 U.S. 165, 171 (1938): on the facts there presented, an order by a federal bankruptcy court which was probably issued beyond its authority was res judicata in subsequent state court proceedings. This case is easily distinguishable since bankruptcy is an exclusively federal cause of action. State courts, however, consistently hold federal adjudications to be res judicata. See cases cited in 47 Am. Jur. 2d Judgments § 1293 (1969). But cf. Babbitt v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970), vacated, 402 U.S. 903 (1971).
84 See, e.g., Deposit Bank v. Board of Councilmen, 191 U.S. 499 (1903); Comment, supra note 80, at 546-50, where the Deposit Bank case is discussed at length.
85 See Note, supra note 77, at 827.
prosecuted in state court. Allowing an individual to plead as res judicata a federal declaratory judgment favorable to him, although probably not unconstitutional, would violate the principle of mutuality; and for this reason, a court could refuse to accord declaratory judgments any res judicata effect. Second, the right to confront witnesses, a right constitutionally guaranteed in a criminal prosecution, is not applicable to civil proceedings. Thus, were a state allowed to plead as res judicata a favorable federal declaratory judgment, the individual's right to confrontation would be violated. Accordingly, allowing the individual to rely on the doctrine of res judicata would raise once again the problem of mutuality.

Third, the parties in the two proceedings are different. When an individual seeks a federal declaratory judgment against enforcement of a state criminal statute, he must sue the state officer charged with enforcing the statute, whereas in the criminal prosecution the state itself, not the official, is technically the prosecuting entity. Since the doctrine of res judicata has traditionally been applicable only where there is an identity of parties, again, a court could refuse to accord such a prior declaratory judgment res judicata effect in a subsequent criminal prosecution.

Despite these theories, the position that federal declaratory judgments have no res judicata effect in state criminal proceedings is not universally accepted. It has recently come under attack by one commentator, and the Supreme Court has indicated that in some situations it may well accord a declaratory judgment some res judicata effect in a subsequent criminal proceeding. Nevertheless, Justice Rehnquist, concurring in Steffel, argued:

A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State author-

---

87 Note, *supra* note 77, at 830.
88 The technical difference, of course, is a necessary one developed to circumvent the eleventh amendment prohibition on suits against states. See *Ex parte Young*, 209 U.S. 123 (1908).
90 Note, *supra* note 77.
91 Yates v. United States, 354 U.S. 298, 335 (1957) (dictum). Admittedly, *Yates* involved a subsequent federal, not state, criminal proceeding; nevertheless, even though it is not relevant to the problem of the difference between state and federal forums, it does apply to the problems raised by the difference between civil and criminal proceedings.
ities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision . . . .

If the federal plaintiff pursues the conduct for which he was previously threatened with arrest and is in fact arrested . . . he may, of course, raise the federal declaratory judgment in the state court for whatever value it may prove to have.92

Thus, whether a state court must accord a federal declaratory judgment res judicata effect in a state criminal proceeding is apparently still an open question.

Given the unsettled state of the law, an individual who has successfully obtained a favorable declaratory judgment cannot be sure that the state court will accord that judgment res judicata effect and thereby protect his constitutional right to engage in the activity in question. Thus, where there is a substantial chance that the state may prosecute in spite of the federal declaratory judgment, the individual may return to federal court to seek an injunction against the prosecution as "[f]urther necessary or proper relief."98

Subsequent Federal Proceedings

If he returns to federal court, the federal plaintiff need not overcome the problems raised by different forums or the differences between civil and criminal proceedings. From his concurrence in Steffel, it is clear that Justice White believes that the declaratory judgment should be res judicata;94 but Justice Rehnquist would evidently accord it only a stare decisis effect.95

There are three possible problems in applying the doctrine of res judicata to declaratory judgments in a later federal proceeding. The first is that the federal court presented with a prior declaratory judgment must find identity of issues and identity of parties in order for the judgment to be res judicata. Identity of issues would require a factual determination that the conduct of the individual pleading res judicata was sufficiently similar to the conduct of the plaintiff in the action for declaratory judgment.96 In order to show identity of parties the individual must show that he was a party to the earlier action or is for some other reason entitled to raise the former suit as a bar to further litigation of previously settled issues. The problem of identity of issues and parties is essentially one that requires factual determinations. As

