UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 53 | Number 4 Article 2

4-1-1975

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FEDERAL DECLARATORY AND INJUNCTIVE INTERFERENCE WITH STATE COURT PROCEEDINGS: THE SUPREME COURT AND THE LIMITS OF JUDICIAL DISCRETION

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I. INTRODUCTION

One of the most unusual characteristics of our judicial system in the United States is its side-by-side arrangement of two sets of courts with concurrent jurisdiction over certain categories of cases, one set obtaining its powers from the national government, the other operating within and deriving its authority from each of the several states. In theory the constitutional authority of Congress to establish inferior federal courts[1] might have provided the opportunity to allocate business between the state and federal court systems without creating a scheme of concurrent jurisdiction. For example, one such allocation of business might have been delegation to the federal courts of exclusive authority to resolve all disputes of "national" concern, while the state systems retained the authority to resolve all "local" disputes.[2] In practice, however, either because Congress has deemed federal interests adequately protected by a grant of less than exclusive jurisdiction to the federal courts over certain "national" matters, or because "national" and "local" issues cannot be neatly compartmentalized within exclusive jurisdictional grants, state and federal courts under the existing jurisdictional pattern share the responsibility for resolving many categories of disputes involving some "federal" element.[3] This system of shared re-

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1. U.S. CONST. art. I, § 8, art. III, § 1.

2. Another scheme, of course, would be to leave both "national" and "local" matters to the state systems. In other words, Congress would create no system of inferior federal courts. Under the existing federal jurisdictional scheme, Congress has made a determination that some "national" matters are of such importance as to warrant a grant of exclusive jurisdiction over them to the federal courts. *See, e.g.*, 28 U.S.C. § 1333 (1970) (admiralty, maritime, and prize cases); *id.* § 1338(a) (patent, plant variety protection, and copyright cases).

3. Typical of provisions granting jurisdiction to the federal courts concurrent with that exercised by the state courts are *id.* § 1331 (general federal question jurisdiction); *id.* § 1343 (civil rights and elective franchise).

sponsibility usually means that at least one of the parties to a lawsuit has the option of resorting to a federal or state court for the resolution of a dispute containing some federal issue. When there is an appropriate grant of original jurisdiction over the dispute to the federal courts, the choice in the first instance belongs to the plaintiff. But even if the plaintiff elects a state court in such a case, the defendant often has the option of "removing" the case from the state court to a federal court.[4] Thus the system generally operates in a way that insures that, once both parties have exercised their options, only one system of courts will remain with the authority to resolve the controversy between them.[5]

Because litigation may arise in a variety of forms, however, it is sometimes possible for a single dispute to be presented for resolution to both federal and state courts simultaneously.[6] Congress could, of course, enact detailed rules to govern when federal and state courts

4. Removal jurisdiction, although existing at the option of the defendant, is generally keyed to original jurisdiction. *See id.* § 1441. The statutory grant of original federal question jurisdiction does not, however, extend to cases in which the federal issue enters by way of defense; *see, e.g.*, Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). Congress, however, clearly has the constitutional power to provide for federal defense removal. Tennessee v. Davis, 100 U.S. 257 (1879). *Cf.* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See also* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1312 (1969) [hereinafter cited as ALI STUDY]. It should be noted that this constitutional authority would enable Congress, if it so chose, to make serious inroads upon the states' ability to confine criminal cases to their own courts, *see* Tennessee v. Davis, *supra*, a problem with which this article is intimately concerned. Thus far, however, Congress has not chosen to extend the removal jurisdiction so far. *See* 28 U.S.C. § 1443 (1970); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966).

5. *See* 28 U.S.C. § 1446(e) (1970) (once removal is effectuated, "the State court shall proceed no further unless and until the case is remanded"); *id.* § 1447(c), which provides: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . . A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case." The authority of the state courts finally to resolve the dispute is, of course, subject to the power of review on appeal or by way of certiorari in the United States Supreme Court in cases involving a federal question. *See id.* § 1257.

6. For example, *A*, a citizen of state *X*, brings suit for $50,000 against *B*, a citizen of state *Y*, in a *Y* state court for personal injuries arising out of an automobile accident, the suit being nonremovable because of the restriction upon a resident defendant's ability to remove in a diversity case. *Id.* § 1441. For tactical reasons, the defendant wishes to file suit in federal court upon a claim against the plaintiff arising out of the same automobile accident rather than file his claim as a counterclaim in the pending state action. Despite the statutory restriction on removal, he is permitted this as a plaintiff by the general diversity statute, *see id.* § 1332(a)(1), although he may be prohibited from maintaining the federal action on other grounds. For a survey of the variety of cases in which such duplication of proceedings can result see Annot., 5 A.L.R. Fed. 10 (1970).

must defer to each other's proceedings, but, with minor exceptions, it has chosen not to do so.[7] Thus, the task has been left largely to the courts to articulate principles that will insure the smooth working of both systems. This task was long complicated by a feeling on the part of the federal courts that they should not decline to exercise jurisdiction legitimately conferred upon them by Congress;[8] but the power, under appropriate circumstances, to stay federal actions in deference to state court proceedings has now generally been recognized by those courts.[9] A more restrictive approach has, however, been evident when federal courts are requested to interfere with state court proceedings by issuing declaratory or injunctive relief to terminate or moot those proceedings.

In private civil litigation, for example, the federal courts will not issue injunctions to stop parallel in personam state court actions simply in order to prevent duplication of effort,[10] although they will issue such

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7. The primary exception, for purposes of this article, is the Anti-Injunction Act, 28 U.S.C. § 2283 (1970). For discussion of the history and construction of this provision see Part III(B) *infra*. For a more elaborate scheme regulating state and federal deference to proceedings in the courts of other systems see ALI STUDY, *supra* note 4, §§ 1371-73.

8. *See* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684, 687 (1960); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978, 980 (1950). The statements of this doctrine have often been cast in absolute form. An example is Chief Justice Marshall's statement in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821):

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404. *See also* McClellan v. Carland, 217 U.S. 268 (1910). That the Court does not consider the doctrine absolute, however, is demonstrated by the authorities dealing with the doctrine of abstention, *see* note 9 *infra*.

9. The Supreme Court has recognized the duty of federal courts to defer to state courts when the narrow, special factors that bring into play the doctrine of abstention are present. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52 (2d ed. 1970); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974). In addition, despite the authorities cited in note 8 *supra*, the lower federal courts have recognized that they possess the discretion to defer to prior pending state court proceedings under certain circumstances. *See, e.g.*, Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949); Note, 60 COLUM. L. REV., *supra* note 8; Note, 59 YALE L.J., *supra* note 8; Annot., 5 A.L.R. Fed. 10 (1970). It should be noted, however, that the latter courts have recognized no absolute obligation to defer even to prior pending state actions. *See* P. BATOR, D. SHAPIRO, P. MISHKIN, & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1234, 1254-61 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

10. *See* HART & WECHSLER, *supra* note 9, at 1235.

injunctions to protect their jurisdiction over property within their control.[11] These principles have been derived from present and past versions of the Federal Anti-Injunction Act[12] and the judicial construction of that Act.[13] Similar judicial construction of the Federal Declaratory Judgment Act[14] has also resulted in federal court deference to pending state actions when federal declaratory relief is requested.[15]

The most intense problems in federal-state relationships do not, however, occur in the area of private civil litigation. Rather, those problems occur when federal courts are asked to halt or prevent state court proceedings on federal constitutional grounds. The problems are more intense in such cases both because state feelings are often likely to run high against federal interference, and because of the tension that exists between state interests and the obligations conferred on the federal courts by Congress. On the one hand, the congressional grant of federal question jurisdiction to the federal courts, while not absolute, does carry with it at some point the obligation to adjudicate those cases in which litigants properly invoke the jurisdiction, including cases involving constitutional challenges to state authority.[16] On the other hand, state courts and state judges are equally bound to enforce the Constitution of the United States in preference to state law when the two are inconsistent.[17] Moreover, the states, not the national govern-

11. *Id. See, e.g.*, Kline v. Burke Constr. Co., 260 U.S. 226 (1922). Much can be said against these rules when they result in wasteful duplication of proceedings in both federal and state courts. For example, there seems to be no valid distinction between in personam and in rem proceedings. In an in rem proceeding the property or thing that is the subject of the litigation is very often not in the physical custody of the court at all, despite the judicial fiction that it is. Any interference that another court might cause would thus be with the disposition of the property. But this is precisely the kind of interference caused in in personam proceedings—*i.e.* interference with another court's disposition of the litigation. Ordinary principles of res judicata might as easily control both kinds of cases, or perhaps injunctions could be permitted against the second proceeding.

12. 28 U.S.C. § 2283 (1970). For a discussion of the history and construction of this provision see Part III(B) *infra.*

13. *See* HART & WECHSLER, *supra* note 9, at 1235-39.

14. 28 U.S.C. §§ 2201-02 (1970).

15. *See* Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942).

16. Most of the challenges to state authority dealt with in this article are brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). In cases brought under that provision, Congress has conferred jurisdiction upon the federal courts without regard to the jurisdictional amount in controversy. *See* 28 U.S.C. § 1343(3) (1970); *cf. id.* § 1331. It has been persuasively argued that the grant of jurisdiction in these cases is especially compelling. *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948).

17. *See* U.S. CONST. art. VI. Procedurally, in the category of cases being discussed in the text, the constitutional question would most often be raised by way of defense in a state civil or criminal proceeding, although state anticipatory remedies for constitutional violations are also available.

ment, are the source of those laws, rules, and regulations that most directly and most frequently bear on the primary conduct and the day-to-day activities of every citizen. Structurally speaking, this places the bulk of the responsibility for the wise protection of individual rights upon the state judiciaries. Necessarily included within that responsibility is the duty of enforcing federal constitutional guarantees, and a corollary of this duty is the function of construing state laws consistently with those guarantees whenever possible—a function that the federal courts, in the final analysis, cannot authoritatively perform.[18] Thus the states have a vital interest in insuring that their courts, rather than federal courts, will usually decide constitutional questions involving local laws.

It should be apparent that this function of state courts to initially decide federal constitutional issues is seriously impaired when the responsibility for constitutional decision-making is taken wholesale from state tribunals and exercised by federal judges. Yet such impairment can be the only result if the federal courts, by issuing anticipatory relief against state proceedings, frequently interpose themselves between the state courts and the process of constitutional adjudication. As a result, both Congress and the Supreme Court have attempted to construct principles that would resolve the dilemma posed by the competing obligations imposed on the federal courts to exercise the jurisdiction conferred upon them to protect constitutional rights from state infringement and simultaneously to avoid unnecessary interference with state court proceedings. The most important legislative attempt to resolve the dilemma is the Federal Anti-Injunction Act, previously mentioned.[19] However, because of the various legislative and judicial exceptions to this statute which have been created over the years, it has not constituted an effective mechanism for resolving the conflicts described.[20] As a result, the bulk of the responsibility for achieving a balance between the jurisdictional grant and countervailing state interests has again fallen to the judiciary, primarily to the Supreme Court of the United States. The Court has undertaken this task by developing principles of restraint for the federal courts to utilize in administering the discretionary remedies of injunction and declaratory judgment.

18. *Compare* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *with* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364, 366 (1957) *and* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419-20 (1964).

19. 28 U.S.C. § 2283 (1970). *See* text accompanying note 12 *supra*.

20. *See* the discussion of the history of this statute in Part III(B) *infra*.

Given the sensitivity and complexity of this job, it is not surprising to learn that the Court has vacillated somewhat in the development of these principles. In fact, an examination of the Court's decisions will reveal that the rigor with which it has been willing to apply principles of restraint has varied with its perception of the need for federal relief against state authority in any given period of history.[21]

In 1971 the Court entered a new period in its evolution of rules to guide the lower federal courts in determining requests for injunctions and declaratory judgments against state court proceedings. In six cases decided in February of that year, the Court made it plain that it was considerably tightening the availability of declaratory and injunctive relief against state criminal actions,[22] although the full scope of the contraction is not yet clear. The purpose of this article is to examine the legitimacy of the Court's regulation of the discretionary remedies of injunction and declaratory judgment in these and subsequent cases. The thesis of the article is that, given the legitimacy of the Court's role in settling the conflict between the federal courts' obligation to adjudicate controversies within their jurisdiction and their obligation to avoid emasculating interference with the state court systems, its response has been deficient in several important respects. First, the Court has failed to articulate a workable, principled formula for allocating responsibility for constitutional adjudication between the two systems of courts. Secondly, the Court has, while adhering in form to the traditional rules governing the administration of declaratory and injunctive relief, in fact perverted the principles which ought to govern the administration of those remedies in our system. Finally, as a result of the above two failures, the Court has, perhaps intentionally, aggrandized to the federal courts a degree of discretion to decline to adjudicate that they are not entitled to exercise, even in administering basically discretionary remedies. To understand fully the deficiencies in the Court's response, it is important to understand the rules that traditionally determine when declaratory and injunctive relief will issue and the history of those remedies in the federal courts.

In any systemic analysis of the federal courts, certain goals should be used as indicia of a functional system. Most important, the rules

21. The Court's application of restraint in issuing declaratory and injunctive relief is discussed in Part III(A) *infra*.

22. *See* Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971). These cases are discussed in Part IV *infra*.

by which any remedy is administered should reflect the *real* reasons and policies behind judicial decisions. These rules should reflect the current needs of the judicial system and not be mere rubrics of another era. If the federal courts instead adhere to the terminology of traditional rules while announcing decisions based on policies irrelevant to those rules, the rules lose their capacity to perform a limiting function. They then only obscure the decision-making process, creating at least the appearance of arbitrariness, if not the actual opportunity for arbitrary decision-making. In a modern procedural system, therefore, courts should establish and be limited by intelligible, functional procedural rules. These rules should form the basis for decision-making, and not be used as justifications for decisions made on other grounds.

II. THE TRADITIONAL RULES GOVERNING THE AWARD OF INJUNCTIONS AND DECLARATORY JUDGMENTS

A. Injunctions

There were three traditional doctrines of equity jurisprudence that governed when a court would issue injunctive relief that are relevant to this article. First, there was the often-stated rule that equity would not enjoin a criminal proceeding. Secondly, was the principle that, before equity would grant an injunction in any case, the plaintiff had to demonstrate a threat of "irreparable injury." Thirdly, was the requirement that the injury threatened must be "imminent" and "substantial" before an injunction would issue. The characteristics and purposes of these doctrines are discussed below. Then the effects of the merger of law and equity in modern procedural systems are examined in order to determine the standards that should be employed by a court operating within such a modern system in determining whether injunctive relief is appropriate.

(1) The Principle That Equity Will Not Enjoin A Criminal Proceeding

In examining the traditional rules governing injunctions against criminal prosecutions, one often encounters the principle, stated in various ways, that equity will not interfere with criminal proceedings.[23]

23. *See, e.g.*, Kerr v. Corporation of Preston, 6 Ch. D. 463, 467 (1876); Saull v. Browne, L.R. 10 Ch. 64 (1872); 1 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §§ 68, 272 (3d ed. 1890); 1 H. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS §§ 58-60 (1909); 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1361b

The fundamental basis of the principle seems to have been a lack of criminal jurisdiction in the English Court of Chancery.[24] More precisely, the rule seems to be the result of Chancery's renunciation of its criminal jurisdiction when the common law began to afford adequate remedies for criminal violations:

> When, however, an improved state of society diminished the frequency of crime, and the state of the country permitted that the powers of the magistracy and of the ordinary tribunals should be efficiently exerted for the repression of outrage and violence, and an effectual supervision was exercised over the magistrates themselves; and when the jurisdiction of the ordinary Courts to afford *Compensation* for injuries, as well as to inflict punishment, was completely established, the necessity for the interference of the Court of Chancery in such matters ceased, and the Court of Chancery renounced its jurisdiction. In modern times the Court of Chancery has refused to exercise any jurisdiction for the repression of crimes, or even to afford its aid to the criminal jurisdiction of the courts of common law . . . .[25]

The basic limitation on interference with criminal proceedings was often stated in conjunction with the rule that equity protects property rights rather than personal rights.[26]

Although the rule against noninterference with criminal proceedings seems to be absolute, the authorities reveal some important exceptions. One long-standing qualification of the rule permitted an injunction against a party in an equity suit, to prevent him from using a subsequently commenced criminal proceeding to litigate the same matter at issue in the equitable action.[27] Some English decisions attempted to narrow this exception to the general rule by restricting it to cases in which the object of the subsequent criminal proceeding was identical to that of the equity suit.[28] However, other authorities seem to indicate that the

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(5th ed. 1941); 1 T. SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES §§ 24, 71 (2d ed. 1901); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 893 (12th ed. 1877).

24. *See* 1 J. HIGH, *supra* note 23, § 68; 1 H. JOYCE, *supra* note 23, §§ 58, 59; 1 T. SPELLING, *supra* note 23, § 24; 2 J. STORY, *supra* note 23, § 893.

25. 1 G. SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 688 (1846).

26. *See* Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818). *See also* 1 J. HIGH, *supra* note 23, § 68; 1 H. JOYCE, *supra* note 23, § 59. For a discussion of this case, and of the property-personal right distinction see *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 998-1001 (1965).

27. *See* Mayor of York v. Pilkington, 26 Eng. Rep. 584 (Ch. 1742).

28. *See* Thames Launches, Ltd. v. Trinity House, [1961] Ch. 197 (1960); Saull v. Browne, L.R. 10 Ch. 64 (1874); *cf.* Attorney-General v. Cleaver, 34 Eng. Rep. 297, 300 (Ch. 1811).

exception was part of a broader power to protect equity's jurisdiction over matters and parties within its control.[29]

A second exception to the general rule which is more important for our purposes is derived from equity's jurisdiction over matters involving property interests. It seems self-evident that even if equity exists only to protect "civil and property rights," there will be occasions in which the maintenance of criminal proceedings can damage such rights.[30] Nevertheless, the rule against interference remained relatively stringent both in this country and in England until the latter part of the last century.[31] At that time the rule began to be relaxed rather drastically in this country, although apparently not in England.[32] The

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29. *See* Turner v. Turner, 15 Jurist. 218 (Ch. 1850), *reproduced in* 2 A. CHAFEE, CASES ON EQUITABLE REMEDIES 227 (1938). In *Turner* a receiver was appointed in the course of the administration of an estate and the defendants were enjoined by the court from carrying on actions of ejectment for any part of the lands of the deceased. Subsequently, the receiver was ordered to pull down a house situated on certain of the property under administration. To do so, however, the receiver's agents were forced to expell one of the defendant's agents from the premises forcibly. For so doing, the defendant procured indictments against the agents. The court enjoined the defendant from prosecuting the indictment, holding that despite equity's absence of jurisdiction over an indictment, the court might enjoin a party from obstructing an order against him. Story cites *Turner*, among other cases, for the following proposition: "Courts of Equity will not only grant an injunction, restraining suits at law, between parties upon equitable circumstances; but they will exercise the same jurisdiction to protect their officers, who execute their processes, against any suits brought against them for acts done under or in virtue of such processes." 2 J. STORY, *supra* note 23, § 891, at 176.

