The Burger Court Opinion Writing Database

Steffel v. Thompson

415 U.S. 452 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1974

PERSONAL

Re: 72-5581 - Steffel v. Thompson

Dear Bill:

Harry has moved over on this case but I am not persuaded that a federal court should interfere with a prospective state prosecution. Are you willing to put your hand to a dissent?

Regards,

WEB

Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 22, 1974

Re: No. 72-5581 - Steffel v. Thompson

Dear Potter:

Please join me in your concurring opinion.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 22, 1974

Re: No. 72-5581 - Steffel v. Thompson

Dear Bill:

Please join me in your concurring opinion.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 21, 1973

Dear Chief Justice:

On going over your Assignment Sheet I notice I am to assign No. 72-5581 Steffel v. Thompson. I assign it herewith to Mr. Justice Brennan.

My memorandum No. 72-1254 Smith v. Goguen is at the printer and should be circulated this afternoon. I come out to affirm.

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 9, 1974

Dear Bill:

Please join me in your opinion in 72-5581, Steffel v. Thompson.

WOD

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

Circulated
1-9-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), held, respectively, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of comity and equity preclude issuance of a federal injunction restraining enforcement of the state criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell*, 401 U. S., at 73–74, 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.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C.

circulated 1/18/74

1, 2, 3, 9, 10, 22

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), held, respectively, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell*, 401 U. S., at 73–74, 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.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C.

circulated 1/22/74

P. 22

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris,* 401 U. S. 37 (1971), and *Samuels* v. *Mackell,* 401 U. S. 66 (1971), held, respectively, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell,* 401 U. S., at 73–74, 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.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C.

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

1-23-74

Richard Guy Steffel,
Petitioner,
v.
John R Thompson et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1974]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

When a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), held, respectively, that, unless bad faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the criminal statute and, in all but unusual circumstances, a declaratory judgment upon the constitutionality of the statute. This case presents the important question reserved in *Samuels* v. *Mackell*, 401 U. S., at 73–74, 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.

Petitioner, and others, filed a complaint in the District Court for the Northern District of Georgia, invoking the Civil Rights Act, 42 U. S. C. § 1983, and its jurisdictional implementation, 28 U. S. C. § 1343. The complaint requested a declaratory judgment pursuant to 28 U. S. C.

January 25, 1974

RE: No. 72-5581 Steffel v. Thompson

Dear Harry:

I sincerely appreciate your note of January 24. My preference would be not to refer to either question. The answer to each will turn, I think, on what the Court does with the question whether the Younger rules apply when a state criminal proceeding is brought after the federal action is filed but before it is heard and decided. I put that question aside in my Perez v. Ledesma, opinion, 401 U.S., at 117 n. 9. I think a persuasive argument can be made that the Younger principle should apply in such case but I am content to defer my final view until the question is presented.

Sincerely,

WJB

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM J BRENNAN, JR.

April 5, 1974

MEMORANDUM TO THE CONFERENCE

RE: Cases Held for Steffel v. Thompson, No. 72-5581

The following seven cases have been held for Steffel v. Thompson, No. 72-5581. My suggested dispositions are:

No. 70-102 Cahn v. Long Island Vietnam Moritorium Comm.; Aspland v. Gwathmey. Appeals from the Second Circuit.

Two appeals are covered by the single jurisdictional statement. In the first, the District Attorney for Nassau County, New York, in early 1970, announced that he would prosecute under §136(a) of the N.Y. Gen. Business Law, anyone distributing the American flag who had superimposed upon it any symbol, design or word, mentioning specifically emblems consisting of a circular representation of any part of the American flag with a superimposed peace symbol.

Appellee organization, distributor of a flag representation with a superimposed peace emblem instituted this action for injunctive and declaratory relief. A three-judge district court held that the statute had been unconstitutionally applied, but granted only declaratory relief. On appeal, the Second Circuit declared the statute unconstitutional both on its face and as applied and affirmed the declaratory relief.

Inasmuch as appellees were specifically threatened with prosecution, and were granted only declaratory relief, not an injunction against prosecution, Steffel would require an affirmance. However, the merits are the same as in Spence v. Washington, No. 72-1690, and I recommend that we continue to hold for that case.