92 415 U.S. at 482 (Rehnquist, J., concurring) (footnote omitted).
94 See 415 U.S. at 476–78.
95 Id. at 482 n.3.
96 See Comment, supra note 80 at 554–56.
such it must be resolved on a case-by-case basis, but it does not act as a blanket prohibition to the application of res judicata.\textsuperscript{97}

The second problem is that where a prior determination of unconstitutionality is raised in a subsequent proceeding, it is sometimes argued that res judicata does not apply. One argument is that unmixed questions of law are not res judicata,\textsuperscript{98} but federal courts have not accepted this argument.\textsuperscript{99} Instead, they have generally prohibited relitigation:

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.\textsuperscript{100}

The third, and related, problem is that the federal courts have sometimes recognized an exception to the doctrine of res judicata where an individual or a class of individuals asserts constitutional rights through a habeas corpus action or a civil rights suit.\textsuperscript{101} Where the plaintiffs have previously lost a case to a governmental entity and, as a result, are being continuously deprived of their fundamental liberties despite an intervening change in the law, the courts have refused to apply the doctrine of res judicata to bar a second action by the plaintiffs. For example, in a civil rights case, the Fifth Circuit noted:

The wisdom of the rule which exempts such cases from the doctrine of res judicata is [clear]. . . . It would be a senseless absurdity to sanction in Baton Rouge segregated seating under a law patently unconstitutional while everywhere else in the country segregated seating is prohibited. The Constitution is not geared to patchwork geography. It tolerates no independent enclaves.\textsuperscript{102}

This exception has always been limited to serve the purpose of preventing continued infringement of important constitutional rights. It may be applied only where the prior litigation is “old and cold.”\textsuperscript{103}

\textsuperscript{97} Id.
\textsuperscript{98} Unmixed questions of law are legal questions where the facts are not at issue. According to the \textit{Restatement of Judgments}, unmixed questions of law should be relitigated without the bar of res judicata. Id. § 70 (1942). This is quite apart from the doctrine of stare decisis, which merely suggests that an earlier decision would be persuasive to the courts. A. VESTAL, \textit{RES JUDICATA/PRECLUSION}, at V-248 (1969).
\textsuperscript{99} Even if the argument were generally accepted it may not apply to the \textit{Steffel} situation where the statute was attacked as applied, not on its face.
\textsuperscript{100} Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931). \textit{See also} United States v. Moser, 266 U.S. 236 (1924) (res judicata held to bar relitigation of unmixed question of law).
\textsuperscript{102} Christian v. Jemison, 303 F.2d 52, 55 (5th Cir. 1962).
\textsuperscript{103} Lipscomb v. United States, 298 F.2d 9 (8th Cir.), \textit{cert. denied}, 369 U.S. 853.
In a case like *Steffel*, however, the litigation is recent; therefore this exception to the res judicata doctrine should not prevent the federal declaratory judgment from being res judicata.

In summary, a federal declaratory judgment may have no res judicata effects in subsequent state court criminal proceedings because of certain widely recognized exceptions to the res judicata doctrine. No exceptions to that doctrine, however, would seem to prevent the application of res judicata principles to a federal declaratory judgment raised in a later federal court action for "[f]urther necessary or proper relief" under the Declaratory Judgment Act.\(^{104}\)

**The Res Judicata Effect of Declaratory Judgments**

If the doctrine of res judicata did not apply to declaratory judgments, they would be unique among "final" judgments of federal courts. But like all federal judgments rendered by article III courts, a declaratory judgment must be a final judgment.\(^{105}\) The Declaratory Judgment Act emphasizes this point by explicitly stating: "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."\(^{106}\)

The argument has been advanced that to deny a declaratory judgment res judicata effect is to deny it finality and, thus, to reduce it to an advisory opinion.\(^{107}\) This argument has been attacked by at least one commentator who says that finality does not require that a judgment be accorded res judicata effect.\(^{108}\) Still, the argument is widely accepted\(^{109}\) and when applied in this context leads inevitably to the conclusion that the declaratory judgment, to be constitutional, must be accorded res judicata effect in the subsequent federal proceeding for "[f]urther necessary or proper relief." Concurring in *Steffel*, Justice White seemed to rely on this argument when he wrote: "[E]minent authority anticipated that declaratory judgments would be *res judicata* . . . and there is every reason for not reducing declaratory judgments to mere advisory opinions."\(^{110}\)

The conclusion that declaratory judgments must be res judicata in the subsequent federal proceeding, however, can be reached without

---


\(^{105}\) U.S. Const., art. III.