> But [the restriction against enjoining criminal proceedings] applies only to cases, where the parties, seeking redress by such proceedings, are not the plaintiffs in Equity; for if they are, the Court possesses power to restrain them personally from proceeding at the same time at law, upon the same matter of civil right, for redress in the form of a criminal proceeding. *In such cases [the injunction] is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights.*

Id. § 893, at 178 (emphasis added).

30. *See, e.g.*, Kerr v. Corporation of Preston, 6 Ch. D. 463 (1876), in which plaintiffs had made certain alterations in a building owned by them, allegedly with the knowledge of the local authorities. After the alterations were completed the authorities threatened criminal proceedings against the plaintiffs if they did not undo them. One of the arguments made by plaintiffs was that the local authority could not prohibit the alterations without paying compensation. *See id.* at 465. The injunction was refused.

31. *See* J. STORY, *supra* note 23, § 893; *Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 1025.

32. There are a number of English cases articulating the rule that while equity has no criminal jurisdiction, if a criminal act causes injury to property, equity will intervene. *See, e.g.*, Springhead Spinning Co. v. Riley, L.R. 6 Eq. 551 (1868); Emperor of Austria v. Day & Kassut, 45 Eng. Rep. 861 (Ch. 1861). But the view of these cases appears to have been repudiated in later decisions. *See* Prudential Assurance Co. v. Knott, L.R. 10 Ch. App. 142 (1875). *See also* White v. Mellin, [1895] A.C. 154. Halsbury states the rule as still being in effect, while citing the repudiating authorities as ones which strongly suggest a contrary proposition. 21 HALSBURY'S LAWS OF ENGLAND 347 & nn. (i)-(1) (3d ed. 1957). The same source does not, however, refer to the exception (or authorities cited to support or repudiate it) when discussing injunctions against criminal

reasons for the intensity of the change in this country have been explained as follows:

> Two developments around the turn of the century undercut the basis for the doctrine of noninterference. An increasing judicial concern with substantive due process was reflected in greater willingness to provide relief against official action interfering with the right to own and use property. At the same time, the increasing number of regulatory statutes, such as rate-fixing laws, and municipal police ordinances, such as zoning laws, presented a variety of conflicts with these property rights. The new laws, often enforced by criminal sanctions, produced numerous challenges to their validity and applicability in which only legal questions were raised. Many of these laws affected continuing commercial activities, and those who might be within the scope of the laws were faced with an unpleasant dilemma: either forego their arguably legitimate and perhaps constitutionally protected activity, or continue it and risk heavy penalties if enforcement procedures should subsequently be instituted.[33]

Thus, because of the fundamental structural differences between our system and the English system, there was an expansion of equity's authority to interfere in criminal matters involving constitutional issues.[34] Coupled with the subsequent demise of the distinction between the protection of property rights and the protection of personal rights by equity,[35] this expansion of authority held serious implications for the ability of government officials to enforce public policy through the medium of the criminal law. However, the blanket restriction upon equity's jurisdiction to interfere with criminal matters was not the only potential limitation upon the issuance of injunctions against criminal prosecutions. The requirements, previously mentioned, that before an injunction might issue there had to be a threat of "irreparable injury," which was "imminent" and "substantial," still held the potential for limiting drastically equity's ability to intervene in criminal actions.

(2) The Principle that an Injunction Will Issue only to Prevent "Irreparable Injury"

Even after the expansion in this country of equity's authority to enjoin criminal prosecutions, the courts were not willing to grant injunc-

proceedings. *See id.* at 406. *See also* Note, *Injunctions Against Criminal Proceedings*, 14 HARV. L. REV. 293, 294 (1900).

33. *Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 1024.

34. Note, 14 HARV. L. REV., *supra* note 32, at 294.

35. The evolution and erosion of the personal-property rights distinction is discussed fully in *Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 998-1001.

tions merely upon a complaint that a prosecution was being brought or threatened under an invalid law.[36] Rather, plaintiffs in equity have always had to demonstrate in addition to the law's invalidity that they were threatened with some "irreparable injury" before an injunction would issue.[37] Typical of statements expressing this general rule is the following: "An injunction, being the 'strong arm of equity,' should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity."[38]

So stated, however, the rule is somewhat misleading. The expression "irreparable injury," or "irreparable harm" implies that an injury which is absolutely destructive in some sense is required, but this has clearly never been the case. On the contrary, the term "irreparable injury" means no more or no less than that the plaintiff's legal remedy must be inadequate—a traditional restriction on equity's authority to restrain actions at law.[39] The following is a good explanation of the doctrine's true meaning:

> In its general sense an irreparable injury is one which cannot be repaired by any means accessible to individual parties or by invoking the aid of others. In its technical sense, as used in connection with the question of granting or withholding preventive equitable aid, we mean by saying that an injury is irreparable either that no legal remedy furnishes full compensation or adequate redress, owing to the inherent ineffectiveness of such legal remedy, or that, owing to the delay incident to the prosecution of an action at law to final judgment and obtaining service thereon, such judgment and process would prove fruitless of beneficial results. However it may have been at a former period, it is not entirely correct to say at present, that an injunction will never be granted except in cases of irreparable threatened injury as a consequence of with-

36. *See, e.g.*, Kent Prods., Inc. v. Hoegh, 245 Iowa 205, 61 N.W.2d 711 (1953); Williams v. Board of Barber Examiners, 75 N.D. 33, 25 N.W.2d 282 (1946); Olds v. Klotz, 131 Ohio St. 447, 3 N.E.2d 371 (1936); Sherod v. Aitchison, 71 Ore. 446, 142 P. 351 (1914).

37. *See* cases cited note 36 *supra*.

38. 1 J. HIGH, *supra* note 23, § 22, at 22. *See also* 1 H. JOYCE, *supra* note 23, § 35, at 70 ("It is a general rule that, where a complaint shows that the injury threatened will be an irreparable one, a court of equity will grant relief by an injunction.").

39. This traditional limitation on relief against actions at law is expressed by 4 J. POMEROY, *supra* note 23, § 1363, at 982, as follows:

> It is . . . a well-settled doctrine that in cases of this kind, where the primary rights of both parties are legal, and the courts of law will grant their remedies, and courts of equity may also grant their peculiar remedies, equity will not interfere to restrain the action or judgment at law, *provided the legal remedy will be adequate*; that is, provided the judgment at law will do full justice between the parties, and will afford a complete relief; the adequacy or inadequacy of the legal remedy is the sole and universal test.

See also id. §§ 1362, 1364.

> holding it. By the term 'irreparable injury' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury be a serious one, or at least a material one, and not adequately reparable by damages at law; and by the term 'the inadequacy of the remedy by damages,' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood.[40]

The irreparable injury standard thus translates into a determination of the circumstances under which the plaintiff's remedy at law will be deemed adequate for purposes of an injunction against a criminal prosecution. Ordinarily, the remedy at law by way of defense of a criminal proceeding, with appeal of any errors of law, has been considered adequate by the courts.[41] The "injury" sustained by having to defend a criminal action brought under an unconstitutional law has not been considered the kind of burden or defect that renders the legal remedy inadequate, because "[t]he ordinary interruption caused by good-faith prosecution [is] considered one of the burdens of citizenship."[42] As a result, some injury or loss that will not be compensated by acquittal in the criminal proceeding must be demonstrated. In general, this means that the *mere enforcement* of the criminal law must involve some cost or damage that will not be eliminated or redressed by a successful defense.[43] For example, when the allegedly invalid law or official action is directed at persons other than the plaintiff, such as his customers or employees, the damage inflicted has generally been considered irremediable by the successful defense of a criminal action.[44] The reasons seem obvious. It is one thing to declare that the

40. 1 T. SPELLING, *supra* note 23, § 13, at 19-20. *See also* 1 H. JOYCE, *supra* note 23, § 60a. The same meaning prevails in England. *See* 21 HALSBURY'S LAWS OF ENGLAND 352 (3d ed. 1957).

41. *See, e.g.*, Thompson v. Van Lear, 77 Ark. 506, 92 S.W. 773 (1906); Kent Prods., Inc. v. Hoegh, 245 Iowa 205, 61 N.W.2d 711 (1953); Williams v. Board of Barber Examiners, 75 N.D. 33, 25 N.W.2d 282 (1946); Olds v. Klotz, 131 Ohio St. 447, 3 N.E.2d 371 (1936); Sherod v. Aitchison, 71 Ore. 446, 142 P. 351 (1914); Kelly & Co. v. Conner, 122 Tenn. 339, 123 S.W. 622 (1909); State v. Logue, 376 S.W.2d 567 (Tex. 1964); Littleton v. Burgess, 14 Wyo. 173, 82 P. 864 (1905); 1 T. SPELLING, *supra* note 23, § 24, at 37; *Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 1024.

42. *Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 1024.

43. *See* State v. Logue, 376 S.W.2d 567 (Tex. 1964).

44. *See, e.g.*, Benton Bros. Drayage & Storage Co. v. City of Savannah, 219 Ga. 172, 132 S.E.2d 196 (1963); Brown v. Nichols, 93 Kan. 737, 145 P. 561 (1915); Milton Dairy Co. v. Great N. Ry., 124 Minn. 239, 144 N.W. 764 (1914); Biddles v. Enright, 239 N.Y. 354, 146 N.E. 625 (1925); Ideal Tea Co. v. City of Salem, 77 Ore. 182, 150 P. 852 (1915); City of Austin v. Austin Cemetery Ass'n, 87 Tex. 330, 28 S.W. 528 (1894); Fellows v. City of Charleston, 62 W. Va. 665, 59 S.E. 623 (1907).

ordinary burdens of citizenship require the plaintiff to choose between adherence to the law and violation of it in order to determine his legal rights. But it is quite another to require him to violate a law in order to obtain a determination of his rights under circumstances where his rights will be effectively destroyed anyway because someone he depends on will refuse to violate the questionable provision. Moreover, there may be instances in which the law is wholly directed at someone other than the plaintiff, but who is essential to the plaintiff's livelihood.[45] Under such circumstances there may obviously be no legal remedy at all, since the plaintiff cannot violate the criminal provision and the person to whom the law is directed probably will not do so.

Another example of a situation in which the remedy of defending a criminal prosecution has been considered inadequate is when the plaintiff is threatened with multiple prosecutions under an invalid law. Very often such a threat is posed when plaintiff has committed significant resources to a course of conduct which is subsequently outlawed.[46] Under these circumstances the choice posed for him is not an "ordinary" burden of citizenship since here he must choose between giving up his established pursuit, probably at great expense, or defending *numerous* prosecutions, which may ultimately result in conviction and the imposition of substantial penalties if his legal theories are wrong. This, the courts have determined implicitly, is a greater burden than citizenship ordinarily requires. Moreover, there are other situations in which a threat of multiple prosecutions has resulted in a conclusion that defense of a criminal action is inadequate, apparently for the same reason. For example, where the plaintiff has not already entered into an established course of conduct, but an allegedly invalid law is framed in such a way that it is virtually impossible to violate it only once, the danger of multiple prosecutions has resulted in the award of appropriate equitable relief.[47] And where multiple prosecutions are brought for purposes of harassment under laws already declared invalid by a state's highest court, the attendant burden of defending against clearly invalid charges has been held appropriate for equitable relief.[48]

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45. *See, e.g.*, Milton Dairy Co. v. Great N. Ry., 124 Minn. 239, 144 N.W. 764 (1914).

46. *See, e.g.*, Ellison v. City of Ft. Lauderdale, 175 So. 2d 198 (Fla. 1965); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956). *See also* New Orleans Baseball & Amusement Co. v. City of New Orleans, 118 La. 228, 42 So. 784 (1907).

47. *See* cases cited note 46 *supra*.

48. *See* Alexander v. Elkins, 132 Tenn. 663, 179 S.W. 310 (1915).

The open-ended nature of the irreparable injury test, of course, precludes one from cataloguing all the situations in which it will be deemed satisfied by the courts. Hopefully enough has been said thus far to demonstrate that the essential characteristics of the test involve some deficiency in the legal remedy. That deficiency may result in the ultimate destruction or deterioration of the interest the plaintiff seeks to protect, place some extraordinary burden upon the plaintiff that may deter him from resorting to his legal remedies, or, as in the case of harassing prosecutions, transform the plaintiff's legal remedy into a sword that may be used to coerce him into obedience of an invalid law. However, the irreparable injury standard is not the only obstacle that a plaintiff seeking an injunction against criminal proceedings must overcome. Equity also contains rules governing the timing and magnitude of the injury necessary before injunctive relief will issue. These are expressed most often as the requirements that the injury to the plaintiff must be "imminent," and "substantial," as well as irreparable, before an injunction will issue.

(3) The Requirement of "Imminent" and "Substantial" Injury

The primary utility of the injunctive remedy to a plaintiff lies in its preventive nature, aided by the ability to coerce the defendant's obedience to it through the sanction of contempt. This very utility, however, has the potential of imposing enormous burdens upon the defendant. For example, suppose there arises a situation in which one group of officials is charged with the responsibility of maintaining the banks of a river in good condition, while another group of officials is responsible for draining land along the sides of the river. The latter group is about to adopt a new method of drainage that will result in an increased flow of water into the river. The officials responsible for maintaining the banks seek an injunction against the new method (i) to preclude its use altogether or (ii) in the alternative to preclude the draining officials from using the new method in such a manner as to injure the banks.[49] If the court grants either form of the injunction, the defendants' legitimate activities are seriously impeded. If the new method is altogether precluded, the defendants are prevented from adopting a more efficient means of fulfilling their responsibility to drain the abut-

49. The hypothetical is derived from Earl of Ripon v. Hobart, 40 Eng. Rep. 65 (Ch. 1834).

ting land. If the second alternative is chosen instead, they may be just as effectively prevented from adopting the new method, since they may not be certain whether or to what extent it will actually affect the river banks harmfully, and will therefore refrain from using it for fear of incurring the contempt sanction. In the end, if the harmful effects of the new method have been miscalculated by the plaintiffs and the court, either alternative will have unnecessarily interfered with the defendants' legitimate activities.

In order to assure that such impositions would be held to a minimum, equity developed the requirement that the harm to the plaintiff had to be "imminent" before an injunction would issue against the defendant:

> To justify the court in granting the relief it must be reasonably satisfied that there is an actual intention on the part of defendant to do the act which it is sought to enjoin or that there is probably ground for believing that, unless the relief is granted, the act will be done. And it is not a sufficient ground for interfering that, if there be no such intention on the part of defendant, the injunction can do no harm.[50]

The application of the requirement does not, as the term "imminent injury" might suggest, entail simply a measurement of the closeness in time of the injury sought to be avoided by the plaintiff. Rather, the process is one of balancing the magnitude of the harm against the probability of its occurrence.[51] The operation of the doctrine was well explained by Lord Chancellor Brougham in *Earl of Ripon v. Hobart*:[52]

> [T]he law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming.[53]

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50. 1 J. HIGH, *supra* note 23, § 22, at 22. *See also* 1 H. JOYCE, *supra* note 23, §§ 17-19.

51. *See, e.g.*, Fletcher v. Bealey, 28 Ch. D. 688 (1885); Pattisson v. Gilford, L.R. 18 Eq. 259 (1874); Hepburn v. Lordan, 71 Eng. Rep. 497 (V.C. 1865); Haines v. Taylor, 50 Eng. Rep. 511 (Rolls 1846); Earl of Ripon v. Hobart, 40 Eng. Rep. 65 (Ch. 1834); Crowder v. Tinkler, 34 Eng. Rep. 645 (Ch. 1816).

52. 40 Eng. Rep. 65 (Ch. 1834).

53. *Id.* at 67-68.

Thus, when the probability of the harm occurring was uncertain and the injury itself not substantial, the English decisions refused injunctive relief.[54] Likewise, when the probability of serious harm was greater, but the defendant might take steps to prevent it, no relief was forthcoming.[55] Conversely, relief was sometimes granted when the injury was substantial, although the probability of its occurrence doubtful.[56] And to constitute a "substantial" injury, it was not necessary that the harm be catastrophic; a certain interference with a legal right possessed by the plaintiff was sufficient.[57] The decisions thus make it apparent that the "imminence" and "substantiality" requirements were merely differ-

54. *See id.*, where the potential harm was damage to a river's banks that would be caused by a steam pump increasing the flow of water into the river. The injunction was refused, in part because the harm was not likely to be done all at once. Thus there would be time enough to reapply to the court for relief when it was certain harm would result from the pumping, and thus unnecessary interference with what might be wholly legitimate activities by the defendants was avoided.

55. *See* Fletcher v. Bealey, 28 Ch. D. 688 (1885), in which the defendant had leased land a mile and one-half above a river from plaintiff's paper manufacturing works, for the purposes of dumping "vat waste" upon the land. The vat would eventually, though not immediately, ooze a noxious green liquid, which if it were allowed to pollute the river, would prevent plaintiff from using its water in paper manufacturing. The court refused injunctive relief, partly upon the grounds that the defendant might be able to prevent the harm:

> [I] think that in ten years time it is highly probable that science (which is now at work on the subject) may have discovered some means for rendering this green liquid innocuous. But even if no such discovery should be made in that time, I cannot help seeing that there are contrivances, such as tanks and pumps, and other things of that kind, by which the liquid may, as the Defendants say, be kept out of the river altogether. Therefore, upon that ground alone I do not think that the action can be supported.

Id. at 699-700. *See* Pattison v. Gilford, L.R. 18 Eq. 259 (1874) (Injunction against defendant selling for building purposes lots on an estate over which plaintiff had a right of shooting refused, on grounds that defendant was selling the lots subject to the plaintiff's right); Haines v. Taylor, 50 Eng. Rep. 511 (Rolls 1846) (Injunction to prevent erection of a gas manufacturing works near plaintiff's residence refused, on the grounds that defendant might be able to manufacture the gas without proving a nuisance). *See also* Crowder v. Tinkler, 34 Eng. Rep. 645 (Ch. 1816) (Injunction to prevent maintenance of powder magazine near plaintiff's paper mill refused. Parties sent to court of law to try issue of nuisance, conditioned on defendant's storing minimum amount of powder on site, so as to avoid imminent danger).

56. *See* Hepburn v. Lordan, 71 Eng. Rep. 497 (V.C. 1865), where an injunction was granted to prevent the defendant from storing jute on land adjacent to the plaintiffs' tanning premises.