In the second case a criminal prosecution brought by appellant Aspland, the District Attorney for Suffolk County, New York, was pending when this federal suit was brought against appellee for violating §136(a). A single district court judge dismissed appellee's complaint for injunctive and declaratory relief, but on appeal the Second Circuit remanded stating:

> "For the reasons set out in our opinion in the Long Island Vietnam case, we hold that §136(a) is unconstitutional. Thus, there is no need for a three-judge court in the instant case. There is every reason to believe that the district attorney here will abide by the decision we have reached, unless the Supreme Court determines otherwise. Hence there is no need at this time to prescribe specific relief. Accordingly, we reverse the judgment below and remand this case to the district court for proceedings consistent with our decision in Long Island Vietnam." (Emphasis added).

Since there was a pending prosecution, the relevant case is not Steffel but, if anything, Younger or Samuels v. Mackell. In finding "no need at this time to prescribe specific relief," however, the Court of Appeals seems to have put the case in limbo, or perhaps, have thought the situation resembled that in Douglas v. City of Jeannette, 319 U.S. 157, 165. Rather than grapple with whether the Second Circuit's remand was proper, I recommend that we hold this for Spence; like Long Island Vietnam, this case presents the Spence question on the merits.

No. 70-120 Mailland v. Gonzalez. Appeal from N.D. Cal.

San Francisco police arrested a group of ten persons under §601 of the California Welfare and Institutions Code in connection with an assault on a young girl. The Code provides, inter alia, that any person under twenty-one years of age "who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life" may be adjudged a ward of the court. When all charges were dropped against the appellees, they brought this action seeking to have a three-judge court declare §601 unconstitutional and enjoin enforcement of the statute.

A three-judge court granted appellees motion for summary judgment. It held that this dispute involved an actual controversy, (1) because appellees sought to have their arrest records expunged; (2) because appellees charged that their arrests had been wilfully aimed at intimidating, humiliating, and denying them their rights, and if this were proved, appellees would be entitled to recover damages; and (3) because appellees and their class faced continued use of the statute against them. The court proceeded to hold the statute unconstitutionally vague and to grant the requested declaratory and injunctive relief.

Since there was no pending state court prosecution at the time the federal action began, the three-judge court's grant of declaratory relief is in accord with Steffel. But was it permissible to grant the injunction against future enforcement of §601? Steffel explicitly reserved the question whether injunctive relief would have been appropriate in that case. I would vacate and remand for reconsideration of the injunction in light of Steffel and Zwickler v. Koota.

No. 72-1359 Heffernan v. Thoms. Cert. to the Second Circuit.

Respondent, and others similarly situated, sought injunctive relief against the enforcement of Connecticut's flag misuse statute and a declaratory judgment that the statute was unconstitutional. A three-judge federal court was convened. At the time the action was commenced, individuals, not parties to the action and apparently unrelated in interest to respondent or his class, were being criminally prosecuted under the Connecticut statute. A three-judge court granted the requested declaration of unconstitutionality, but stated that, since it had no reason to believe petitioners would continue to enforce the statute, "we forbear to enter an injunction." The Second Circuit affirmed, holding that a federal court could properly grant declaratory relief when a criminal action was not pending against the federal plaintiff. The court also found that respondents were faced with "a credible threat of enforcement," based upon evidence of a series of prosecutions against others as well as letters and phone conversations respondent had had with police officers concerning his own conduct. On the merits the court found the statute unconstitutionally overbroad and vague.

The Second Circuit's decision anticipates Steffel. There was a realistic threat of prosecution; there were no pending prosecutions against respondent or his class; and the only relief granted was a declaratory judgment. However, this case has already been held for Smith v. Goguen, No. 72-1254, and perhaps final disposition should await circulation of Lewis' memo on the cases held for Smith v. Goguen.

No. 72-1671 McConnell v. Unitarian Church West. Cert. to the Seventh Circuit.

After respondents publicly announced that they were about to begin a sex-education course for children of the Church, petitioner, a District Attorney for Waukesha County, Wisconsin, insisted upon a right to inspect the materials for the course and told respondents that, if he were not permitted to inspect the materials and he later concluded the course was unlawful, they would be subject to prosecution. The respondents thereupon commenced this action for declaratory and injunctive relief in federal district court.