\(^{107}\) See Note, *supra* note 77, at 832–35.

\(^{108}\) Id. at 836–39.

\(^{109}\) See, *e.g.*, Comment, *supra* note 80, at 551.

\(^{110}\) 415 U.S. at 477.
DECLARATORY JUDGMENTS

resort to the constitutional requirement of finality. The Declaratory Judgment Act demands that the "declaration shall have the force and effect of a final judgment or decree." Basically, this is a requirement that declaratory judgments be accorded the same weight as any other judgment rendered by an article III court. From the above discussion, it is apparent that federal declaratory judgments do have res judicata effects when raised in subsequent federal civil proceedings and are not within the recognized exceptions to the res judicata doctrine. To make an exception of declaratory judgments would be to accord declaratory judgments a different weight than other judgments. Were the principles of res judicata not to apply to declaratory judgments, while applying fully to other federal judgments, the declaratory judgment would not have "the force and effect of a final judgment or decree."

DECLARATORY JUDGMENTS AND INJUNCTIVE RELIEF

In Steffel, the expanded federal forum for anticipatory relief was said to provide the federal plaintiff "with a concrete opportunity to vindicate his constitutional rights." In many cases declaratory relief is all that is necessary. In the 1973 abortion decisions, Roe v. Wade and Doe v. Bolton, the Supreme Court granted only declaratory relief and withheld injunctive relief. Despite the controversy surrounding those decisions, the declaratory judgment has proved sufficient. At the time the judgments were rendered, however, declaratory judgments had been issued only in circumstances where injunctive relief was also appropriate. This potential availability of injunctive relief may well have deterred even the most hostile prosecutors. If injunctive relief were not available, the deterrent to prosecution would be reduced. Also, state courts would be more likely to deny res judicata effect to the federal declaratory judgment. Thus, further relief may be necessary to preserve the integrity of the declaratory judgment. The issue then becomes whether an injunction may subsequently be granted as further relief even though injunctive relief was not appropriate at the time the declaratory judgment action was brought.

112 See text accompanying notes 80–104 supra.
113 415 U.S. at 462.
114 See id. at 469.
118 Injunctive relief may not have been available to Steffel. 415 U.S. at 469. But see
Principles of Equity, Comity, and Federalism

Once a declaratory judgment is obtained, the constitutional adjudication is res judicata in federal court. Nevertheless, more than a determination of unconstitutionality is required to obtain a federal injunction against enforcement of a state criminal statute. Such an injunction is a drastic measure, violation of which is punishable by contempt. Indeed, it is this element of enforceability which distinguishes it from a declaratory judgment:

"[E]ven though a declaratory judgment has ‘the force and effect of a final judgment,’ . . . it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.”

As a result, the Supreme Court has held that the granting of an injunction requires a showing of “irreparable harm.” This requirement is unique to the injunctive remedy and a product of the historical restraints of equity. The requirement of “actual controversy” (for a declaratory judgment) is similar to the “irreparable harm” requirement in that both examine the motive and the extent of antagonism between the parties. However, a greater degree of antagonism is necessary for a showing of “irreparable harm” than for a showing of “actual controversy.”

generally Dombrowski v. Pfister, 308 U.S. 479 (1965); Note, Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation, 83 Harv. L. Rev. 1879 (1970), suggesting that a great degree of irreparable injury or bad faith is not required for federal injunctive relief where a first amendment right is being “chilled.”

See text at notes 94–112 supra. The prosecutor has every right to appeal the declaratory judgment in the federal courts before it becomes final. However, after an appeal is unsuccessful, or if the prosecutor defaults, the litigation on the constitutional issue ends. Fed. R. Civ. P. 54(b). In a declaratory judgment action, unlike a criminal prosecution, the prosecutor does not have the same degree of control over the federal litigation. In a prosecution, for example, he can control the time suit is to be instituted, the party against whom proceeded, the choice of the opposing party, etc.

The injunction is issued against a person (personally or ex officio—against an office)—usually the state’s attorney, but in the facts of Steffel possibly against the police, the county prosecutor or the owner of the shopping center—and it carries with it the penalty of contempt for violators. The contempt penalty can be imposed whether or not the decision to issue the injunction was correct. Walker v. City of Birmingham, 388 U.S. 307 (1967); United States v. United Mine Workers, 330 U.S. 258 (1947). See C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS § 16 (1970).