57. *See* Goodhart v. Hyett, 25 Ch. D. 182 (1883), in which an injunction was granted to prevent defendant from erecting a house over a line of water pipes owned by the plaintiff. The plaintiff had acquired an easement for the pipes across the land, and although the house could be built without eliminating the pipes, its construction would have made repair of the pipes difficult, though not impossible. The court states: "It appears to me that this is a case in which I am bound to interfere by granting an injunction, because there is not only a mere possibility that harm may come, but the necessary effect of what is being now done is that when the pipes have to be repaired there will be a greater difficulty and greater expense in doing it than at the present time." *Id.* at 190.

ent ingredients in the same balancing process,[58] the substantiality factor operating primarily to mitigate the effect of a remote or doubtful probability of occurrence, but otherwise being relatively unimportant in the presence of a clear infringement of a legal right.[59]

The remaining question is how these two factors operate in the context of injunctive challenges to criminal prosecutions in this country. In most situations it seems clear that there will exist no question of prematurity at all. For example, when public officials threaten to enforce the penal provisions of a confiscatory rate statute against a railroad, there is no question that the harm threatened to the railroad is both imminent and substantial.[60] The confiscatory nature of the statute will produce immediate lost profits if the statute is obeyed and the constitutional nature of the objection to the statute would seem to foreclose any argument that the plaintiff should delay his request for injunctive relief until the certainty of the injury is increased.[61]

The most likely situation in which a prematurity objection will exist is when a statute or ordinance is challenged before the officials charged with the responsibility of enforcing it against the plaintiff have taken steps to do so. Two cases from Texas provide a good illustration. In *Page v. Tucker*[62] the plaintiffs, cattle owners, filed suit to enjoin certain public officials from enforcing the state tick eradication law. Although the law was alleged to be unconstitutional on several grounds, the trial court refused the injunction and the court of civil appeals affirmed. The appellate court held the law to be constitutional, but went on to state that even if the law be considered void for any of the reasons assigned by the plaintiffs, an injunction was properly refused.[63] All that had been done toward enforcement of the law was the entry

58. *See* 21 HALSBURY'S LAWS OF ENGLAND 355-56 (3d ed. 1957).

59. Small injury or damage was, as indicated, not generally grounds for refusing the injunction. *See id.* at 354-55. There existed a rule that an equity court would not interfere by injunction when the violation was so "small, slight and formal that the plaintiff [had] no ground in conscience to complain of it." *Id.* at 355. However, it seems to have been difficult successfully to defend with an objection of this sort. *See id. Compare* Harrison v. Good, L.R. 11 Eq. 338, 352 (1871), *with* Lloyd v. London, C. & D. Ry., 46 Eng. Rep. 496, 500 (Ch. 1865) *and* Kemp v. Sober, 61 Eng. Rep. 200, 201 (V.C. 1851).

60. *See, e.g.*, Coal & C. Ry. v. Conley, 67 W. Va. 129, 67 S.E. 613 (1910).

61. Of course, the irreparable injury standard would have to be satisfied also. This would doubtless be accomplished by demonstrating that multiple prosecutions would result if the statute's enforcement is not enjoined. *See id.* at 149-50, 67 S.E. at 622.

62. 218 S.W. 584 (Tex. Civ. App. 1919), *aff'd*, 288 S.W. 809 (Tex. Comm'n App. 1926, judgmt adopted).

63. *Id.* at 586.

of an order by the county commissioner's court that provided the necessary funds for enforcement and the appointment of inspectors prescribed by the law.[64] As the court of appeals stated:

> [A]ppellants are not entitled to injunctive relief against [the law's] enforcement till it is shown that there is some impending or threatened injury to them or to their property. The law requires stock owners to have their animals dipped, and provides a penalty for a failure to do so. It also authorizes the forcible seizure, for the purpose of dipping, of stock which are not dipped by their owners or custodians. There is no evidence in this record that the appellees, or any of them, were threatening or intending to prosecute the appellants criminally for a failure to dip their stock, or that the proper officers were intending or threatening to seize their stock for the purpose of dipping them.[65]

In *Neal v. Boog-Scott*[66] another group of plaintiffs challenged the same tick eradication law, again on constitutional grounds. Again the trial court denied an injunction, and the plaintiffs appealed. This time, however, the appellate court reversed, holding that the trial court erred in sustaining the defendants' demurrer to one of the plaintiffs' allegations. The allegation was that the dipping solution in which plaintiffs' stock was ordered to be dipped was very harmful and would kill or damage many of the stock.[67] Since any such damage would, under the law, go uncompensated, the court held that the plaintiffs would be entitled to an injunction if the allegations were true.[68]

The relevant distinction between the two decisions seems clear, at least as far as the question of "imminent substantial injury" is concerned. In *Neal*, unlike *Page*, the plaintiffs had actually been ordered to dip their stock by the officials charged with enforcing the tick eradication law. Failure to comply would result in either prosecution, or seizure of the stock, or both. Thus it was clear that there was a high probability of injury if the plaintiffs' allegations were true.[69]

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64. *Id.* at 584.

65. *Id.* at 586.

66. 247 S.W. 689 (Tex. Civ. App. 1923, no writ).

67. This same allegation had been made in *Page*. However, in that case the trial court did not sustain a demurrer to the allegation, as in *Neal*. Rather, evidence was presented by both plaintiffs and defendants as to the deleterious nature of the dip, and the conflict was resolved in favor of defendants. 218 S.W. at 586.

68. The court rejected other contentions made by plaintiffs as grounds for injunctive relief, because the contentions would provide a complete defense to any criminal prosecution instituted against them. 247 S.W. at 693-94. Still others were rejected as being without merit. *Id.* at 690-93.

69. *See also* Davis v. City of Houston, 264 S.W. 625 (Tex. Civ. App. 1924, no writ), in which suit was brought by operators and passengers of "jitneys" to enjoin the enforcement of an ordinance prohibiting the use of the streets for "jitney service." The

One may properly wonder, however, whether the distinction is not one without a difference. The purpose of the imminent substantial injury requirement, as reflected in the English decisions, is protection of the defendant's *legitimate* activities from interference by an unnecessary or overbroad injunction. When the defendant is a public official and the plaintiff's ground for injunctive relief is the unconstitutionality of a law the defendant is charged with enforcing, why should the plaintiff have to do more than establish the law's invalidity—*i.e.* demonstrate that the defendant's activity, if undertaken, will be *illegitimate*? One might justify retention of the "irreparable injury" requirement as a device with which to prevent encroachment of the equity courts upon the law courts,[70] but if anticipatory relief is otherwise proper because the defense of a criminal prosecution does not afford an adequate remedy, what function will making the plaintiff's burden heavier possibly serve?

In our system there appear to be at least two possible functions which the "imminent substantial injury" requirement may continue to serve. First, there is the tradition, inherent in our process of constitutional adjudication, of avoiding premature decisions of constitutional issues whenever possible. The reason for this tradition is not merely reluctance on the part of the courts to override the judgment of legislative bodies, though doubtless there is some feeling by the judges that their determinations of constitutional issues are not necessarily more accurate than those of legislators. Rather, the most important reason is that in our system the courts generally do not adjudge legislation to be constitutional or unconstitutional on its face. Instead, laws are ordinarily judged valid or invalid as applied to particular fact situations, and this means that courts usually require a concrete factual context before they will agree to make constitutional determinations.[71] The traditional requirement of an imminent injury thus contributes to the decision-making

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trial court refused relief and the court of civil appeals affirmed, in part because the plaintiffs had failed to allege that prosecution under the ordinance was imminent.

70. *But see* Part II(A)(4) *infra*.

71. At the extreme, this so-called ripeness requirement is derived from the rule against advisory opinions, which governs most United States courts and which is itself a function of the case or controversy requirement. The purposes underlying the rule against advisory opinions are themselves closely related to the inherent nature of the judicial function and the correlative limitations upon that function. *See generally* G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 72-76 (1970); HART & WECHSLER, *supra* note 9, at 64-70. To the extent that the ripeness requirement embodies policies that are discretionary with the courts, as opposed to constitutionally compelled, it seems directed in part to insuring that the courts will avoid the same kind of pitfalls inherent in rendering advisory opinions. *See* G. GUNTHER & N. DOWLING, *supra* at 76-85; HART & WECHSLER, *supra* at 140-49. *See also* Part II(B)(2) *infra*.

process by insuring that the courts will subject laws to constitutional scrutiny only when, at a minimum, their operation is visible within the context of incipient enforcement activities.

Second, and closely related to this first function, is the function of allowing ample play to the discretion traditionally afforded law enforcement officials within our system.[72] This discretion has often operated in a manner that mitigates some of the rigors of the criminal law by permitting police and prosecutors the latitude not to arrest or prosecute for activities that violate that law.[73] Clearly, such discretion not to enforce penal provisions can operate also to nullify the effect of unconstitutional laws as well as it can to reduce the hardship imposed by unfair ones. Moreover, the discretion of police and prosecuting officials in deciding how to enforce questionable laws can be an important factor in determining whether they are ultimately applied constitutionally or unconstitutionally. Thus, the imminent harm requirement, by permitting the discretion of public officials to mature fully, can avoid constitutional confrontations altogether in certain categories of cases and insure in others that laws possessing the potential for both constitutional and unconstitutional applications are saved whenever possible through wise administration.

It should be noted, however, that the operation of the imminent harm requirement may make it quite impossible for a plaintiff to obtain a determination of his legal rights without first becoming a lawbreaker. If a court refuses injunctive relief because the officials charged with the enforcement of criminal laws have not yet taken or threatened action against the plaintiff, the only viable option left open to him may be violation of the challenged provision. The officials in question may refuse to indicate whether enforcement will follow a violation, thus forcing the plaintiff to choose whether to obey a law he considers invalid or to risk incurring penalties if his legal theories are incorrect. Before concluding that law-abiding citizens should be forced into such a dilemma, one should be certain that the imminent harm requirement actually serves functions which cannot be better served in some alternative way. Indeed, all of the traditional limitations upon injunctive relief

72. For a general discussion and description of this discretion see, *e.g.*, K. DAVIS, DISCRETIONARY JUSTICE (1969); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); J. SKOLNICK, JUSTICE WITHOUT TRIAL 71-90 (1966); J. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 83-139 (1968).

73. *See* authorities cited note 72 *supra*.

deserve such scrutiny, to determine whether their retention in the context of a modern procedural system is desirable.

(4) Injunctive Relief in a Merged System of Law and Equity

The various restrictions upon injunctive relief had their origin in the early English chancery practice, when equity and law were considered to be wholly separate systems. In England, this formal distribution of power between separate courts of law and equity ended with the Supreme Court of Judicature Act of 1873,[74] which consolidated the High Court of Chancery with various other tribunals and permitted legal and equitable remedies to be administered by a single court. In the United States, most states have also abolished the distinction between courts of law and courts of equity and operate in merged systems.[75] This widespread consolidation of law and equity courts raises the question whether the functions once served by the ancient chancery principles controlling the issuance of injunctions are still served by the retention of such principles in a merged system. If they are not, and if the old principles serve no valid modern function, it seems they should be discarded in favor of rational, modern rules.

First, it may confidently be said that no valid, modern function is served by the principle that equity possesses jurisdiction only over civil and property rights and has no jurisdiction over criminal matters. Enough has been said above to demonstrate that courts in this country are more than willing to enjoin criminal prosecutions in appropriate cases. Unfortunately, however, there is a tendency even by modern courts to honor the ancient jurisdictional shibboleth, even if only in the breach.[76] Yet it is demonstrable that a court requested to enjoin an actual or threatened criminal prosecution in no sense lacks "jurisdiction" to do so in the same way that the courts of chancery lacked "jurisdiction" over criminal matters. A court in the United States has "jurisdiction" to act over a case if by the law of its creation it has been given competence over the subject matter of the lawsuit and if it has, consistent with statutory and constitutional restrictions, obtained personal jurisdiction over the defendant.[77] Since virtually all state courts of gen-

74. 36 & 37 Vict., c. 66, §§ 3, 24, 25.

75. For a discussion of the reforms in the United States see 1 J. POMEROY, *supra* note 23, § 40.

76. The problems involved when a court determines it lacks "equity jurisdiction" are admirably discussed in Z. CHAFEE, SOME PROBLEMS OF EQUITY 296-363 (1950).

77. *See id.* at 301-21.

eral jurisdiction usually have subject matter and may obtain personal jurisdiction when they are requested to enjoin criminal proceedings, there is no true jurisdictional problem at all in the vast majority of such cases. Any restrictions upon the court's ability to afford the remedy of injunction against criminal actions should therefore be based upon articulated policies disfavoring the use of the remedy, rather than wrongheaded notions that the courts have no power to act in the situations described. The argument is not simply an academic one. A court that views restrictions upon its authority to give a particular remedy as "jurisdictional" is not likely to advert to the important interests on both sides of the lawsuit that would allow it to formulate principled guidelines to govern the administration of the remedy in all cases.[78] As a result, litigants are likely to be left with clear statements that the courts lack power to give an injunction and even clearer impressions that those statements are untrue, but only vague notions of when the remedy will be available to them in particular cases. If policy reasons exist in favor of or against injunctions to restrain criminal prosecutions, they are likely to be ignored altogether.

Similarly, the rule that a criminal prosecution will not be enjoined in the absence of a showing of "irreparable injury" is demonstrably unsound in a merged system, at least in so far as it represents an absolute principle restricting the availability of injunctive relief. The term "irreparable injury," it will be recalled, is properly used only as another means of expressing the rule that the plaintiff's remedies at law must be inadequate.[79] And the inadequate remedy at law requirement was evolved as one means of dividing the authority of law and equity courts before the merger of the two systems.[80] However, in a merged system it is apparent that the inadequacy of the plaintiff's remedy at law should no longer control whether a court will interfere to grant an equitable remedy. For when a single court is competent to administer both legal and equitable remedies, it makes little sense to retain a remedial stand-

78. It may also, as Professor Chafee has demonstrated, warp the court's ability to determine when sanctions should be imposed for the violation of equitable decrees and to determine when such violations should be excused. *See id.* at 296-363.

79. *See* text accompanying notes 39-40 *supra.*

80. Where the jurisdiction of equity was concurrent with that of law—*i.e.* when the underlying substantive rights were legal and the remedies awarded by chancery were of the same kind as the remedies obtainable in a law court—the requirement was truly jurisdictional in nature. *See* 1 J. POMEROY, *supra* note 23, § 217. However, when the jurisdiction was exclusive because of the remedy equity afforded, such as an injunction, the requirement was only a rule regulating the proper exercise of the jurisdiction. *Id.* §§ 216, 220.

ard that was originally designed to confine a separate court of equity within its proper sphere.

> [I]f the true spirit and intent of the reformed procedure were fully carried out by the courts . . . the question whether or not an adequate remedy can be obtained at law would cease to have the slightest importance in the actual decision of causes. . . .
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> . . . .
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> In those states which have carried out "the true spirit and intent of the reformed procedure," all branches of the law are of equal dignity—the common law, statutory law, and principles of equity. The court does not so much inquire into the question as to the adequacy of a legal remedy as compared with an equitable remedy, as it inquires into the appropriateness of the relief sought.[81]

Of course, there may be other reasons why an equitable remedy is inappropriate in a particular case, especially with regard to injunctions against criminal prosecutions. The public interest in the unencumbered enforcement of penal laws may be deemed so strong that few circumstances will justify burdening a law enforcement official with an injunction and its attendant contempt sanction. If so, it seems appropriate to state the controlling policies clearly, so that the situations in which they apply may be distinguished by litigants and courts alike from those in which they do not. By retaining the "irreparable injury" standard the courts often obscure the most important inquiry beneath dysfunctional labels of ancient chancery lore, a process which assists neither the litigant who seeks an injunction, the official who opposes it, or the courts which must initially decide between them. All concerned are distracted from a functional inquiry into the policy choices that ought to govern the administration of the remedy by the metaphoric quality of the traditional standard.

For example, in *Combined American Insurance Co. v. City of Hillsboro*,[82] the plaintiff insurance company sued for an injunction against the city of Hillsboro, Texas to prevent the city from enforcing the provisions of its vendors' and peddlers' ordinance against the company, and to obtain a declaratory judgment that the ordinance was invalid. The trial court denied the plaintiff both forms of relief. The court of civil appeals affirmed the denial of injunctive relief on grounds of prematurity. However, the court then went on to reverse the trial court's denial of declaratory relief and awarded a declaratory judgment

81. *Id.* § 358, at 804-05, 807.
82. 421 S.W.2d 488 (Tex. Civ. App. 1967, writ ref'd n.r.e.).

that the ordinance was invalid as applied to plaintiff. Such a *result* could perhaps have been justified on the ground, among others, that coercive relief was unnecessary on the facts of the case. However, the court did not choose to justify the result at all, except to say that under the circumstances there was "no ground" for injunctive relief in the absence of threatened enforcement. It did not explain why, if the constitutional question was ripe for adjudication in a declaratory judgment action, anything inherent in the process of sound constitutional adjudication required refusal of an injunction. Nor did it suggest that a declaratory judgment would interfere less with the exercise of enforcement discretion than an injunction, since it expressly stated that it assumed "that under the judgment here rendered the city of Hillsboro will make no further attempt to enforce the ordinance . . . ."[83] As indicated, one justifiable ground for such a procedure seems to be a preference for noncoercive relief over coercive relief, where both will apparently achieve the same result. Yet the court's opinion did not attempt to express such a preference, much less to explain why there should be a preference given to noncoercive relief. It merely adhered to the traditional requirement of an imminent injury for an injunction. As a result, the case illustrates dramatically how the retention of anachronistic equity standards can impede the process of evolving rational criteria.

Adherence to the traditional standards governing injunctive relief also impairs the true usefulness of the injunction by ignoring one of its most important characteristics: the flexibility of the injunctive decree. Cases in which laws are challenged on constitutional grounds do not readily fit into fixed categories. Their number and variety preclude the formulation of fixed, narrow rules to govern when injunctive interference with law enforcement should be permitted. A functional approach would establish an analytical framework for courts and litigants, within which the relevant interests at stake in each case can be taken into account. The ability to mold the injunctive decree to fit the particular facts of each case significantly enhances this analytical process. Once the relevant interests have been identified and weighed, the decree can be framed so as to produce only the amount of restraint required and no more. Adherence to the traditional standards governing injunctive relief impairs these flexible qualities by causing relief to be denied and sometimes granted by reference to an absolute standard,

83. *Id.* at 491.

without reaching a point where the court may consider tailoring a decree to fit the situation. In short, because the ancient equity labels are substituted for an analytical process, the true scope of the relief needed is often obscured.