The district court issued a preliminary injunction against the commencement of any prosecution for conducting the sex-education course, finding that the respondents would likely be successful in demonstrating that interference with the course infringed their rights of free exercise and free speech and that respondents had delayed establishing their sex-education program out of fear of prosecution. The Court of Appeals for the Seventh Circuit affirmed by order.

Here, the only arguable conflict with Steffel is the issuance of the preliminary injunction. Steffel explicitly reserved the question whether a permanent injunction might be granted, but made no reference to a preliminary injunction. Since no prosecution was pending, and it was demonstrated that the Church would be required to forego constitutionally protected activity to avoid prosecution, I incline to the view that preliminary injunctive relief was proper. Any impact of the declaratory judgment upon prosecutors and state courts might well be lost unless the court might afford time for reflection provided by preliminary relief. I would deny the petition.

No. 73-130 Ellis v. Dyson. Cert to the Fifth Circuit.

Petitioners were arrested under a Dallas loitering ordinance. Prior to their trials, petitioners had applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent prosecution under the ordinance on the ground that it was facially unconstitutional. The writ was denied. When the case came to trial, petitioners timely moved to dismiss on the same grounds argued before the Court of Criminal Appeals. This motion was denied, and petitioners then entered pleas of nolo contendere. They were convicted and fined.

Following their convictions, petitioners filed a complaint in federal court, seeking a declaratory judgment that the ordinance was unconstitutional

and ancillary relief (expungement of their records). The court noted that petitioners had standing to sue since they had previously been arrested under the disputed ordinance and had alleged that they would continue to engage in the same conduct that had resulted in their prior convictions. The court went on to hold that dismissal of the complaint was nonetheless required because (1) under previous decisions of the Fifth Circuit (including that court's decision in Steffel), Younger principles were applicable, even though criminal prosecutions were merely threatened, and (2) the petitioners had not alleged any bad faith or harassment sufficient to overcome the Younger hurdle. The Fifth Circuit (Bell, Godbold, Ingraham) affirmed per curiam.

I would grant certiorari, and vacate and remand for reconsideration in light of Steffel, since the district court dismissed the request for declaratory relief on the erroneous ground that Younger was applicable even where no prosecution was pending.

No. 73-978 Blair v. Joseph. Cert to the Fourth Circuit.

This petition covers a number of actions that were commenced in federal district courts to enjoin the enforcement of ordinances of four Virginia municipalities and to declare the ordinances unconstitutional. The ordinances, under sanction of criminal penalty, regulate massage parlors and, with certain exceptions, prohibit the massage of any person by another of the opposite sex.

In one of the actions which had been heard by Judge Mehrige, an injunction against enforcement of one of the ordinances was granted pendente lite. Judge Mehrige concluded that Younger did not prevent him from exercising jurisdiction, since none of the plaintiffs before him was facing a pending criminal prosecution. Judge Kellam, however, in two other actions, dismissed the complaints on the ground that, while no prosecutions had been commenced against the plaintiffs, Younger was nevertheless applicable. Judge Kellam also questioned whether he was presented with an extant controversy.

The Fourth Circuit upheld Judge Mehrige's issuance of an injunction pendente lite, finding that the plaintiffs would likely succeed on the merits and that they might suffer irreparable injury if injunctive relief were not granted.

However, the court reversed Judge Kellam's dismissal on the complaints, holding that "where . . . there was no state criminal prosecution pending against any plaintiff, and no plaintiff had pending, at the time the district court dismissed the suits, any civil action in a state court in which the issues raised in the federal litigation were present or raised, Younger neither authorized nor required the non-exercise of federal jurisdiction." The court further disagreed with Judge Kellam's conclusion that there was no existing case or controversy. It found that the plaintiffs were owners of massage parlors and masseuses employed in establishments where it was alleged that massages were administered to members of the opposite sex and concluded that there existed a genuine threat of enforcement of the statutes which endangered the plaintiff's livelihood and freedom from prosecution.