Younger v. Harris, 401 U.S. 37, 41–42 (1971) (Younger's co-plaintiff had not even been threatened with prosecution; no actual controversy) and Steffel.
Thus, in order to obtain an injunction as further relief, a plaintiff like Steffel will have to show antagonism sufficient to constitute "irreparable harm" as well as plead the declaratory judgment as res judicata.

On the facts in Steffel, "irreparable harm" could not be shown absent some indication by the prosecutor that he would disregard the court's decision. For example, if the prosecutor threatens to prosecute, the finding of "irreparable harm" will be based on the extent and nature of the threat. Should the prosecutor actually file criminal charges, there would be such a showing of "irreparable harm." By denying effective vindication of the plaintiff's constitutional rights, such action by the prosecutor makes the equitable use of injunctive relief appropriate.

Nevertheless, it may be argued that the federal court must abstain from issuing an injunction on the grounds of federalism—specifically, the policy against federal interference in the state's enforcement of its criminal laws. In the context of a threatened criminal prosecution, a federal court must balance its self-imposed policy of restraint from interfering in the enforcement of state criminal laws with its interest in protecting final judgments (as well as the plaintiff's coordinate interest in avoiding relitigation).

In considering a request for an injunction where a state criminal prosecution is threatened, according to Steffel (citing Younger v. Harris), the federal doctrine of restraint is based on two factors. First, a pending state proceeding, in all but unusual cases, provides the federal plaintiff with the necessary vehicle for vindicating his constitutional rights. Second, restraining an ongoing prosecution entails an unseemly failure to give effect to the principle that the state court has the solemn responsibility equally with the federal courts to guard, enforce and protect every constitutional right. These factors remain as strong whether petitioning parties have previously received a federal declaratory judgment or are before the court for the first time.

The federal court's interest in the adjudication and duty to protect...
its own litigants, however, is much greater once a federal declaratory judgment is rendered than when an injunction is initially requested. An injunction by a federal district court "to protect or effectuate its [own] judgments" is an express exception to the restraints of the anti-injunction act.\(^{2}\) While the anti-injunction act is no longer considered a meaningful restraint on the federal courts,\(^{2}\) this exception does evince a congressional intent that an injunction be available to prevent state proceedings from undermining a prior federal judgment.\(^{3}\)

To prohibit an injunction once a declaratory judgment is rendered would raise the possibility of relitigation of the case in state court, resulting in an inconsistent state court judgment. Assume, for example, that a federal district court erroneously declares a state statute unconstitutional. Rather than appeal the declaratory judgment, the state prosecutes an individual for violating the statute. The state court correctly finds the statute constitutional, and the individual is convicted. When the conviction is appealed, the United States Supreme Court will face a dilemma. If it upholds the state court decision, the federal declaratory judgment would become meaningless. If, in order to avoid this result, the Supreme Court considers itself bound by a lower federal court's judgment, it would uphold an erroneous constitutional decision. This dilemma is avoided if an injunction is available following a federal declaratory judgment.

**Injunctive Relief**

On the facts in Steffel, where a declaratory judgment has been obtained and state criminal prosecution has been threatened but not instituted, the federal court's interest in preserving its judgments and protecting its litigants outweighs the detrimental effects of interference with the state's enforcement of its own criminal laws.

When no state criminal proceeding is pending at the time . . . , federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting nega-

---


tively upon the state court's ability to enforce constitutional principles.\footnote{132} In these circumstances, an injunction enables the federal court to enforce its judgment and avoids the difficulty of inconsistent judgments by resolving the dispute within the federal system.

On the other hand, if, after a declaratory judgment but prior to application for a federal injunction, prosecution has actually been instituted in a state court (the more likely situation), the balance is different. While the federal court's interests in enforcing its judgment and preventing duplicative proceedings remain as strong, the disruption of the state's enforcement of its criminal laws is much greater.\footnote{133} A federal injunction clearly interferes with the state's prosecution and shows little faith in the state court's ability to vindicate constitutional rights.\footnote{134} These considerations in \textit{Younger} led the Supreme Court to abstain from granting an injunction:

\begin{quote}
\begin{flushright}
[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.\footnote{135}
\end{flushright}
\end{quote}

Here \textit{Younger} is inconsistent with the central concern of \textit{Steffel}, that the federal courts in a declaratory judgment provide a concrete opportunity for a plaintiff to vindicate his constitutional rights. This opportunity, however, would be meaningless if commencement of a subsequent state prosecution could prevent a federal court from issuing an injunction. Therefore, an injunction must be allowed.