The modern approach to injunctive relief favors a test which focuses the courts' attention upon all the interests which bear on the appropriateness of the injunction in a particular case. One such approach is that set out in the *Restatement of Torts*.[84] The process there described is one of measuring the appropriateness of the injunctive remedy by making a comparative appraisal of all of the factors in the case.[85] The method employed is to estimate "the probable consequences of the remedy if it is granted and of the alternative remedies if they are employed."[86] The primary factors to be appraised in each case are (i) "the character of the interest to be protected," (ii) the relative adequacy to the plaintiff of an injunction as opposed to other available remedies, (iii) any delay on plaintiff's part in bringing suit, (iv) any misconduct on plaintiff's part, (v) the relative hardship that will result to the defendant if the injunction is granted and to plaintiff if it is denied, (vi) "the interests of third persons and the public," and (vii) "the practicability of framing and enforcing the order or judgment."[87]

The Restatement's approach retains the traditional factors that governed injunctive relief against tort, albeit it places them within a superior analytical framework. The important point to note about the scheme outlined is that it is far superior to the approach often taken by the courts in evaluating the appropriateness of injunctions against criminal prosecutions. It is superior because it illuminates, rather than obfuscates, the analytical process that must be employed in a wise evaluation of the injunction's appropriateness. It thus enables courts and litigants to bring to bear the important arguments, interests, and policies that should govern the decision-making process in each case.

In a larger sense, this modern decision-making process is one of evaluating not simply the appropriateness of injunctions against criminal proceedings, but rather of assessing the need for anticipatory relief against the enforcement of criminal laws. The injunction is only one

84. RESTATEMENT OF TORTS §§ 933-51 (1939).
85. *See id.* §§ 934, 936.
86. *Id.* § 934.
87. *Id.* §§ 936(1)(a)-(g). Although the Restatement's approach is devoted to the technique of evaluating the appropriateness of injunction against tort, the same principles are stated to be applicable to injunctions against the enforcement by public officers of an unconstitutional statute. *See id.* §§ 933-51, at 678-79 (Scope Note).

of two important anticipatory remedies that might be given against such laws. The other is the remedy of declaratory judgment. An analysis of the need and desirability of anticipatory relief should take into account the relevant features and functions of both remedies, in order to enhance the range of flexible remedies available to courts and litigants in the analytical process. To that end, the origins and characteristics of the declaratory remedy must now be examined.

B. Declaratory Judgments

In contrast with the early origins of injunctive relief, the declaratory judgment is a fairly recent development in American law. No state enacted an effective declaratory judgment statute until 1915, and the Uniform Declaratory Judgments Act was not approved until 1922.[88] Since that time, however, the remedy has gained overwhelming acceptance in this country, and can now be said to represent an important part of the remedial scheme of most states.[89] For the purposes of this article, it will be important to examine those topics which bear most directly upon the usefulness of the declaratory judgment as an anticipatory remedy for constitutional violations. These are four: (i) the underlying philosophy and general purposes of declaratory relief; (ii) the extent to which traditional notions of justiciability affect the availability of declaratory relief; (iii) the characteristic of the declaratory judgment as a "discretionary" remedy and the standards which guide the courts' discretion in administering the remedy; and (iv) the availability of the remedy to challenge the validity of penal statutes.

(1) The Premises of Declaratory Relief

A declaratory judgment is simply a final judicial determination, embodied in a formal declaration, of the rights and liabilities of the parties to a controversy.[90] The characteristic which differentiates it from more traditional remedies, such as damages and injunction, is that it has no coercive effect.[91] That is, of itself it cannot be executed against a defendant as can the coercive remedies.[92]

88. *See* E. BORCHARD, DECLARATORY JUDGMENTS 244-45 (1st ed. 1934); *Developments in the Law—Declaratory Judgments 1941-1949*, 62 HARV. L. REV. 787, 790-91 (1949).

89. *See Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 791.

90. *See id.* at 787.

91. *Id.*

92. E. BORCHARD, *supra* note 88, at 23.

The premises of the declaratory remedy are grounded in the needs and characteristics of modern society. In a civilized society, typified by the formation of complex legal relationships and competition between divergent legal interests, there is a need for some mechanism with which officially and authoritatively to stabilize legal relationships by adjudicating disputes *before* they ripen into violence or disruption of the status quo.[93]

Of course, the utility of noncoercive anticipatory adjudication would be sharply diminished if litigants were generally unwilling to accept declaratory judgments as final, authoritative pronouncements of their rights. Thus, a second premise of declaratory relief is that in a civilized society, the necessity of displaying force in order to secure obedience to court decrees is sharply reduced.[94] "The adjudication, not the command, is the essence of judicial power; and in our civilized communities, it is the adjudication, and not the command, which evokes respect and official sanction, because it is a determination by the societal agent appointed to perform that function, and thus irrevocably fix legal relations."[95]

From these premises one can readily observe that the uniqueness of the declaratory remedy in the context of criminal proceedings stems from two of its characteristics. First, when the remedy is authorized, it permits litigation to be instituted much earlier than when traditional coercive remedies are sought. That is, damages need not accrue nor harm be imminent before a declaration of rights is requested. Quite the contrary, since the purpose of the declaratory judgment is to avoid the accrual of damages and the peril and insecurity that attends imminent injury, its usefulness would be nullified if it were not available much earlier than traditional remedies. Second, the remedy is available to one who would be in the position of a defendant in a coercive action. It therefore permits the potential defendant to take the initiative in the litigation process. To require otherwise would, again, be to nullify much of the remedy's usefulness, since it is often the potential defendant who is most threatened with peril and insecurity in a legal controversy.

The very usefulness of these characteristics of the declaratory judgment creates difficulties, however. The primary difficulty stems

93. *Id.* at 2, 94-98.
94. *See id.* at 10.
95. *Id.*

from traditional notions in this country of the elements necessary to comprise a justiciable controversy.

(2) The Problem of Justiciability

The necessity of proving the elements of damage and the imminent harm that is traditionally prerequisite to injunctive relief generally insure that the facts of a controversy will be well developed before a court is asked to give those forms of coercive relief. However, because the potential defendant in a coercive action is able to take the initiative in seeking declaratory relief, and because that relief may be requested prior to the time a cause of action for coercive relief has matured, the factual development in a declaratory action will often be significantly less than in an action for damages or an injunction. Consequently, litigants seeking declaratory relief frequently must confront one of the traditional requirements of a justiciable controversy in our system: the requirement that an action be "ripe" for decision.[96] The requisite degree of factual development necessary to meet the ripeness standard in a declaratory action has been described in terms of the degree of probability that the harm or coercive litigation feared by the plaintiff will actually occur. A difficulty has sometimes arisen, however, when a plaintiff has attempted to challenge the constitutional validity of a statute by means of a declaratory action. Sometimes the courts have required a threat of enforcement against the plaintiff before considering such a case justiciable.[97] One explanation that has been offered for this requirement is the view in our constitutional law that an official enforcing an invalid statute is not acting out of official duty, but rather lawlessly, as an individual tortfeasor.[98] Under this view, it is not possible to create a justiciable controversy by the mere enactment of an unconstitutional statute, since the plaintiff's quarrel is with the lawless official, not the statute.

Although the requirement of an official threat as an essential element of justiciability has the virtue of being consistent with the discre-

96. *See generally id.* 40-50; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 795.

97. *See* Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 459 (1943); *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 870-71; Note, *Official Threat of Enforcement as a Requisite of Justiciability in Declaratory Judgment Actions*, 50 YALE L.J. 1278 (1941).

98. *See* Borchard, *supra* note 97, at 459, 467-75; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 870 n.657; Note, 50 YALE L.J., *supra* note 97, at 1280-81.

tion conferred upon law enforcement officials in our system,[99] the requirement has correctly been criticized as inappropriate as a measure of the courts' fundamental authority to entertain an action.[100] Realistically, the mere enactment of an invalid statute, coupled with an official's duty to enforce it, can create the very kind of peril and insecurity that the declaratory judgment is designed to remedy, even though the law fictionally treats the enforcing official as an individual tortfeasor.[101] In any practical sense, therefore, there exists a case or controversy appropriate for judicial action in such instances. There may, of course, be cases in which declaratory relief should be refused in the court's discretion in order to obtain more concrete facts, or to avoid unwarranted interference with the discretion of enforcement officials.[102] But, as in the case of the dysfunctional requirement of imminent injury which is prerequisite to injunctive relief, it seems more appropriate for the courts to say so and articulate the reasons why declaratory interference is unjustified, rather than to deny the existence of authority to deal with the controversy. To do otherwise is to confuse power with discretion.

Happily, however, the requirement of an official threat has not been a major obstacle to declaratory relief in most jurisdictions.[103] The next question is therefore under what circumstances the courts should generally grant declaratory relief when a justiciable controversy is present.

(3) The Declaratory Judgment As a Discretionary Remedy

The declaratory judgment is generally conceded to be a discretionary remedy.[104] However, the injunction is often described as a remedy whose issuance is within the sound discretion of the chancellor,[105] but from the above discussion of the standards by which injunctions were administered it should be apparent that this does not mean the availability of the remedy is subject to the unfettered discretion of the court. Injunctions are administered by settled principles,[106] and so it is with

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99. For a discussion of this discretion see authorities cited note 72 and accompanying text *supra*.

100. *See* authorities cited note 98 *supra*.

101. *See* E. BORCHARD, *supra* note 88, at 45-47; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 870-71.

102. *See* Parts II(B)(3) & III(C) *infra*.

103. *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 870-71.

104. *Id.* at 805-17; *see* E. BORCHARD, *supra* note 88, at 109-13.

105. *See, e.g.*, O. FISS, INJUNCTIONS 74 (1972).

106. *See id.* 74-93.

declaratory relief, although it is very clear that the same principles governing the availability of injunctions are not to limit the court's ability to grant declaratory judgments.[107] For example, it is clear that the irreparable injury standard is inapplicable as such in determining whether a declaratory judgment should be granted,[108] and enough has already been said to demonstrate that the requirement of imminent injury should be irrelevant in declaratory actions. Rather, the basic standard by which declaratory relief is to be administered is stated in the Uniform Declaratory Judgments Act, as follows: "Discretionary.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."[109]

In operation, this principle is often said to involve the determination whether a declaratory judgment will serve a "useful purpose" in resolving the controversy between the parties.[110] This determination is obviously open ended, requiring an evaluation of all the factors which bear on the question of the declaratory judgment's usefulness in the particular case.[111] For example, such factors as whether all interested parties may be joined in the declaratory action, whether all issues involved in the controversy have been raised, the relative balance of convenience between the plaintiff and defendant in resolving the controversy in a declaratory action, and the public importance of the issue all bear on the question of the declaratory judgment's usefulness in resolving a particular controversy.[112]

One factor of particular importance to the subject of this article that is sometimes considered under the useful purpose test is the effect of a prior pending action on the availability of declaratory relief. It

107. *See Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 789, 808.

108. *Id.* at 808. UNIFORM DECLARATORY JUDGMENTS ACT § 1 provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed.*" (emphasis added).

109. UNIFORM DECLARATORY JUDGMENTS ACT § 6.

110. *See* Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677, 678 (1942); *cf.* E. BORCHARD, *supra* note 88, at 103; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 807.

111. *See Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 807-17. The similarity of this analysis to that described above as the modern approach to determining the appropriateness of injunction against tort is obvious. *See* notes 84-87 and accompanying text *supra*.

112. *See generally* E. BORCHARD, *supra* note 88, at 102-13; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 805-08.

has already been stated that the propriety of a declaratory judgment is not properly measured by reference to the equity standard of whether an adequate remedy at law exists.[113] However, it is equally clear that the existence of a *prior pending action* can have a direct bearing upon the *usefulness* of the declaratory proceeding.

> As a general rule it may be stated that a declaratory action will not be entertained, where another remedy is available and applicable, provided an action seeking to invoke the same is already pending when the action for a declaration of rights is filed, and in such case it is the duty of the court in the subsequently filed declartory judgment action to proceed no further than may be necessary to protect the rights of the parties, and if no necessity therefor exists, then the declaratory action should be dismissed.[114]

Therefore, when the courts speak in terms of the adequacy of another remedy in such cases, their statements should be evaluated in terms of the useful purpose test, rather than the equity standard of an irreparable injury.[115]

The remaining question is whether, against the background of the above discussion of the declaratory judgment's general purposes, the requirements of justiciability in declaratory actions, and the standards that should guide the courts' discretion in administering declaratory relief, declaratory judgments should be available to challenge the validity of criminal laws.

(4) The Availability of Declaratory Judgments Against Criminal Laws

It is clear that there is no across-the-board restriction upon declaratory judgments against invalid criminal laws. From the premises underlying the remedy, it is apparent that there can be a need for a declaratory judgment to prevent violence and disruption of the status quo in disputes involving criminal laws as well as in other situations.[116]

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113. *See* notes 108-09 and accompanying text *supra.*

114. 1 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 443 (2d ed. 1951).

115. The adequacy standard in declaratory actions is applicable where another action is imminent, as well as where it is pending. This seems clearly correct, since the usefulness of the declaratory remedy is affected quite as much where substantial preparation toward another proceeding has taken place, as well as where the proceeding has been formally instituted. In either case the standard applied is whether the other action will resolve the controversy as well as the declaratory proceeding. If not, as all the same issues are not involved in the other action, the declaratory judgment will serve a useful purpose and should be granted. *See Developments in the Law,* 62 HARV. L. REV., *supra* note 88, at 808-10.

116. *See* Borchard, *supra* note 97, at 445; Note, *Declaratory Relief in the Criminal Law,* 80 HARV. L. REV. 1490 (1967).

Thus the Uniform Declaratory Judgments Act broadly provides for challenges to the validity of statutes and ordinances without regard to whether they are penal.[117]

In challenges to penal statutes, however, there are several problems relating to justiciability and the discretion afforded to the courts in administering declaratory relief that deserve mention. First, there is the difficulty, adverted to above, of determining whether a threat of enforcement is a prerequisite to the justiciability of a declaratory action.[118] The proponents of declaratory relief against criminal laws take the view that justiciability requires no threat of enforcement in order to render an action appropriate for judicial determination:

> [P]etitioners are placed in jeopardy by a *statute* or *ordinance* requiring them under penalty to change their mode of life or business, to which a threat by the Attorney-General only adds weight but of which it is not the source. The jeopardy lies in the statute, not in the Attorney-General, and it is the statute that they challenge and not the Attorney-General's threat. A threat in any event is only *one* type of jeopardy, which may be created—and therefore initiates justiciability—by an event, like war; by a document, like a statute or a deed; by a personal act, like an unjust charge or claim; or, among other challenges, by a threat of an enforcing officer, alone or, as usual, in combination with other operative facts.[119]

However, others have found merit in the requirement of a threat of prosecution as a prerequisite to a "ripe" controversy:

> Threatened prosecution as the criterion for ripeness in the typical case strikes a practical balance between adjudication too soon and too late. The prosecutor's threat assures the court that the citizen's interest is not mere meddling, while the court's intervention will still be timely enough to allow the citizen to alter his conduct on the basis of the decision.[120]

However, the latter view seems erroneous for several reasons. First, it is unrealistic, in that it views the justiciability requirement more stringently than is warranted by daily experience. Criminal laws are designed to deter behavior without the necessity of a threat by the offi-

117. "Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." UNIFORM DECLARATORY JUDGMENTS ACT § 2.

118. *See* notes 97-103 and accompanying text *supra*.

119. Borchard, *supra* note 97, at 464.

120. Note, 80 HARV. L. REV., *supra* note 116, at 1508.

cials charged with their enforcement. Consequently, when the laws perform their assigned task, it seems unrealistic to argue that something more is required in order to invoke the authority of a court to adjudge their validity. Second, the "ripeness" requirement is often associated with the courts' power to act—*i.e.* with the requirement that there be an actual "case or controversy" before the court in order for it to entertain an action.[121] Yet it again seems unrealistic to suppose that there is no actual controversy when the plaintiff is faced with an allegedly invalid criminal law which jeopardizes his activities. There may be solid reasons why there should be no adjudication of the law's validity in a particular case, but it seems that these reasons are more appropriately addressed to the court's discretion than to its power to act.[122] Finally, to impose a threat of enforcement as a prerequisite to the justiciability of declaratory actions against criminal laws is to place the imperiled citizen at the mercy of the official charged with enforcing the statute.

> The [official] becomes the only one who as of right can challenge the statute. By the mere process of refraining from a "threat" to enforce or prosecute he can frustrate all opportunity of the victim or taxpayer or affected citizen to raise the issue. Thus he alone can control the possibility of litigation and the public must assume all risks of observing an unconstitutional statute or exposing its members to a criminal prosecution.[123]

To prevent the official from thus insulating an invalid statute from judicial review while effectively enforcing its provisions, it seems far better to consider a declaratory action justiciable whenever it can be objectively demonstrated that the existence of a statute imperils a citizen's activities, leaving abuses of the remedy to be dealt with by discretionary dismissal.

What standards should be used to determine whether a declaratory action challenging a criminal statute serves a useful purpose? The proper exercise of the court's discretion in some common categories of situations involving declaratory challenges to penal statutes has been analyzed, as follows:

> When plaintiff admits that he is within the statute and contests only its validity, there would seem to be no public benefit in refus-

121. *See, e.g.*, E. BORCHARD, *supra* note 88, at 29, 40. The ripeness requirement in the federal courts is clearly composed of some discretionary elements, over and above the constitutionally compelled "case or controversy" requirement. *See* Part III(C) *infra*.

122. *See* text following note 102 *supra*.

123. Borchard, *supra* note 97, at 467. *See also* Note, 80 HARV. L. REV., *supra* note 116, at 1509.

> ing to declare a statute unconstitutional even though the effect of such a declaration would undoubtedly be to restrain enforcement. Where the application of the legislation to the plaintiff is at issue, however, the public interest in having the penal laws enforced without undue restriction upon the enforcing officials may be stronger cause for denying declaratory relief. A court may be reluctant to render a declaration for fear that it will deter future prosecutions which may be justified by reason of a change in the circumstances surrounding plaintiff's activity. However, where the plaintiff's conduct is admitted there would usually be no reason to deny a declaration concerning the applicability of the statute to the activity in question.[124]

By refusing a declaration in a case where the facts are disputed, and restricting any judgment to the facts before the court, maximum freedom is retained by prosecutors to enforce the law in any situation not before the court. This illustrates the manner in which the courts should generally evaluate requests for declaratory judgments against criminal statutes. It should particularly be noted that the analytical method used seeks to avoid unnecessary interference with legitimate law enforcement discretion, while employing the declaratory judgment where it will otherwise serve a useful function.[125]

One factor not dealt with above, but which deserves special attention, is the effect on the discretionary determination of a prior pending criminal proceeding. In measuring the usefulness of declaratory relief in such a situation, it is important to recall that the basic purpose of the declaratory judgment is to provide a means of avoiding violence and disruption of the status quo:[126]

> The modern declaratory action to construe or invalidate a penal statute bears the important distinction that it does not disrupt a pending prosecution, but seeks to resolve legal issues to prevent prosecution. Whereas prosecution can only follow conduct, the modern declaratory action precedes it, and in that difference lies its cardinal function. . . . Once the disputed conduct has taken place, the equities of the statute itself can be at least as well litigated in defense to the prosecution thus ripened. But criminal trial

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124. *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 871-72 (footnotes omitted). *See also* Note, 80 HARV. L. REV., *supra* note 116, at 1511-13.