The Fourth Circuit subsequently denied a petition for rehearing and a rehearing en banc. The court's per curiam opinion noted that it had now been informed by defendants that there were civil and criminal actions pending in state courts with regard to certain of the ordinances. But in one of those cases the criminal and civil actions had been commenced by an individual who was no longer a party in the federal action, and in another, while a civil action had been instituted by a party to the federal action, the first reference to the pending action came in the petition for rehearing, "too late", the court held to be considered. (Respondents now assert that even this latter state civil action has been dismissed without prejudice).

I would deny certiorari. Since there were no pending state civil or criminal actions of which the Fourth Circuit was aware, the court, in refusing to apply Younger principles, correctly anticipated our holding in Steffel. And although it may later have appeared in the petition for rehearing that a state civil action was in fact pending against one of the federal plaintiffs, that civil action has apparently now been dismissed, and even if it had not been, the Fourth Circuit was doubtless acting within its discretionary power in refusing to take notice of the civil action. It should be noted, however, that the Fourth Circuit's approval of Judge Mehrige's issuance of an injunction pendente lite presents an issue similar to that in McConnell v. Unitarian Church West, No. 72-1671, supra, where I express the view that the preliminary relief was proper.

W.J. B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 16, 1974

MEMORANDUM TO THE CONFERENCE

RE: No. 73-130 Ellis v. Dyson (Cert.to the 5th Circuit)

This case, held for Steffel and discussed at the last conference, has been relisted. Some concern was expressed at conference that the federal action was in essence an attack upon the prior state convictions and that therefore res adjudicata supported dismissal of the federal action, though not that ground but the erroneous one in reliance on Younger was the stated reason for the dismissal. I continue to believe that certiorari should be granted, and judgment vacated and the case remanded for reconsideration in light of Steffel.

Petitioners were arrested for violation of a Dallas loitering ordinance. Prior to trial, petitioners applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent prosecution under the ordinance on the ground that it was facially unconstitutional. The writ was denied. At trial petitioners timely moved to dismiss on the same grounds. The motion was denied. Petitioners then entered pleas of nolo contendere and were convicted and fined.

Following their convictions, petitioners filed a complaint in federal court, seeking a declaratory judgment that the ordinance was unconstitutional and ancillary relief (including expungement of their records). Respondents moved to dismiss, and for purposes of the motion, the District Court assumed that respondents would continue to enforce the ordinance and that this might subject petitioners to future prosecutions.* The court held further that dismissal of the complaint was nonetheless required because (1) under previous decisions of the Fifth

* The court also ruled that the petitioners had standing to sue since they had previously been arrested under the disputed ordinance and had alleged that they would continue to engage in the same conduct that had resulted in their prior convictions.

Circuit (including that court's decision in Steffel), Younger principles were applicable, even though criminal prosecutions were merely threatened; (2) the petitioners had not alleged any bad faith or harassment sufficient to overcome the Younger hurdle; and (3) the petitioners had not alleged that they had exhausted the state appeal processes after being convicted in the municipal court. The Fifth Circuit (Bell, Godbold, Ingraham) affirmed per curiam.

1. Res judicata is surely a debatable basis for denial of the petition. The federal plaintiffs were primarily seeking relief against future prosecutions. If the requests for expungement of their records can be viewed as impermissible attacks upon their convictions, the District Court should only have dismissed that portion of petitioners' complaint which requested that relief.

2. While I appreciate the force of the argument that failure to appeal a conviction through the state courts should, for reasons of comity and federalism,bar a later federal action for declaratory relief, it seems to me that this case may present a situation for an exception to that principle. Petitioners assert that they submitted affidavits to the District Court which suggested that whenever parties have appealed convictions under the Dallas loitering statute seeking a trial de novo, the City has either declined to prosecute or has quashed the complaint. (There appears to be some dispute whether petitioners filed these affidavits in their federal action or had only filed them in the state courts when they had sought a writ of prohibition. Compare Brief for Petitioenrs, at 4-5, with Brief for Respondents, at 4.) Thus, this may be a situation in which timely resort to the state appellate processes would not and could not result in an adjudication of the constitutionality of the disputed statute.