The availability of a declaratory judgment under \textit{Steffel}, when combined with the ability to obtain an injunction as further federal relief upon the showing of irreparable harm where prosecution is threatened, effectively allows a federal plaintiff full anticipatory relief despite the principles of "equity, comity, and federalism"\footnote{136} that were so important in \textit{Younger}. If an injunction can be so readily obtained, the declaratory judgment is effectively as intrusive on the state's criminal justice system as an injunction. Yet a declaratory judgment, which does

\footnotesize\begin{itemize}
\item[\textsuperscript{132}] 415 U.S. at 462.
\item[\textsuperscript{133}] The second circuit has found a preliminary injunction appropriate where a declaratory judgment action is pending and state criminal prosecution has been threatened but not instituted. 414 Theater Corp. v. Murphy, 499 F.2d 1155 (2d Cir. 1974); \textit{see also} Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973), \textit{cert. denied}, 416 U.S. 955 (1974).
\item[\textsuperscript{134}] \textit{Younger v. Harris}, 401 U.S. 37 (1971).
\item[\textsuperscript{135}] \textit{Id.} at 44.
\item[\textsuperscript{136}] 415 U.S. at 460; \textit{Younger v. Harris}, 401 U.S. 37, 43-44 (1971).
\end{itemize}
not require a showing of "irreparable harm," is more readily available than an injunction. Consequently, the Supreme Court's preferences for the declaratory judgment procedure must be based on a consideration other than the degree of intrusiveness into the state's criminal justice system.

One possibility is suggested by the Court's aversion to the use of three-judge courts, the courts empowered to issue injunctions against state statutes. Decisions of such courts may be directly appealed to the Supreme Court. In a series of decisions, the Supreme Court has narrowly construed this requirement because of the burden it imposes on both the lower federal courts and the Supreme Court itself. Since a declaratory judgment may be issued by a single district court judge and reviewed by a court of appeals, it may be preferred because it is less burdensome to the federal court system.

A RACE TO THE COURTHOUSE

Federal anticipatory relief from enforcement of a state criminal statute is available only so long as an action for declaratory judgment is initiated in federal court before state prosecution is begun. However, "if the state prosecution was first filed and if it provides an adequate forum for the adjudication of constitutional rights, the federal court should not ordinarily intervene." Otherwise, the state is denied a chance to adjudicate its own criminal laws. "[W]hether a federal court should stay its hand" is determined "ordinarily . . . by examining the dates upon which the federal and state actions were filed."

Thus, after Steffel, there is a race to the courthouse. Because of this race, the prosecutor's desire to preserve a state forum will encourage the filing of charges in questionable cases which might otherwise never be brought. Such action will increase litigation and, by occupying more individuals as defendants, may reduce freedom. However, the seriousness of the risk can be overemphasized. The individual does have the freedom to obtain a federal forum, and foreclose state adjudication of

---

141 Id. at 103.
142 Id.
his allegedly criminal conduct, simply by filing first.

If, nevertheless, the race to the courthouse is perceived as a problem, the solution is not to reduce the extent of the impact of the federal declaratory judgment in subsequent proceedings. Such a reduction would only waste the time of a federal court—an increasingly scarce resource. Moreover, such a reduction would be inconsistent with the Declaratory Judgment Act. If proceedings in state court, whenever instituted, foreclosed federal proceedings, the federal district court would, at best, exercise its jurisdiction at the will of the state prosecutor, who could summarily terminate federal proceedings by filing in state court. Under these conditions, the availability of a federal forum would have no utility.

CONCLUSION

After Steffel v. Thompson, under certain circumstances a declaratory judgment is available to provide relief from enforcement of a state penal statute even though an injunction is not appropriate. Such a federal declaratory judgment must be res judicata in federal court and should be a bar to subsequent state prosecution. If a state nevertheless seeks to prosecute, the federal court can issue an injunction based on the declaratory judgment. If a state prosecution is begun before a federal declaratory judgment is sought, however, federal anticipatory relief is foreclosed. The forum in which the individual’s constitutional rights are adjudicated depends on who wins the race to the courthouse. This race is inevitable under our constitutional scheme of concurrent state and federal jurisdiction. As long as there is concurrent jurisdiction, there will be forum shopping; and as long as the selection of the forum depends on who files first, there will be a race to the courthouse.

Christopher A. Bloom