125. The flexibility of the declaratory decree should also be noted. By placing the burden on the plaintiff in the declaratory action to establish his conduct with particularity or be denied relief under the useful purpose standard, the analysis insures that futile judgments—*i.e.* ones which do not resolve the uncertainty created by the statute—will not be rendered. The flexibility afforded by the declaratory decree thus parallels that of the injunction, without the coercive sanction of contempt attached to violation.

126. *See* text accompanying notes 93-94 *supra*.

> is not an adequate remedy where the legal dispute precedes the conduct; anticipatory relief intends that no criminal liability be created. "The right to test a statute by submitting to arrest is not a remedy."[127]

This does not, of course, mean that declaratory relief may never be granted in the presence of a pending criminal prosecution. All it means is that the action is less likely to serve a useful purpose in such cases. Where circumstances are found to exist that would point to a useful purpose, the declaratory judgment should issue in spite of any pending criminal action.[128]

C. *Summary and Conclusions*

The foregoing discussion of injunctive and declaratory relief should illustrate several important things. First, the administration of both the injunctive and declaratory remedies has sometimes been saddled with dysfunctional and unanalytical standards. The traditional roots of the injunction in English Chancery practice continue to influence the availability of the remedy today, leaving it encumbered with standards no longer relevant in a modern merged system of law and equity. Similarly, the availability of declaratory judgments has sometimes been fettered by unrealistic principles governing the justiciability of declaratory actions. Second, the modern, functional approach to both remedies requires an evaluation of all the factors in a case which bear upon the appropriateness and utility of the two remedies in the particular situation before the court. Although this analytical process requires more effort on the part of judges and lawyers than would a more mechanical process of deciding cases in accord with labels, such as "irreparable injury," and dysfunctional factors of justiciability, such as whether there has been a threat of prosecution, it more nearly accords with the true function of the remedies as anticipatory devices with which to prevent future harm. Moreover, it has the virtue of taking into account all the various interests and policies which relate to the benefits and burdens of an anticipatory remedy in a given case. Finally, when unanalytical, restrictive standards are employed to govern the availability of the two remedies, the ultimate result is not only to cloud the proper criteria by which each remedy will be administered, but also to make impossible an intelligent choice *between* the two remedies when some form of anticipatory relief is clearly appropriate.

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127. Note, 80 HARV. L. REV., *supra* note 116, at 1503-04 (footnotes omitted).
128. *See Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 872.

In this last regard, it seems apparent that if both remedies continue to serve valid purposes in a modern procedural system, it is because each has distinctive features which allows it to perform unique functions. It is clear that insofar as both remedies involve adjudication of the respective rights and liabilities of parties to a dispute, both can serve the primary function of declaratory relief to avoid violence and disruption of the status quo prior to the time action of some sort is required of the plaintiff or defendant. However, there is one prominent difference between the two remedies which makes a functional, intelligent choice between them possible. That difference is the availability of the contempt sanction as a means of enforcing an injunctive order, but not as a means of executing a declaratory judgment.

It will be recalled that the absence of contempt as a sanction for violation of a declaratory judgment is grounded in the assumption that in a civilized society it is ordinarily not necessary to display force in order to secure obedience to court decrees.[129] Consequently, the declaratory remedy may be viewed as a uniquely civilized remedy, to be preferred over an injunction as long as there is no affirmative evidence pointing to the need for a coercive sanction to secure obedience to the court's determination in a given case. This preference for the declaratory remedy is not simply an abstract desire to adhere to more civilized procedures over less civilized ones. Rather, the preference serves a valuable function in guarding against the harshness with which judicial mistakes can fall upon litigants. Despite the care with which a court may frame its decrees, there is always a danger that it will go farther than is justifiable in restricting the defendant's activities in order to secure the plaintiff's rights. For example, in cases where a decree is sought against enforcement of an allegedly invalid statute, the court may find it has restricted legitimate law enforcement activity to an unwarranted extent by a decree so broad or ambiguous that it potentially encompasses activities by the plaintiff which are constitutionally punishable, but which did not occur to the court or to the defendant when the decree was originally framed. If the decree is in the form of an injunction, the enforcement officials have basically two alternatives: (i) to move for a modification of the decree to reflect the constitutional scope of the statute or law in question; or (ii) to attempt what they believe to be legitimate enforcement anyway and risk imposition of the contempt sanction. The first alternative will probably be suffi-

129. *See* text accompanying notes 94-95 *supra.*

cient in most cases. But there may be instances in which the activities of the plaintiff are so injurious that they call for immediate enforcement of the law without the delay of a court proceeding to determine whether the activities are covered by the decree. It may well be that if such enforcement ultimately proves to have been justified in constitutional terms, the enforcing official may rely upon the reason and good faith of the court not to impose contempt penalties. But there is no reason, in the first place, why an official should have to face a risk of incurring fine and imprisonment or, alternatively, to give up legitimate enforcement of a statute. In the absence of any affirmative evidence presented by the plaintiff that the official will not obey the decree, the court should issue only a declaratory judgment, thus leaving law enforcement officers free, in extraordinary cases of need, to act in accord with their good-faith view of the decree's legitimate scope without fear of subsequently being punished for contempt. The plaintiff is not left without remedy in cases where the officials are not justified in undertaking activities in apparent violation of the decree, for the court is free to enjoin the officials from violating a declaratory judgment if they are in error as to the extent of its legitimate coverage.[130] And at the time of the hearing on the request for such an injunction, if the court determines that the officers should be enjoined, it may frame its decree as narrowly or broadly as the new circumstances indicate is appropriate.

Having explored the history, nature, and function of injunctions and declaratory judgments in our system, it remains to consider the history of those remedies in the federal courts prior to the Supreme Court's decisions in 1971. In the discussion that follows, primary emphasis will be placed upon federal injunctions and declaratory judgments against state court proceedings, particularly criminal prosecutions.

III. Injunctions and Declaratory Judgments in the Federal Courts

The option given to Congress by article III of the Constitution to create inferior federal courts is generally interpreted as giving it a broad

130. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.
Uniform Declaratory Judgments Act § 8.

power to regulate the jurisdiction of those courts it decides to create.[131] This power to regulate jurisdiction, in turn, gives Congress "a wide choice in the selection of remedies" that an inferior federal court may afford.[132] In the first judiciary act Congress conferred original jurisdiction upon the lower federal courts in

> all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.[133]

The same act also provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law,"[134] a limitation which was only repealed in 1948.[135] The forms of process, except as to style, and forms and modes of proceedings in equity cases were to accord with the "principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law," subject, however, to a rulemaking power in the Supreme Court.[136] This statutory prescription persisted until law and equity were merged by the Federal Rules of Civil Procedure in 1938.[137] However, a major limitation upon the power of federal courts to enjoin state court proceedings was enacted in 1793 and continues in effect today, in altered form, as the so-called Anti-Injunction Act.[138] In 1875, the jurisdiction of the inferior federal courts was first permanently broadened to include cases arising under the Constitution and laws of the United States.[139] And, finally, in 1934 the authority of the federal courts was first expanded to permit them to grant the remedy of declaratory judgment.[140]

Against this constitutional and statutory background, the important questions for purposes of this article are: (i) what was the nature of

131. *See, e.g.*, HART & WECHSLER, *supra* note 9, at 309-75.
132. *See id.* at 332-35.
133. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.
134. *Id.* § 16, 1 Stat. 82.
135. *See* HART & WECHSLER, *supra* note 9, at 729.
136. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276, *amending* Act of Sept. 29, 1789, § 2, 1 Stat. 93-94. *See* HART & WECHSLER, *supra* note 9, at 664-65 (complete history of federal equity).
137. *See* HART & WECHSLER, *supra* note 9, at 664-65; FED. R. CIV. P. 1-2.
138. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334; 28 U.S.C. § 2283 (1970).
139. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See* C. WRIGHT, *supra* note 9, at 54.
140. Act of June 14, 1934, ch. 512, 48 Stat. 955.

the principles evolved by the federal courts to govern the administration of injunctions against state court proceedings from 1789 to 1971; (ii) to what extent has the federal Anti-Injunction Act been a factor in preventing injunctive relief against state court proceedings; and (iii) how has the new remedy of declaratory judgment affected the availability of federal anticipatory relief against state court proceedings?

A. Federal Equitable Principles Governing Injunctions Against State Proceedings

Early in its history, the Supreme Court of the United States recognized the authority of an inferior federal court to enjoin state officials from enforcing an unconstitutional state law.[141] With the expansion of federal jurisdiction to include general cognizance of federal question cases in 1875,[142] it was perhaps inevitable that the frequency of such injunctions would increase.[143] However, the equity power conferred upon the federal courts by the statutory and constitutional scheme summarized above[144] was considered to be that of the High Court of Chancery in England as of 1789.[145] Consequently, since many such injunctions were sought against the enforcement of penal provisions in state criminal proceedings,[146] the plaintiff in a federal suit had to overcome all the traditional obstacles to equitable interference with criminal actions. Perhaps as a result, the federal courts did not begin extensively to enjoin state officers from instituting criminal proceedings until after 1890.[147] However, in 1894 the Supreme Court affirmed an injunction against a state officer to preclude him from instituting suits against a railroad to recover penalties for the violation of a rate statute.[148] The railroad's alternatives were either to submit to the unreasonable rates during the course of lengthy proceedings to determine

141. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 841-60 (1824); Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 431 (1930).

142. *See* text accompanying note 139 *supra*.

143. For the history of federal injunctions against state courts prior to the jurisdictional expansion in 1875 see Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

144. *See* text accompanying notes 131-40 *supra*.

145. *See, e.g.*, Lockwood, Maw & Rosenberry, *supra* note 141, at 431 n.21.

146. *See, e.g., In re* Sawyer, 124 U.S. 200 (1888); Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1190 (1933). *See also* Davis & Farrum Mfg. Co. v. City of Los Angeles, 189 U.S. 199 (1903).

147. *See* Warren, *supra* note 143, at 373.

148. Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894). *See* Warren, *supra* note 143, at 373-74.

their validity, or to violate the rate provisions and risk enormous penalties for each separate violation.[149] Subsequently, the Court approved similar injunctions against the commencement of criminal proceedings to enforce rate laws, in order to prevent a multiplicity of suits and prosecutions,[150] and denied relief in cases where the remedy at law was perceived to be adequate.[151] However, the high point of federal injunctions against state criminal proceedings came with the Court's now famous decision in *Ex parte Young*.[152] *Young* is famous primarily for the Court-created fiction that acts of state officers under an unconstitutional statute, even if undertaken in the name of the state, strip them of their official authority, so that suits against the officers to enjoin their activity do not violate the eleventh amendment.[153] However, the decision also contained a significant passage dealing with the principles that were to govern a federal court in determining the propriety of injunctions against state criminal prosecutions.

The issue arose because a federal court had issued an injunction against the attorney general of Minnesota to restrain him from enforcing a statute regulating railroad rates. The attorney general subsequently attempted to enforce the statute by mandamus proceedings against the railroads and was held in contempt by the federal court. He then sought a writ of habeas corpus from the Supreme Court to free himself from custody under the contempt orders. In addition to his eleventh amendment objection, he also raised the point that a federal court of equity had "no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law."[154] To this argument the Court responded as follows:

> This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of in-

149. Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 394 (1894).

150. *See* Prout v. Starr, 188 U.S. 537 (1903); Smyth v. Ames, 169 U.S. 466 (1898).

151. *Compare* Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207 (1903), *with* Dobbins v. City of Los Angeles, 195 U.S. 223 (1904). *See also* Fitts v. McGhee, 172 U.S. 516 (1899), in which suit was brought to enjoin the enforcement of an Alabama statute fixing the tolls that could be charged for passage over a bridge on the Tennessee River. The Court reversed an injunction against enforcement of the statute, primarily on grounds that the suit was one against the state in contravention of the eleventh amendment. However, it also held that the federal court was without equity jurisdiction to enjoin the institution or prosecution of criminal proceedings. *Id.* at 531. The remedy at law by way of defense of criminal prosecutions was considered adequate by the Court. *Id.* at 532.

152. 209 U.S. 123 (1908).

153. *See* C. WRIGHT, *supra* note 9, § 48.

154. 209 U.S. at 161.

> quiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. . . .
>
> . . . In *Dobbins v. Los Angeles* . . . it is remarked by Mr. Justice Day, in delivering the opinion of the court, that "it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity."[155]

In addition, the argument was made that the remedy at law available to the plaintiffs was adequate. The Court rejected this contention:

> It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.[156]

The Court went on to discuss other deficiencies in the remedy available by way of defense of a criminal prosecution. These were (i) the difficulty of finding an agent or employee who would be willing to disobey the law in the face of potentially large fines and lengthy imprisonment, and (ii) the difficulty of making out a defense that the rates were too low, a difficulty which would arise because of the complicated nature of the facts which would have to be examined, rendering decision by a jury "almost impossible."[157] Indeed, the Court's ultimate conclusions about the inadequacy of a criminal defense were actually an argument in favor of the general utility of anticipatory adjudication of constitutional issues:

> To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally de-

155. *Id.* at 161-62.
156. *Id.* at 163.
157. *Id.* at 164-65.

> termined that the act was valid. This risk the company ought not be required to take. . . . The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights.
>
> All the objections to a remedy at law as being plainly inadequate are obviated by a suit in equity, making all who are directly interested parties to the suit, and enjoining the enforcement of the act until the decision of the court upon the legal question.[158]

The last-quoted portion of the Court's opinion reveals that more was at stake in *Young* than mere application of principles derived from English Chancery practice. The Court was clearly, if implicitly, expressing two important policy judgments. One was the judgment that some means ought to be available to parties in the position of the railroad to permit them to obtain a determination of their legal rights in advance of a criminal violation. As indicated above, this is one of the primary functions of the modern remedy of declaratory judgment.[159] The second policy judgment was that there should be no preference given to initial state court adjudication of constitutional issues in cases such as *Young*. This is clear from the Court's statement that the "courts having jurisdiction, Federal *or* state" should supply relief to protect litigants in the position of the railroad.[160]

After *Young* the Court continued to determine the propriety of injunctions against state criminal prosecutions by reference to the principles of English equity.[161] However, it seems clear that these principles were as flexible as the Court's view of its constitutional role demanded.[162] *Ex parte Young* was decided in the heyday of substantive due process, and its view of the constitutional balance between state and nation was colored accordingly. When the Court moved into an

158. *Id.* at 165.

159. *See* text accompanying notes 93-94 *supra.*

160. 209 U.S. at 166-67. Not everyone was as confident as the Court of the restraint that would be exercised by federal judges or of the wisdom of injunctive interference with law enforcement. "It was greeted with harsh criticism by the country when it was decided and for years thereafter." C. WRIGHT, *supra* note 9, § 48, at 186. Congress responded by creating a court of "special dignity" to hear applications for injunctions against state statutes on grounds of their unconstitutionality, with direct appeal to the Supreme Court. *Id.* § 50; Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299 (1963). This burdensome procedure remains with us, in modified form, today. *See* 28 U.S.C. §§ 1253, 2281, 2284 (1970).

161. *See* Cline v. Frink Dairy Co., 274 U.S. 445 (1927); Fenner v. Boykin, 271 U.S. 240 (1926); Packard v. Banton, 264 U.S. 140 (1924); Terrace v. Thompson, 263 U.S. 197 (1923); Cavanaugh v. Looney, 248 U.S. 453 (1919); Truax v. Raich, 239 U.S. 33 (1915).

162. *See generally* Note, *Irreparable Injury in Constitutional Cases*, 46 YALE L.J. 255, 269-72 (1936).

era of greater judicial restraint, characterized both by greater reluctance to permit federal interference with the operation of state courts and by a more liberal view of the constitutionality of state regulatory measures,[163] the Court did not discard the traditional equity principles as a measure of the propriety of federal injunctive relief. On the contrary, it continued to decide cases by reference to those principles, while making it clear that the occasion for the actual issuance of a federal injunction against state criminal proceedings would be rare indeed.[164] However, the Court did intimate that a federal injunction would issue in three separate categories of cases, even while operating under stricter notions of restraint.

First, the Court indicated that an injunction would be appropriate when the federal plaintiff was threatened with multiple prosecutions under an unconstitutional statute.[165] This was small help to the litigant faced with potential state criminal action, however, since the Court also clearly indicated that a general statement by a prosecuting official that he stood ready to perform his duty was not the quality of threat necessary to warrant intervention by a federal court of equity.[166] And the Court also made it easy for the prosecuting official to avoid a threat of multiple prosecutions by permitting him to represent that he intended to institute only a single test prosecution to determine the validity of the law in question.[167]

Secondly, the Court indicated that a federal injunction would be appropriate when the state authorities invoked an unconstitutional law for purposes of harassment. In *Hague v. CIO*[168] the Court affirmed the issuance of an injunction against municipal officers who had adopted a deliberate policy of harassment toward plaintiffs, in an attempt to exclude them from a city and prevent them from communicating their views to other persons. Although the Court did not specif-

163. *See Developments in the Law*, 78 HARV. L. REV., *supra* note 26, at 1025-26.

164. *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157 (1943); Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935).

165. *See* Douglas v. City of Jeannette, 319 U.S. 157, 165 (1943); Watson v. Buck, 313 U.S. 387, 400 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96 (1935); Cline v. Frink Dairy Co., 274 U.S. 445 (1927); *Ex parte* Young, 209 U.S. 123 (1908). It should be noted, however, that in none of the cited cases was an injunction actually granted.

166. *See* Watson v. Buck, 313 U.S. 387, 399-400 (1941).

167. *See* Beal v. Missouri Pac. R.R., 312 U.S. 45, 48-50 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96 (1935).

168. 307 U.S. 496 (1939).

ically indicate that harassment was the ground for the injunction, in the subsequent decision of *Douglas v. City of Jeannette*[169] Mr. Justice Black interpreted the injunction in *Hague* as being justified on that ground.[170]

Finally, the Court in one decision stated that a federal injunction would be justified if a state statute were found to be "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it,"[171] although no such statute was involved in the case before the Court and none was cited by way of example. In substance, however, this standard may not be substantially different than the bad faith and harassment standard, since anyone who attempts to enforce a provision that is, as described by the Court, so defective that no reasonable person could fairly believe it constitutional, might also be found guilty of bad faith.