3. Moreover, the District Court's reliance upon the fact that petitioners had failed to exhaust the state appellate machinery was not an available reason for dismissal of the complaint. This is a Sec. 1983 action and exhaustion of state judicial remedies is not required. See Monroe v. Pape, 365 U.S. 167 (1961).

Although the Court has not previously had occasion to address the question of whether Younger applies when a federal plaintiff seeks declaratory relief against a threatened prosecution and the federal plaintiff has previously been convicted under the state statute, I would not take this case to resolve the issue. First,

there has as yet been no determination whether Dallas officials have in fact deliberately avoided a constitutional test of the loitering statute. A finding on this issue might well be critical to a disposition of the case in this Court. Second, although the District Court assumed for purposes of the dismissal motion that petitioners faced a genuine threat of enforcement of the loitering statute, it may be that on remand the District Court will find the threats of prosecution too speculative to satisfy the tests set forth in Steffel. Presently, the District Court's opinion leaves me unconvinced that there is in fact a genuine threat, but we certainly cannot resolve this question on the record before us.

In sum, since the District Court erroneously dismissed the request for declaratory relief on the ground that Younger was applicable although no prosecution was pending, I think the best disposition is to grant, vacate and remand for reconsideration in light of Steffel.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 14, 1974

No. 72-5581, Steffel v. Thompson

Dear Bill,

I am glad to join your opinion for the Court in this case on the assumption you will make the minor changes we discussed on the telephone today. It is likely that I shall write a brief concurring opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

To: The Ch...
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Circulated: FEB 7 1974

Recirculated: _____

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1974]

MR. JUSTICE STEWART, concurring.

While joining the opinion of the Court, I add a word by way of emphasis.

Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in *Younger* v. *Harris*, 401 U. S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ."

See also *Boyle* v. *Landry*, 401 U. S. 77, 80–81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute . . . ."* Cases where such a genuine threat" can be demonstrated will, I think, be exceedingly rare.

*See opinion of the Court, *supra*, p. 22.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated:

Recirculated: FEB 19 1974

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1974]

MR. JUSTICE STEWART, concurring.

While joining the opinion of the Court, I add a word by way of emphasis.

Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in *Younger* v. *Harris,* 401 U. S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ."

See also *Boyle* v. *Landry,* 401 U. S. 77, 80–81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute . . . ."* Cases where such a gen-

*See opinion of the Court, *supra,* p. 22. Whether, in view of "recent developments," the controversy is a continuing one, will be

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated:

Recirculated: MAR 15 197

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 19, 1974]

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring.

While joining the opinion of the Court, I add a word by way of emphasis.

Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels "chilled" in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

As the Court stated in *Younger* v. *Harris,* 401 U. S. 37, 52:

> "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ."

See also *Boyle* v. *Landry,* 401 U. S. 77, 80–81.

The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated "a genuine threat of enforcement of a disputed state criminal statute . . . ."* Cases where such a gen-

*See opinion of the Court, *supra,* p. 22. Whether, in view of "recent developments," the controversy is a continuing one, will be

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1974

Re: No. 72-5581 - Steffel v. Thompson

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 3-14-74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1974]

MR. JUSTICE WHITE, concurring.

I offer the following few words in light of MR. JUSTICE REHNQUIST's concurrence in which he discusses the impact on a pending federal action of a later filed criminal prosecution against the federal plaintiff, whether a federal court may enjoin a state criminal prosecution under a statute the federal court has earlier declared unconstitutional at the suit of the defendant now being prosecuted, and the question whether that declaratory judgment is *res judicata* in such a later filed state criminal action.

It should be noted, first, that his views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

At this writing, at least, I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded *res judicata* effect in any later prosecution of that very conduct. There would also, I think, be additional circumstances in which the federal judgment would be of far greater legal consequences than that of a relevant precedent to be considered by the state court.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 3-15-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, *v.* John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1974]

MR. JUSTICE WHITE, concurring.

I offer the following few words in light of MR. JUSTICE REHNQUIST's concurrence in which he discusses the impact on a pending federal action of a later filed criminal prosecution against the federal plaintiff, whether a federal court may enjoin a state criminal prosecution under a statute the federal court has earlier declared unconstitutional at the suit of the defendant now being prosecuted, and the question whether that declaratory judgment is *res judicata* in such a later filed state criminal action.