In each of the instances cited as appropriate for federal equitable intervention, the Court adhered to the traditional standards of "great and immediate irreparable injury." However, it is again clear from the decisions that more was involved than simply a continuing application of the same equity standards utilized in *Ex parte Young*. Rather, the decisions now took pains to express concern both for a different priority in the process of constitutional adjudication and for the interests of the state courts in that process. Thus, for example, in *Watson v. Buck*[172] the Court expressed a view, contrary to that expressed in *Young*,[173] of the desirability of federal court abstention in adjudicating the constitutionality of a state criminal statute before authoritative interpretation by the state courts.[174] In the same term, the Court in *Beal v. Missouri Pacific Railroad*,[175] reiterated a strong policy of deferring to state court adjudication of criminal statutes.[176]

169. 319 U.S. 157 (1943).
170. *Id.* at 164.
171. Watson v. Buck, 313 U.S. 387, 402 (1941) (dictum).
172. 313 U.S. 387 (1941).
173. *See* text accompanying note 158 *supra*.
174. 313 U.S. at 401-02.
175. 312 U.S. 45 (1941).
176. The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. . . . And in the exercise of sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential

The Court's attitude toward federal anticipatory relief and toward the legitimate interest of the state court systems had thus altered drastically since *Ex parte Young*, primarily because the Court had narrowed its view of its own role in the process of constitutional adjudication. This restrictive review was not permanent, however; it was altered when the Court perceived at a later time that state courts were not adequately protecting constitutional rights. Faced with the massive Southern resistance to desegregation following *Brown v. Board of Education*,[177] the Court impliedly relaxed the requirements for federal injunctions against state criminal proceedings in civil rights cases.[178] This development was only one part of a broad slackening of judicial restraint, which was characterized by the Warren Court's overall activist posture in the areas, among others, of civil rights and freedom of expression.[179] It was in this period of "loose" restraint that the Court decided the now famous case of *Dombrowski v. Pfister*.[180]

Coming after the developments in the earlier, more rigorous period of judicial restraint, described above, and the apparent relaxation of the standards for federal injunctions against criminal prosecutions in civil rights cases, *Dombrowski* superficially seemed to represent only a slight extension of prior law. In the first place, plaintiffs were officers of an organization "active in fostering civil rights for Negroes in Louisiana and other States of the South."[181] They alleged that the defendants in the federal action were threatening to enforce certain Louisiana statutes against them in order to "discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."[182] Thus the case appeared to contain the same elements that prompted the Court to relax the stand-

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grounds.

Id. at 49-50. It should be noted that the basis of subject matter jurisdiction in the federal courts was diversity of citizenship, though the Court spoke in terms ordinarily applied to constitutional cases and did not inquire whether the state courts would enjoin the prosecution. For another statement of concern for the state systems see Douglas v. City of Jeannette, 319 U.S. 157, 163-64 (1943).

177. 347 U.S. 483 (1954).

178. *See* Bush v. Orleans Parish School Bd., 194 F. Supp. 182 (E.D. La.), *aff'd per curiam sub nom.* Gremillion v. United States, 368 U.S. 11 (1961); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956). These cases and others in the lower federal courts are discussed in Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 548-52 (1970).

179. *See generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); A. COX, THE WARREN COURT (1968).

180. 380 U.S. 479 (1965).

181. *Id.* at 482.

182. *Id.*

ards governing injunctions against criminal prosecutions in civil rights cases. Secondly, the Court adhered formally to the requirement that plaintiffs demonstrate "irreparable injury" before an injunction would issue.[183] It found that requirement satisfied by threats of multiple prosecutions in bad faith under overbroad statutes regulating expression, which created a "chilling effect" upon the exercise of first amendment rights.[184] Since it had appeared before *Dombrowski* that a showing of bad faith and harassment would suffice to establish irreparable injury, the case merely seemed to confirm prior law on that point. The innovative aspect of the case was its apparent extension of the irreparable injury standard to encompass the so-called "chilling effect" of a vague or overbroad statute regulating freedom of expression. Together with subsequent decisions, *Dombrowski* seemed to mean that a plaintiff might establish this chilling effect by showing either a threat of prosecution in good faith under a facially unconstitutional statute, or a threat of bad faith prosecution, even under a facially valid statute.[185]

Despite *Dombrowski*'s apparent consistency with prior law, a closer comparison of the opinion with decisions handed down during the earlier period of more rigorous judicial restraint described above reveals that the case was in truth a broad authorization by the Warren Court of federal intervention into state affairs—an authorization which was motivated by the basic assumption that state courts would "not be as prone as federal courts to vindicate constitutional rights promptly and effectively."[186] In *Dombrowski* Mr. Justice Brennan expressed the majority's view that defense of a state prosecution was inadequate fully to protect first amendment rights when a chilling effect existed:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. . . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. . . . The chilling effect upon the exercise of First Amendment rights may

183. *Id.* at 484-85.

184. *Id.* at 485-89.

185. *See* Cameron v. Johnson, 390 U.S. 611 (1968); C. WRIGHT, *supra* note 9, § 52, at 208; Maraist, *supra* note 178, at 578-79; Note, *Bad Faith Prosecution of Civil Rights Matters in State Courts—Future Developments of Injunctive Relief in Federal Courts*, 1 GA. L. REV. 656, 660-63 (1967).

186. 380 U.S. at 499 (Harlan, J., dissenting).

> derive from the fact of the prosecution, unaffected by the prospects of its success or failure.[187]

However, this view of the propriety of federal intervention conflicted sharply with that expressed by the Court during the earlier period in *Douglas v. City of Jeannette*.[188] In *Douglas* the Court was faced with the question of whether it should enjoin the enforcement of an ordinance that it had declared unconstitutional the same day, partly on grounds of overbreadth, in *Murdock v. Pennsylvania*.[189] Even though first amendment rights were involved in *Douglas*, the Court found no inadequacy in the remedy available by defense of a state criminal prosecution. Although the decision may have been influenced by a belief that the local authorities would observe its holding in *Murdock*,[190] the clear import of the *Douglas* opinion for future cases was that federal district courts should leave state prosecutions unfettered, even when sensitive first amendment rights were threatened under overbroad statutes. Thus, fairly interpreted, the Court's approval of federal injunctive relief in *Dombrowski* when a "chilling effect" upon first amendment rights was present actually signified more than simply "an extension of well-established legal principles to a peculiar fact situation."[191] Rather, it represented one aspect of another fundamental shift in the Court's attitude toward federal anticipatory relief for constitutional violations and the legitimacy of state court processes as a means of remedying those violations.

Read together, therefore, the Court's decisions on federal injunctive interference with state criminal proceedings from *Ex parte Young* to *Dombrowski* reveal that although the Court has continuously applied the labels of English Chancery practice in deciding cases, those labels actually masked the important principles of decision during any given period. The results in the decided cases can be explained more readily as a function of the Court's attitude toward anticipatory adjudication of constitutional issues, the legitimacy of the states' interest in initial decision of constitutional questions involving state law, and the efficacy of state court processes to protect constitutional rights. So viewed, however, the Court's approach is subject to criticism. In the first place,

187. *Id.* at 486-87.
188. 319 U.S. 157 (1943).
189. 319 U.S. 105, 116-17 (1943).
190. 319 U.S. at 165; Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 904-05 n.496 (1965).
191. *See* Maraist, *supra* note 178, at 565.

it is questionable whether there was ever a justification for applying the English equity principles in the federal courts. Under the various statutory schemes existing since 1789, single federal courts have always been competent to issue both legal and equitable remedies. Though confined for many years by the statutory requirement that there be no "plain, adequate, and complete remedy" at law, that requirement was designed to measure the adequacy of the remedies available on the law "side" of the federal courts, not to determine the propriety of a federal as opposed to a state forum.[192] In any event, the requirement was abolished in 1948, and there seems to be no substantial justification for retaining any of the ancient equity requirements under the completely merged system of the Federal Rules of Civil Procedure today. Retention of the historical requirements for injunctive relief impedes the development of rational, analytical standards for determining the appropriateness of such relief in a modern procedural system. And nowhere is this more apparent than in the cases dealing with federal injunctions against state criminal proceedings.

The Supreme Court, by holding out the ancient equity standards as principles of decision, has confused the functional inquiry that ought to take place in determining the propriety of federal anticipatory relief against state action. A functional inquiry should take into account such factors as the appropriate relationship between federal anticipatory relief and state anticipatory relief, the appropriate relationship between federal anticipatory relief and defense of state civil or criminal proceedings, the legislative purposes behind the relevant statutory grants of authority to the federal courts, including jurisdictional grants, the Supreme Court's proper role as arbiter of the relationships between the state and federal courts, and perhaps others. Instead, the Court has used the rubric of "imminent irreparable injury" as a standard of shifting content with which to reflect changes in the basic allocation of business between the state and federal court systems. Coupled with that rubric's historical meaning, the end result has been the apparent application of a "no adequate remedy at law plus" standard, with the content of the "plus" being substantially in doubt. As the authors of one famous casebook have expressed the operation of the standards governing injunctive relief against enforcement of state criminal laws, "notions of federal-state comity intersect traditional equity requirements in connection with the more inclusive requirement that the plaintiff in equity show irreparable

192. HART & WECHSLER, *supra* note 9, at 1009.

harm, and more particularly in connection with equity's traditional reluctance to interfere with criminal proceedings unless such harm would result."[193]

The decision-making process which has been established is, therefore, one without intellectual or practical boundaries, which shifts according to the whims of a majority of the Court. As will be later discussed, this dysfunctional process can and should be replaced by an analytical standard based upon sound procedural policies and upon all the factors relevant to the appropriateness of federal anticipatory adjudication of state laws.

B. The Federal Anti-Injunction Statute

As indicated above, a federal Anti-Injunction provision has been in existence, in one form or another, since 1793.[194] The history and purposes of this statute have been examined in detail by others.[195] Suffice it here to say that the legislative history of the provision is scanty and its original purposes obscure.[196]

Where it is applicable, the prohibitions of the statute are absolute. That is, it prohibits injunctions against state court proceedings without regard to the adequacy of the remedy in the state courts, the quality of injury the federal plaintiff will suffer if an injunction is refused, or the need for federal anticipatory intervention by way of injunction.[197] Consequently, it is important to determine when the statute applies to understand the entire scope of discretion open to the federal courts to enjoin state actions.

The most important exception to the operation of the statute is that it only applies to state court proceedings already commenced when the federal injunction is sought. The justification for this exception is shaky, at best. If, as often stated, the statute performs the function of preventing needless friction between state and federal courts,[198] it

193. *Id.* at 1009-10.

194. *See* note 138 and accompanying text *supra.*

195. *See, e.g.,* C. WRIGHT, *supra* note 9, § 47; Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute,* 30 MICH. L. REV. 1145 (1932); Taylor & Willis, *supra* note 146; Note, *Federal Power to Enjoin State Court Proceedings,* 74 HARV. L. REV. 726 (1961); Note, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent,* 38 U. CHI. L. REV. 612 (1971); Note, *Anti-Suit Injunctions Between State and Federal Courts,* 32 U. CHI. L. REV. 471 (1965). *See also* Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation,* 83 HARV. L. REV. 1870 (1970).

196. *See* authorities cited note 195 *supra.*

197. *See* C. WRIGHT, *supra* note 9, § 47, at 182.

198. *See, e.g., id.* § 47, at 178.

would seem that the function is largely impaired by the exception. As one commentator has stated:

> There is thus presented the curiously illogical situation, that if a state officer succeeds in initiating his criminal proceedings in a state court to enforce an alleged unconstitutional state law, he cannot be enjoined or interfered with by the federal court; but if he can be caught on the immediate verge of initiating such action, he may be so enjoined. It is difficult to see why action of a state court is not, in fact, as effectively restrained in the latter case, as it would be by an injunction in the former case. It is also difficult to see why the right of an individual to test the constitutionality of a state law by a suit in the federal court—a right which he possesses only by virtue of the provisions of the federal statutes should be deemed to be more sacred than the right of a state to have the action of its courts freed from restraint by a federal court injunction—a right which it also possesses only by virtue of a federal statute.[199]

Further reducing the effectiveness of the statute for many years were numerous other court-made exceptions to it.[200] In 1941, in the case of *Toucey v. New York Life Insurance Co.*,[201] the Supreme Court rejected all but one of these nonstatutory exceptions to the statute.[202] In response to *Toucey*, however, Congress sought in the 1948 revision of the Judicial Code to restore the law as it existed prior to *Toucey*.[203] This present version of the statute reads, as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[204]

It has been said with no little accuracy that this provision "is not a model of clear draftmanship,"[205] and since the revision, the Supreme Court has vacillated in the strictness with which it has viewed the statute's prohibitions.[206] For the purposes of this article, the most important difficulty with the language of the statute was what construction should be given the exception for injunctions "expressly authorized by Act of Congress." Specifically, the question was whether the Civil Rights Act[207] constituted such an "expressly authorized" exception.

199. Warren, *supra* note 143, at 375.
200. *See* authorities cited note 195 *supra*.
201. 314 U.S. 118 (1941).
202. *See* C. WRIGHT, *supra* note 9, § 47, at 178-79.
203. *See* 28 U.S.C. § 2283 (1970) (Reviser's Note).
204. *Id.* § 2283.
205. *See* C. WRIGHT, *supra* note 9, § 47, at 179.
206. *Id.* at 179-80.
207. 42 U.S.C. § 1983 (1970).

For some time, the lower federal courts were divided over whether to treat the Act as an "expressly authorized" exception to the Anti-Injunction Statute,[208] and, prior to 1972, the Supreme Court consistently refused to resolve the question.[209] Given the Court's willingness to manipulate traditional equity principles in accord with its view of the merits of judicial restraint, the ultimate direction in which it resolved the issue was of no little importance. Many suits brought to enjoin state criminal proceedings on constitutional grounds are based upon alleged fourteenth amendment violations, which the Civil Rights Act includes within its scope. Thus, if the Court ultimately held the Act to be an "expressly authorized" exception to the Anti-Injunction Statute, the only important factors limiting injunctive relief against the bulk of state court proceedings would be the shifting application of the traditional rules of equity jurisprudence. Conversely, if the Court held that the Anti-Injunction Statute barred injunctions under the Civil Rights Act against state proceedings, state law enforcement officers would at least be free of federal interference if they were able to win the race to the courthouse. Of course, injunctions against "threatened" or "future" proceedings would remain unaffected by the Anti-Injunction Act.

As will be seen, the Court ultimately determined that the Anti-Injunction Statute does not bar injunctive relief when suit is brought under the Civil Rights Act.[210] This determination is part of the shift in direction initiated by the Court's decisions in 1971 and will be discussed below. It should be noted here, however, that the result finally reached was not generally expected by the commentators.[211] As Professor Currie inquired prior to the Court's resolution of the issue, "by what stretch of the English language could it be argued that the Civil Rights Act 'expressly' authorizes injunctions against suits in state courts?" As will be observed below, this and other questions which

208. *Compare* Cooper v. Hutchinson, 184 F.2d 119, 124 n.11 (3d Cir. 1950), *with* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *cert. denied*, 381 U.S. 939 (1965); Wojcik v. Palmer, 318 F.2d 171 (7th Cir.), *cert. denied*, 375 U.S. 930 (1963); Coss v. Illinois, 312 F.2d 257 (7th Cir. 1963); Moss v. Jones, 288 F.2d 342 (6th Cir.), *cert. denied*, 368 U.S. 868 (1961); Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Sexton v. Barry, 233 F.2d 220 (6th Cir.), *cert. denied*, 350 U.S. 838 (1956); *and* Norwood v. Parenteau, 228 F.2d 148 (8th Cir. 1955), *cert. denied*, 351 U.S. 955 (1956). *See also* Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969).

209. *See, e.g.*, Cameron v. Johnson, 390 U.S. 611, 613-14 n.3 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). The issue has now been resolved in favor of a construction that permits injunctive relief. *See* Mitchum v. Foster, 407 U.S. 225 (1972), discussed in Part IV(D) *infra*.

210. Mitchum v. Foster, 407 U.S. 225 (1972).

211. *See* C. WRIGHT, *supra* note 9, § 47, at 181-82.

might be asked about the Court's approach in this area may be answered by reference to a desire to retain in itself a large degree of discretion to adjust the relationships between the state and federal courts as its own composition shifts with variations in the political climate. As with its approach to injunctions against threatened state court proceedings, this degree of discretion has the capacity of being dysfunctional. In addition, as will be seen, it is a degree of discretion the Court is not entitled to exercise.

C. *Declaratory Judgments in the Federal Courts*

As indicated above, the remedy of declaratory judgment was not available in the federal courts until 1934.[212] The legislative history of this Act reveals clearly that the federal declaratory judgment was based on the same premises, was intended to embody the same purposes, and was designed to have the same characteristics that underlie the remedy generally—that is, the legislative history recognizes the validity of a mechanism to adjudicate disputes before they ripen into violence and disrupt the status quo, coupled with an assumption that in a civilized society coercion is generally unnecessary to secure obedience to court decrees.[213] Moreover, it is certain that the federal remedy was intended to be available to challenge criminal statutes[214] and that it was to be a discretionary remedy.[215] In this last regard, it is also clear un-

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212. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

. . . .

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

28 U.S.C. §§ 2201-02 (1970). *See* note 140 and accompanying text *supra*. *See also* FED. R. CIV. P. 57.

213. *See* S. REP. No. 1005, 73d Cong., 2d Sess. 2-6 (1934); H.R. REP. No. 1264, 73d Cong., 2d Sess. 2 (1934); *Hearings on H.R. 5623 Before a Subcomm. of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 21, 38-40 (1928) [hereinafter cited as *1928 Hearings*]. Despite the provision for "further necessary or proper relief based on a declaratory judgment" in section 2202, which is similar to the provision in section 8 of the Uniform Act, the above legislative history indicates a belief that coercive relief would not *ordinarily* be necessary. Nevertheless, it was contemplated from the outset that ancillary proceedings to enforce the judgment would, if required, be available against a recalcitrant litigant, even though such proceedings would be the exception rather than the rule. *See id.* at 21, 39.

214. *See* S. REP. No. 1005, *supra* note 213, at 3, 6; *1928 Hearings* at 18-19.

215. *See* H.R. REP. No. 1264, *supra* note 213, at 2; Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 49 (1934).

der the federal provision that the courts' discretion was not to be controlled by the traditional principles applied to govern injunctions, and the Supreme Court has so held.[216] However, it is equally plain that the federal courts should exercise their discretion under the statute in accord with the proper role of the federal judiciary in our constitutional plan and avoid unnecessary interference with state affairs.[217] Operating under this last principle the Supreme Court has refused to sanction federal declaratory judgments which would needlessly interfere with the execution of state policies.[218] And the Court has also made it clear that in exercising its discretion under the Act a federal court should determine whether a federal declaratory judgment would be useful in the face of a pending state proceeding:

> Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there.[219]

The discretion afforded to the federal courts under the ordinary standards applicable to declaratory judgment proceedings has not, however, been the only means those courts have devised to decline adjudication in such actions. Especially in cases involving public law issues, the Supreme Court has applied the ripeness standard in a manner which clearly indicates the Court is declining to adjudicate cases which satisfy the constitutional prerequisites of a case or controversy. Although at one time it appeared that the Court would require a specific threat of enforcement before it would consider an action "ripe" for adjudication,[220] in recent years its decisions evidence the evolution of a

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216. Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 241 (1937); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264 (1933).

217. *See, e.g., Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 814, 867-72.

218. *See* Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247 (1952); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

219. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942). *See also* Borchard, *supra* note 110, at 692-99; *Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 814-15.

220. *See Developments in the Law*, 62 HARV. L. REV., *supra* note 88, at 870-71; Note, 50 YALE L.J., *supra* note 97. This view has apparently been espoused by the Supreme Court on a number of occasions. *See* Poe v. Ullman, 367 U.S. 497, 501 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75, 88 (1947); *Ex parte* La Prade, 289 U.S. 444, 458 (1933). However, it has been articulately criticized by Professor Borchard, among others, *see* Borchard, *supra* note 97, at 464-67; Note, 50 YALE L.J., *supra*. That

set of more rational standards to govern this "discretionary" ripeness determination. It may be helpful to examine these standards in the context of a suit for declaratory relief from a threatened criminal action. This may be accomplished by examining two basic situations a person endangered by a criminal law may confront and the difficulties he will face in meeting the federal ripeness standard in these situations. They are cases in which (i) the person is in jeopardy of criminal prosecution for an ongoing course of conduct, either because the authorities have threatened such a prosecution, or because an allegedly invalid statute requires him to cease the conduct or risk incurring serious criminal penalties, and (ii) when the person is in danger of prosecution for contemplated future action, either because the authorities have threatened to prosecute him if he takes the action, or because an allegedly invalid statute proscribes the conduct in which he wishes to engage.

Initially, one may dispose of the situation in which the authorities threaten to prosecute the plaintiff unless he ceases a particular, well-defined course of conduct. Here the plaintiff's ongoing activity eliminates all doubts about whether he will act and what he will do, factors important in determining, for purposes of the ripeness inquiry, whether he possesses definite rights that are being subjected to definite prejudicial interference.[221] The official threat, in turn, provides the necessary degree of certainty that the authorities actually intend to prosecute him for his conduct.[222] Thus, in this situation there seems no doubt that the case is ripe for determination under any reasonable standard.

When, instead, the plaintiff is engaging in ongoing activity, but there has been no official threat of enforcement, ripeness depends largely upon the character of the law in question. If the law is self-executing in nature, so that it clearly appears the plaintiff must either cease or alter his activities, or risk incurring substantial criminal penalties, the case is ripe for adjudication.[223] On the other hand, where the law challenged requires some action by the authorities before it may be enforced, adjudication may have to await the content of an actual

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such a requirement is not an absolute prerequisite to a case or controversy has previously been discussed. *See* text accompanying notes 97-103, 118-22 *supra.*

221. *Compare* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), *with* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

222. *Cf.* Poe v. Ullman, 367 U.S. 497 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

223. *See* Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136, 152-53 (1967); *cf.* Bantam Books v. Sullivan, 372 U.S. 58 (1963). *See also* Dickson, *Declaratory Remedies and Constitutional Change*, 24 VAND. L. REV. 257, 268-75 (1971).

application.[224] In both instances the standard to be applied has a "two-fold aspect, requiring [the court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration;"[225] but in the latter case the presence of a cognizable danger of harm to the plaintiff depends upon the kind of enforcement activity undertaken by the authorities.[226] The problems encountered in enforcement, the kinds of safeguards employed to protect the plaintiff's legitimate interests, and the need for various types of enforcement activity in order to attain permissible governmental goals, are all likely to have an important bearing on the law's validity.[227] Thus the need to know how the law will be enforced becomes urgent for purposes of adjudicating its constitutionality;[228] and as long as the hardship of denying relief to the plaintiff is not severe enough to outweigh this need for a specific application, the case will be considered "unripe."[229]

The most difficult case in which to establish justiciability arises when the plaintiff is not engaging in an ongoing course of conduct, but instead alleges that an invalid statute proscribes some action he wishes to take in the future.[230] Here the difficulty lies in determining whether the plaintiff will act, and, assuming that he will act, what precisely he will do. In other words, it is difficult to tell whether he really needs an adjudication of the statute's invalidity, or whether he is posing a hypothetical situation for the court to resolve.[231] Under these circumstances, the existence or nonexistence of a specific threat to enforce the questionable law may be critical to justiciability, not because the threat itself is an absolute prerequisite to a ripe controversy, but because the plaintiff may be unable to point to any other factual element which will establish the concreteness necessary for adjudication.[232] A

224. *See* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).
225. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).
226. *See* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).
227. *Cf. id.* at 163-64.
228. *Id.*
229. *See id.* at 165.
230. *See* Golden v. Zwickler, 394 U.S. 103 (1969); Poe v. Ullman, 367 U.S. 497 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Dickson, *supra* note 223, at 270-75.
231. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947).
232. *Id.* at 88-90. After indicating that no sufficient threat of enforcement existed to establish justiciability, the Court went on to state:

> The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. *We can only speculate as*

threat of enforcement will generally establish sufficient concreteness for justiciability, because it normally represents both a reasonable belief by the authorities that the plaintiff will engage in proscribed future activity and a concomitant attempt to deter him from so acting. Ordinarily, it seems, the authorities will not make such a threat unless the plaintiff gives them reason to do so, as where he inquires whether his proposed actions will be prosecuted, publicizes his intention to perform the activity, or has engaged in past conduct which has attracted the attention of the officials, but which they do not wish to prosecute as long as plaintiff ceases his activity in the future. Thus it is often not the threat alone that establishes a ripe controversy, but also the facts which give rise thereto; and in this regard one should note that both factors operating together must demonstrate that the authorities intend to take *definite* action against *specific* conduct of the plaintiff. Otherwise, the threat will constitute only a "general threat by officials to enforce those laws . . . they are charged to administer. . . . ,"[233] which the Supreme Court has held insufficient to establish a ripe controversy.[234] Finally, even if a threat of prosecution for future conduct is "clear and imminent," other circumstances, such as long-continued nonenforcement of the questionable law, may dispell the need for adjudication;[235] and even when prior action by both the plaintiff and the enforcement authorities indicates that a particular act will be prosecuted, changed circumstances may make it so improbable that the plaintiff will commit the act as to render the case unripe.[236]

Combined with the discretionary power of the federal courts to dismiss declaratory actions, the Supreme Court's application of the ripeness requirement appeared to place substantial obstacles in the path of one who sought a declaratory judgment against an unconstitutional state criminal law. However, the Court's opinions subsequent to *Dombrowski v. Pfister*, but before its line of decisions beginning in 1971,

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to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interference upon the other.

Id. (emphasis added).

233. *Id.* at 88.

234. Poe v. Ullman, 367 U.S. 497, 501 (1961); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). *See also* Watson v. Buck, 313 U.S. 387, 400 (1941).

235. *See* Poe v. Ullman, 367 U.S. 497 (1961). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-56 (1962).

236. *See* Golden v. Zwickler, 394 U.S. 103 (1969).

left at least some doubt about the circumstances when declaratory relief would be available to challenge state criminal provisions.

From the Court's decision in *Zwickler v. Koota*[237] it appeared that the propriety of federal declaratory relief might be determined in accord with the test of the *Dombrowski* case. In *Zwickler* the federal plaintiff had been convicted of violating a New York statute prohibiting the distribution of anonymous election literature. His conviction was reversed on state law grounds by the New York courts, and thereafter he sought declaratory and injunctive relief against future enforcement of the statute against him from a federal district court in New York, arguing that the statute was unconstitutionally overbroad in that it embraced anonymous literature both within and outside the protection of the first amendment. A three-judge district court applied the federal doctrine of abstention and dismissed the complaint, in order that the plaintiff might obtain a construction of the statute from the New York courts.[238] On appeal to the Supreme Court, that Court reversed and remanded the case.

As far as the decision to abstain was concerned, the Supreme Court held that, under the circumstances of the case, the district court had violated the duty of the federal judiciary to give proper respect to a suitor's choice of a federal forum when it deferred to the New York courts under the doctrine of abstention. The Court held that the special factors justifying abstention in favor of state courts were absent, since the plaintiff was challenging the New York statute on grounds of overbreadth, not vagueness, and therefore there existed no possibility of a state court construction of the statute which would avoid the constitutional question.[239] The Court also pointed out that the attack on the statute was based on first amendment grounds, thereby creating the danger that state court proceedings would "chill" the exercise of those rights.[240] This was in accord with *Dombrowski*, which had held abstention inappropriate when statutes were attacked as "overly broad and vague regulations of expression."[241]

The district court had treated the questions of abstention, injunctive relief, and declaratory relief as the same in *Zwickler* and had

237. 389 U.S. 241 (1967).
238. *See* note 9 *supra.*
239. *See* 389 U.S. at 246-52. *See also* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).
240. *See* 389 U.S. at 252.
241. 380 U.S. at 489-90; *see* Maraist, *supra* note 178, at 578.

denied all relief because the plaintiff had not made the showing necessary to entitle him to an injunction against a state criminal prosecution.[242] The Court held that *Dombrowski* required a different test for abstention and injunctive relief, and that a similar distinction existed between declaratory and injunctive relief.

The *Zwickler* decision was widely interpreted as *requiring* district courts to issue declaratory judgments whenever a state statute was challenged on its face as an overbroad regulation of expression.[243] By itself, however, *Zwickler* is entirely consistent with a standard of discretion which would require federal district courts to refuse declaratory relief against state criminal laws when to do so would unnecessarily disrupt state affairs or would not serve a useful purpose, since the Court merely directed that requests for federal declaratory relief *be considered* independently of requests for injunctions. It did not hold that considerations of state-federal relations were to be disregarded once a question of abstention had been resolved in favor of the plaintiff. Nevertheless, when *Zwickler* is read together with the holding in *Dombrowski* there is some support for the view that declaratory relief becomes mandatory once abstention is denied on grounds of a "chilling effect." *Dombrowski* had clearly held that the irreparable injury necessary to justify injunctive relief would be established by the chilling effect incident to an overbroad regulation of first amendment rights.[244] Since the same facts which established this chilling effect also made abstention unwarranted,[245] and since a declaratory judgment is a "milder" remedy than an injunction, both declaratory and injunctive relief seemed to follow automatically from a refusal to abstain after *Dombrowski* and *Zwickler*. In *Zwickler*, however, relief was later declared to be inappropriate on grounds of mootness and lack of ripeness.[246]

In summary, after *Dombrowski* and *Zwickler*, it appeared that declaratory judgments against the enforcement of state criminal laws would be available as a matter of course when such laws were challenged as overbroad regulations of expression, but that the ripeness standard would be applied with some stringency to preclude "premature" adjudication of constitutional issues. Thus the Court continued to

242. *See* 389 U.S. at 252-54.
243. *See* C. WRIGHT, *supra* note 9, at 207; Maraist, *supra* note 178, at 578.
244. 380 U.S. at 490; *see* Maraist, *supra* note 178, at 578.
245. *See* 380 U.S. at 489-90.
246. *See* Golden v. Zwickler, 394 U.S. 103, 107 (1969).

adhere to the traditional labels governing injunctive relief, ignoring the possibility of treating federal declaratory judgments and injunctions against state laws in a comprehensive fashion, as complementary remedies to be utilized in accord with their unique characteristics, as well as with consistent, rational principles reflecting the Congressional purpose behind the Civil Rights Act and the Declaratory Judgment Act and the necessities of our dual system of federal and state courts. The Court's next attempt to deal with these remedies came in the context of suits for federal injunctions and declaratory judgments against pending state criminal actions. As will be seen, its response in this context also failed to establish rational, principled criteria for federal relief. However, the Court's decision did indicate a retreat from its liberal attitude about federal anticipatory adjudication of state laws in *Dombrowski* to a narrower view of the situations in which federal intervention would be permissible.

IV. FEDERAL INJUNCTIVE AND DECLARATORY RELIEF AGAINST STATE CRIMINAL LAWS: THE YOUNGER-SAMUELS LINE OF DECISIONS

A. Younger v. Harris and Federal Injunctive Relief

In *Younger v. Harris*[247] the plaintiff, a member of the Progressive Labor Party, was indicted for distributing leaflets alleged to be in violation of the California Criminal Syndicalism Act. He then sought a federal injunction against the District Attorney of Los Angeles County to stop the prosecution. As grounds for the injunction, he alleged that the existence of the Act and the prosecution under it inhibited him in the exercise of his first amendment rights. Subsequently, three other persons intervened as plaintiffs, claiming that the prosecution inhibited their teaching and political activities. A three-judge district court held the Criminal Syndicalism Act void for vagueness and overbreadth and enjoined the defendant from prosecuting Harris thereunder. On direct appeal from this judgment the Supreme Court reversed.[248]

247. 401 U.S. 37 (1971). The commentary on *Younger* and its progeny has been extensive. The best works seem to be Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO ST. L.J. 744 (1971); Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 SW. L.J. 282 (1972); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972); Sedler, *Dombrowski in the Wake of Younger: The View from Without and Within*, 1972 WIS. L. REV. 1.

248. 401 U.S. at 40-41. Justices Brennan, White, and Marshall concurred in the result. *Id.* at 56-58. Justice Douglas dissented. *Id.* at 58-65.

The Court per Mr. Justice Black first held that the intervening plaintiffs had alleged no live controversy with the defendant. In the Court's view the intervenor's allegations were wholly insufficient to warrant the exercise of federal jurisdiction since they were under no danger of actual prosecution. Thus the Court adhered to its prior ripeness decisions by refusing to adjudicate the intervenor's case in the absence of any demonstration that the authorities would apply the statute to them for the activities in which they were engaging.

After disposing of the intervening plaintiffs, the Court turned its attention to the original plaintiff, Harris. Conceding that a ripe controversy existed with respect to him because of the pending prosecution, the Court nevertheless held that injunctive relief under the circumstances of the case would be a "violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[249] Justice Black cited three sources evidencing this long-standing national policy.

First, he cited the long existence of the Anti-Injunction Statute as evidence of a congressional policy "to permit state courts to try cases free from interference by federal courts,"[250] implying that this congressional policy was a source of strength from which the Court might draw in restricting the availability of injunctive relief against state proceedings. This reliance upon the Anti-Injunction Act was curious for at least two reasons. First, Justice Black made it clear later in his opinion that the Court was *not* deciding whether the anti-injunction provision barred a federal injunction against state proceedings of its own force, or whether, instead, the Civil Rights Act would be considered an "expressly authorized" exception to that statute.[251] However, as earlier observed, the Anti-Injunction Statute, when it applies, is an absolute prohibition on a federal court's power to enjoin a pending state action.[252] In a sound procedural system, similar questions concerning a court's power to act over a particular controversy are disposed of at the threshold of a lawsuit, while issues dealing with the manner in which a court exercises its authority or discretion are dealt with later. Any other sequence holds the potential for serious waste of the courts' time and effort.[253] The Supreme Court's approach in *Younger* ignored this

249. *Id.* at 41. The Court also denied a declaratory judgment. *Id.* at 41 n.2.
250. *Id.* at 43.
251. *Id.* at 54. *See also id.* at 55 (Stewart, J., concurring).
252. *See* text following note 196 *supra.*
253. *See* Z. CHAFEE, *supra* note 76, at 316-19.

"Policy of First Things First"[254] by reserving the Anti-Injunction Act issue for later determination in order to decide the case on substantive principles governing the availability of federal injunctive relief. Second, the Court's reliance on the Anti-Injunction Statute as a source of strength for its ultimate decision seems entirely misplaced, in light of its subsequent holding in 1972 that the Civil Rights Act constitutes an expressly authorized congressional exception to that statute.[255] How a policy against enjoining state proceedings can be derived from a statute which expressly allows such injunctions is confusing, to say the least.

A second source of the "national policy" against federal injunctions against state court proceedings was said to be the traditional equity requirements of irreparable injury and lack of an adequate legal remedy.[256] Mr. Justice Black's final source of evidence for the "national

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254. *Id.* at 316.

255. *See* Part IV(D) *infra.*

256. [T]he basic doctrine of equity jurisprudence [is] that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.

401 U.S. at 43-44. Justice Black therefore recognized the origins of the "irreparable injury" doctrine as being in "circumstances peculiar to the English judicial system," but suggested that there are independent reasons for retaining the doctrine in the federal courts. However, it is difficult to see how the most important role of the jury is "eroded" by a federal injunction against state criminal proceedings. The jury trial guarantees in our system are primarily designed to safeguard the rights of the accused. If he wishes to forego those guarantees in favor of an anticipatory adjudication of his rights, it is hard to see how the role of the jury will be significantly eroded by permitting him to do so. Moreover, the second of his reasons for retaining the "irreparable injury" standard—to avoid duplication of legal proceedings where a single suit will be adequate to protect constitutional rights—begs the question to be decided. The issue was, or should have been, when *federal anticipatory relief* ought to be available to prevent the enforcement of state laws through criminal proceedings. This suggests a host of factors that should be taken into account in the decision-making process *in addition to* the adequacy or inadequacy of the remedy available by defending a state criminal proceeding, including the goals Congress was attempting to achieve in conferring jurisdiction on the federal courts in civil rights cases without regard to jurisdictional amount, the permissible range of discretion available to federal courts in light of those jurisdictional goals and the policies Congress was seeking to achieve in the substantive portions of the Civil Rights Act, the *relative efficacy* of federal anticipatory relief as opposed to state anticipatory relief to achieve the same goals, the *relative efficacy* of anticipatory relief as opposed to defense of a criminal prosecution to achieve those goals, and the relative roles of the federal and state courts in the process of constitutional adjudication. To suggest that all of these factors, as well as others which might be relevant, are satisfactorily reflected in the ancient equity standard is disingenuous, at best.

policy" forbidding federal injunctions against state court proceedings was

> the notion of "comity," that is, 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. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism". . . .[257]

This passage, along with the Court's later discussion of the *Dombrowski* case, constituted the heart of its reasons for denying injunctive relief in *Younger*. The Court had again switched from the concern it has demonstrated in *Ex Parte Young* and *Dombrowski* for the plight of litigants threatened by state criminal action to an orientation toward the interests of the state. The Court indicated, however, that the change was not absolute and protection of certain federal interests might possibly override state interests and result in a proper occasion for anticipatory relief.[258] Nevertheless, it was clear that the pendulum had swung in favor of the states. The only question was exactly how much room was left for federal anticipatory relief after the swing.