It should be noted, first, that his views on these issues are neither expressly nor impliedly embraced by the Court's opinion filed today. Second, my own tentative views on these questions are somewhat contrary to my Brother's.

At this writing, at least, I would anticipate that a final declaratory judgment entered by a federal court holding particular conduct of the federal plaintiff to be immune on federal constitutional grounds from prosecution under state law should be accorded *res judicata* effect in any later prosecution of that very conduct. There would also, I think, be additional circumstances in which the federal judgment should be considered as more than a mere precedent bearing on the issue before the state court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1974

Re: No. 72-5581 -- Steffel v. Thompson et al.

Dear Bill:

Please join me in your opinion in this case.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 24, 1974

Dear Bill:

Re: No. 72-5581 - Steffel v. Thompson

Please join me.

This case has given me some difficulty. Originally I was inclined to go along with the thesis of Judge Tuttle in his concurrence. I am now content not to do so.

There are two sources of discontent for me. One is the basic undesirability of any race to the courthouse. The opinion makes no reference to this possibility, and perhaps it is just as well we consider it when it arises.

There is left unanswered, also, the possible fact situation lurking in the background. Suppose that Steffel now proceeds to obtain a favorable federal declaratory judgment. Suppose, further, that the local prosecutor, despite the federal judgment, institutes a criminal proceeding in state court and, further, that he obtains a conviction and the conviction is affirmed on appeal. What then? May Steffel obtain a federal injunction somewhere along the line, pursuant to 28 U.S.C. § 2202, or is this foreclosed by the anti-injunction statute, 28 U.S.C. § 2283? Perhaps this problem too is better resolved when it arises on specific facts. Of course, if Steffel does not have his injunctive relief, then the whole purpose behind the federal declaratory judgment act could be said to be thwarted.

I mention all this because I do not wish to be understood as being locked in by my concurrence. I see no reason to complicate

matters by a separate writing, and I shall leave to you whether mention of these possibilities is worth a footnote in your opinion.

Sincerely,

Harry

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 19, 1974

No. 72-5581 Steffel v. Thompson

Dear Bill:

I have reviewed this morning the changes in your Third Draft, and appreciate your making the substance of much of what I suggested.

You have a fine opinion which I expect to join. I do have, however, two minor suggestions which I have indicated on page 22 of the enclosed copy of my working draft. It seemed to me that a mere "assertion" of a threat is not in itself enough to justify the issuance of federal declaratory relief. If the issue were not resolved summarily, I think a plaintiff should be put to his proof to show in fact that there is an imminent threat of state prosecution if the plaintiff engages in the constitutionally protected activity.

Also, characterizing the threat as merely "non-speculative" may also be interpreted as requiring little or no proof of the genuineness of the threat.

The facts in this case give me no trouble whatever. Steffel did not resort to federal court until it was quite clear that he would be arrested if he continued his hanbilling activity. But there will be marginal cases where the presence of an actual threat may be largely subjective.

I write this note rather than talking to you personally, as Jo and I hope to be away for the next ten days looking for some sunshine in Florida. I do hope that you and Marjorie also will be able to join your lovely daughter there.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 23, 1974

No. 72-5581 Steffel v. Thompson

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Brennan

CC: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 2/15/74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-5581

Richard Guy Steffel, Petitioner, v. John R. Thompson et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1974]

MR. JUSTICE REHNQUIST, concurring.

I concur in the opinion of the Court. Although my reading of the legislative history of the Declaratory Judgments Act of 1934 suggests that its 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*, Congress apparently was aware at the time it passed the Act that persons threatened with state criminal prosecutions might choose to forego the offending conduct and instead seek a federal declaration of their rights. Use of the declaratory judgment procedure in the circumstances presented by this case seems consistent with that congressional expectation.

If this case were the Court's first opportunity to deal with this area of law, I would be content to let the matter rest there. But as our cases abundantly illustrate, this area of law is in constant litigation, and it is an area through which our decisions have traced a path that may accurately be described as sinuous. Attempting to accommodate the principles of the new declaratory judgment procedure with other more established principles—in particular a proper regard for the relationship between the independent state and federal judiciary systems—this Court has acted both to advance and to