Justice Black went on in *Younger* to discuss additional reasons for the Court's renewed deference to state courts. These included the already mentioned greater reliance on traditional standards of equitable relief than in *Dombrowski*, an attempt to show that the "chilling effect" analysis in *Dombrowski* was not necessary to the decision there, the possibility that a federal injunction would not end the plaintiff's fear of prosecution since the state would be able to act after a state court limited the reach of the statute, and a policy against invalidating a state statute on its face without a concrete application.

In *Boyle v. Landry*,[259] decided the same day, the Court held to the same restrictive view of federal anticipatory relief it has expressed in *Younger*. In both cases, the Court made it clear that its pre-*Dombrowski* precedents governing the propriety of injunctive relief had been reinstated. Those precedents have been previously discussed; they approved injunctions only against prosecutions brought in bad faith or for purposes of harassment,[260] against prosecutions under flagrantly

257. 401 U.S. at 44.
258. *Id.*
259. 401 U.S. 77 (1971).
260. *See* Dyson v. Stein, 401 U.S. 200 (1971) (per curiam), decided the same day

unconstitutional statutes, against multiple prosecutions, and in other "unusual," but undefined, situations.

By returning to the pre-Warren Court principles governing injunctive relief, the Court effectively emasculated *Dombrowski*, but left the area of federal injunctions against state court proceedings in an unsatisfactory state. As previously observed, the retention of the old chancery principles in a modern procedural system tends to divert the courts' focus from the kinds of factors which would permit them to develop rational criteria to govern this sensitive area. The Court did suggest some possible factors it might take into account in determining the propriety of relief in future cases, however, and these have yet to be discussed. Before determining whether these factors combined with the Court's traditional approach to injunctive relief will produce rational standards, it will be helpful to examine the Court's holdings on federal declaratory relief in the decisions under scrutiny.

B. Samuels v. Mackell and Federal Declaratory Relief

In *Samuels v. Mackell*[261] several persons who had been indicted in New York for criminal anarchy brought suit in federal court to obtain declaratory and injunctive relief from the state prosecutions. They alleged, *inter alia*, that the New York anarchy statute was void for vagueness in violation of due process and that it abridged their freedoms of speech, press, and assembly in violation of the first and fourteenth amendments. As a consequence, they asserted, the trial of their indictments in state court would harass them and cause them to suffer irreparable injury. They requested that the state courts be enjoined from proceeding and, in the alternative, that the New York law be declared unconstitutional. A three-judge district court held the criminal anarchy statute constitutional and dismissed the complaint. On appeal the Supreme Court affirmed.

In an opinion written by Justice Black, the Court first observed

as *Younger*. In *Dyson* the plaintiff was charged with two violations of the Texas obscenity statute. He brought suit in federal court for declaratory and injunctive relief against arrest and seizure of his property by the Dallas police without a prior determination of obscenity. A three-judge district court refused such relief, but did hold the Texas obscenity statute unconstitutional on its face. The Supreme Court vacated and remanded in light of *Younger* and its companion decision, Samuels v. Mackell, 401 U.S. 66 (1971), so that the district court could, if appropriate, make findings of "irreparable injury." On the facts of the case, it clearly appeared that bad faith and harassment existed. Dyson v. Stein, *supra* at 204-06 (Douglas, J., dissenting). *See also* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated*, 401 U.S. 987 (1971).

261. 401 U.S. 66 (1971).

that the plaintiffs had made no showing sufficient under *Younger* to establish irreparable injury; therefore, no federal injunction was warranted.[262] Then the Court held that the plaintiffs' alternative prayer for a declaratory judgment was also insufficient, since under ordinary circumstances the same considerations that require federal courts to withhold injunctive relief against pending state court proceedings also make declaratory relief inappropriate.[263]

The Court relied upon prior decisions in which it had denied declaratory judgments that would have prevented the collection of state taxes and found no relevant difference between state tax collections and state criminal prosecutions "with respect to the limited question whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards."[264] The Court did leave open the possibility that a declaratory judgment might issue in certain circumstances where, although an *otherwise sufficient* showing for injunctive relief exists, an injunction should be withheld because "particularly intrusive or offensive."[265] But the Court made it plain that the practical effects of the two forms of relief would usually be the same and that federal courts should, in the proper exercise of their discretion, deny declaratory judgments where this is so.[266] Thus the Court relied upon the line of decisions, previously described, which held that federal declaratory relief should be administered in such a way as to avoid unnecessary interference with state affairs.[267]

The Court made it plain, in spite of its statement that a declaratory judgment would sometimes be appropriate as a milder alternative to injunctive relief, that it was not authorizing a true analytical approach to the remedy. Rather, it was approving a rather mechanical process, whereby declaratory relief would be denied whenever the traditional chancery rules dictated that injunctive relief be refused:

> We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, *the same equitable princi-*

262. *Id.* at 68-69.
263. *Id.* at 69.
264. *Id.* at 72.
265. *Id.* at 73.
266. *Id.*
267. *See* notes 217-18 and accompanying text *supra*. The Court might also have relied upon the ordinary standard governing declaratory relief—*i.e.* whether a declaratory judgment will serve a useful purpose in resolving the dispute between the parties—since as observed earlier, a declaratory action will not normally be useful in resolving a dispute that is already the subject of a prior pending action.

> *ples relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.*[268]

This approach flies squarely in the face of the intent of the draftsmen of the Declaratory Judgment Act as well as the Court's prior decisions holding that the declaratory remedy is not to be administered in accord with traditional equity rules.[269] Worse, it demonstrated once again an insensitivity to the need for a coherent approach to the entire problem of federal anticipatory relief, based on the unique features of the declaratory and injunctive remedies and the different functions that state and federal courts perform in our dual court system which might bear on the relative appropriateness of anticipatory relief in constitutional cases being issued by one or the other system.

The Court in *Younger* and *Samuels* reserved for later decision certain questions the resolution of which might have a bearing on the coherence of the Court's overall approach to federal anticipatory relief. Before passing final judgment upon the decisions, therefore, it will be helpful to examine the nature of these questions and their subsequent history in the Court.

C. *The Questions Reserved*

The Court and its various members suggested a number of distinctions in the 1971 decisions which might provide a basis for less stringent restrictions on federal injunctions and declaratory judgments against state actions. These were (i) a possible distinction between the availability of federal relief against future state court proceedings, as opposed to pending proceedings; (ii) a possible distinction between declaratory and injunctive relief; and (iii) a possible distinction between civil and criminal proceedings. Subsequent decisions of the Court have resolved some of these questions; while other decisions have given some indication how the declaratory and injunctive remedies should be administered under the principles articulated in *Younger* and *Samuels*.

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268. 401 U.S. at 73 (emphasis added). Clearly the Court did not mean by using the word "ordinarily" to authorize a thoroughgoing analysis of the declaratory remedy's utility in each case, for the quoted passage of its opinion was immediately followed by a passage emphasizing that the remedy might be a useful alternative to an injunction when the injunction was *otherwise appropriate*, but was, for some reason, particularly intrusive. *Id.*

269. *See* note 216 and accompanying text *supra*.

The Court has, as yet, not formally resolved the question of whether federal injunctive relief against future state proceedings will be administered by the same standards as injunctions against pending proceedings, but there are a number of reasons for believing that the same principles will be applied to both. First, as previously indicated, the Court decided the case of *Boyle v. Landry* on the same day it decided *Younger*. *Boyle* involved a situation in which no state prosecution was pending at the time federal relief was sought, and the Court disposed of the case under the irreparable injury standard of *Younger*. However, *Boyle* does not finally dispose of the question, since on the facts of the case, it strongly appeared that the plaintiffs were in the same position as the intervenors in *Younger* who failed to establish a ripe controversy.[270] Nevertheless, there are other indications that the same standard will be applied to govern injunctions against pending and future proceedings.

For one, the precedents cited by the Court in *Younger* to support its application of the irreparable injury test to pending prosecutions were all cases in which the plaintiffs sought to enjoin future prosecutions.[271] For another, Mr. Justice Brennan, expressing the views of three dissenting members of the Court in *Younger*'s companion case of *Perez v. Ledesma*[272] indicated that the same standard should be applied to govern injunctions against both pending and future proceedings.

In *Perez* the operators of a newsstand in the Parish of St. Bernard, Louisiana, were arrested and charged in state court with selling obscene magazines, books, and playing cards in violation of a state statute and a local ordinance. Subsequently, they filed suit in federal court, seeking a declaratory judgment that the statute and ordinance were unconstitutional and an injunction against pending and future prosecutions. A three-judge district court held the state statute constitutional on its face, but held that the arrests of the plaintiffs and the seizure of allegedly obscene materials were invalid for lack of a prior adversary hearing. The court issued an order requiring suppression and return of the materials seized, although it did not issue an injunction against pending or future prosecutions. While recognizing that it had no authority to rule on the constitutionality of the local ordinance, the three-judge court nevertheless expressed its view that the ordinance was un-

270. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 305 n.26 (1971).
271. *See* authorities cited 401 U.S. at 45-47.
272. 401 U.S. 82 (1971).

constitutional. The district judge who originally referred the case to the three-judge court then adopted that court's view of the ordinance's validity and held it unconstitutional. The clerk of the district court merged the orders of both the three-judge court and the district judge into a single judgment. On appeal the Supreme Court reversed the judgment of the three-judge court insofar as it granted injunctive relief and vacated and remanded the rest of the judgment, with directions that the district court issue a fresh decree from which the parties might appeal to the Court of Appeals for the Fifth Circuit.[273]

Mr. Justice Brennan, joined by Justices White and Marshall, dissented. These Justices agreed with the majority that the decision of the three-judge court was properly reviewable by the Supreme Court, and that the three-judge court had improperly ordered the suppression and return of the allegedly obscene materials.[274] On the question of whether the district court correctly issued declaratory relief, the dissenters first argued that a live controversy prerequisite to relief under the Federal Declaratory Judgment Act existed.[275] Even though, prior to the federal hearing, the state authorities had entered a *nolle prosequi* on the charges under the parish ordinance,[276] the "aggressive prosecution" of the plaintiffs gave rise to an inference that any further attempts to sell the questioned materials would again be met with prosecutions under both statute and ordinance.[277] Having demonstrated a live controversy, Justice Brennan then argued that no pending prosecution existed under the parish ordinance to make federal intervention improper.[278] Although charges were pending under the ordinance at the time the federal suit was brought, the authorities had entered the *nolle prosequi* prior to the time the three-judge court convened and heard the case.[279] In the dissenters' view, the availability of federal relief depended upon the situation at the time of the hearing, rather than at the time the federal suit was initiated.[280]

> The key predicate to answering the question whether a federal court should stay its hand, is whether there is a pending state prosecution where the federal court plaintiff may have his constitutional defenses heard and determined. Ordinarily, that question may be

273. *Id.* at 88.
274. *Id.* at 95, 96-98.
275. *Id.* at 101.
276. *Id.* at 94.
277. *Id.* at 102.
278. *Id.* at 103.
279. *Id.*
280. *Id.*

> answered merely by examining the dates upon which the federal and state actions were filed. 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. When, however, as here, at the time of the federal hearing there is no state prosecution to which the federal court plaintiff may be relegated for the assertion of his constitutional defenses, the primary reason for refusing intervention is absent. Here there was no other forum for the adjudication of appellees' constitutional objections to the ordinance.
>
> There is, of course, some intrusion into a state['s] administration of its criminal laws whenever a federal court renders a declaratory judgment upon the constitutionality of a state criminal enactment. The Court holds today in *Samuels v. Mackell* . . . that considerations of federalism ordinarily make the intrusion impermissible if a state prosecution under that enactment is proceeding at the time the federal suit is filed. . . . But considerations of federalism are not controlling when no state prosecution is pending and the only question is whether declaratory relief is appropriate. In such case, the congressional scheme that makes federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.[281]

Mr. Justice Brennan then reviewed the history of federal suits to enjoin the enforcement of state statutes,[282] concluding that the Federal Declaratory Judgment Act was designed in part to allow litigants to test the constitutionality of state and federal statutes under circumstances where injunctions would not be appropriate and where, in fact, injunctive relief had been abused prior to that Act in order to give what amounted to a declaratory judgment.[283] On these grounds he argued for rejection of the majority's "suggestion" that the irreparable injury test applied to control the propriety of a declaratory judgment when no prosecution is pending at the time federal relief is sought;[284] and he made clear the view of the dissenters that the *Dombrowski* chilling effect should be sufficient to justify federal declaratory relief against future prosecutions, although he conceded that *Younger*'s stricter criteria of irreparable injury should control the propriety of injunctions under the same circumstances.[285]

281. *Id.* at 103-04.
282. *Id.* at 104-10.
283. *Id.* at 111-15.
284. *Id.* at 115-16.
285. *Id.* at 117-30.

The dissenters therefore advocated retention of the traditional approach to injunctive relief, while drawing a distinction between the availability of federal declaratory relief against pending and future prosecutions. As previously observed, however, the Court has not yet indicated whether it will adhere to their view of the standards by which injunctive relief should be administered against future state court proceedings. During the remainder of its 1970 term, the Court summarily disposed of twenty-one cases on authority of the six February decisions, but none of the dispositions shed additional definitive light on the main decisions.[286] Moreover, decisions of the Court since the 1970 term have consistently left the issue unresolved.[287] And although a few cases have indicated the direction the Court might take, the indicators are conflicting. For example, in *Lake Carriers' Association v. MacMullan*,[288] plaintiffs filed suit to have the Michigan Watercraft Pollution Control Act of 1970 declared unconstitutional and its enforcement enjoined. A three-judge court, finding an absence of a justiciable controversy and grounds for abstention, dismissed the complaint. The Supreme Court, although affirming the district court's determination to abstain, disagreed with some of the grounds for that determination. In rejecting certain of these grounds, the Court, per Mr. Justice Brennan, had occasion to comment on the effect of *Younger* and *Samuels* upon federal relief against future proceedings:

> [T]he absence of an immediate threat of prosecution does not argue against reaching the merits of appellants' complaint. In *Younger v. Harris* . . . and *Samuels v. Mackell* . . . this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma* . . . (separate opinion).[289]

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286. The memorandum disposition of these cases is reported in 401 U.S. 984-90 (1971).

287. The Court's latest reservation of the question appears in Allee v. Medrano, 416 U.S. 802, 820 n.15 (1974). *See also* Steffel v. Thompson, 415 U.S. 452, 473 (1974); Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 COLUM. L. REV. 874 (1972); Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe*, 48 N.Y.U.L. REV. 965 (1973).

288. 406 U.S. 498 (1972).

289. *Id.* at 509-10.

Although one reading of this passage is that the Court will apply a less stringent standard to federal injunctive relief against future prosecutions, it seems dangerous to draw that conclusion given Mr. Justice Brennan's citation to his separate opinion in *Perez*, which indicated the contrary. Moreover, the Court has given subsequent indication that the *Younger* rule may be applied to injunctions against future prosecutions. In *O'Shea v. Littleton*,[290] decided during the Court's 1973 term, the plaintiffs brought a class action against certain city officials and judges of Cairo, Illinois, alleging that the defendants had engaged in maladministration of the criminal justice system in Cairo which deprived plaintiffs of their constitutional rights and requesting injunctive relief against the alleged unconstitutional practices. The district court dismissed the case for "want of jurisdiction to issue the injunctive relief prayed for"[291] and on the grounds that the judicial defendants were immune from suit with respect to acts done in the course of their judicial duties. The court of appeals reversed, directing the district court to fashion appropriate injunctive relief, and the Supreme Court granted certiorari and reversed the judgment of the court of appeals. Although the Court first declared that the complaint failed to allege a live controversy, it also declared that the plaintiffs had failed to state grounds for federal equitable relief. Citing *Younger* as well as earlier cases denying injunctive relief against future prosecutions, the Court stated that the principles of those authorities precluded equitable intervention in the case, even though no pending prosecutions were involved. In a revealing passage, the Court continued:

> Respondents do not seek to strike down a single state statute, either on its face or as applied; nor do they seek to enjoin any criminal prosecutions that might be brought under a challenged criminal law. . . . What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. . . . Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent.[292]

O'Shea seems to hold that federal injunctive interference against future state prosecutions will be regulated by the same standards as injunctions

290. 414 U.S. 488 (1974).
291. *Id.* at 492.
292. *Id.* at 500.

against pending actions. Nevertheless, it would be unsafe to conclude that it finally resolves the pending-future issue. For one thing, the injunction was sought against valid criminal laws, rather than allegedly unconstitutional ones; and, in addition, it was clear that unlike the ordinary injunction against *commencement* of state criminal proceedings, the form of the injunction requested by the plaintiffs in *O'Shea* would permit the *institution* of criminal actions, but require highly intrusive intervention and supervision by a federal court of the pending prosecutions thereafter. Coupled with the Court's subsequent assurances that the pending-future issue is still open,[293] these distinctions preclude a confident prediction that the *Younger* standards will be applied to injunctions against future prosecutions, although the balance of the opinions is in that direction.[294]

Fortunately, the Court has at last resolved the question of whether federal declaratory relief will be administered by a less stringent standard than the one articulated in *Samuels* when no state prosecution is pending at the time the relief is sought. In its 1973 Term the Court decided *Steffel v. Thompson*,[295] which involved a threat of criminal prosecution under circumstances where no bad faith or other element sufficient to justify federal declaratory relief under *Samuels* was present. In *Steffel* the plaintiff and his companions were distributing handbills protesting the American involvement in Viet Nam on a sidewalk of the North DeKalb Shopping Center in DeKalb County, Georgia. Shopping center employees requested that they cease their handbilling and leave, but they refused to do so, whereupon the police were summoned. The police informed the handbillers that they would be arrested if they did not stop their activity, and plaintiff and his group left to avoid that possibility. Two days later, however, the plaintiff and a companion returned and again began handbilling. The manager of

293. *See* cases cited note 287 *supra*.

294. *Cf.* Lemon v. Kurtzman, 411 U.S. 192, 208-09 (1973), in which the Court affirmed the judgment of a three-judge district court refusing to enjoin a state from reimbursing nonpublic schools for educational services performed under a law subsequently held unconstitutional by the Supreme Court. *Compare* Roe v. Wade, 410 U.S. 113 (1973) (declaratory and injunctive relief refused to a physician who sought that relief only against future prosecutions for violation of an abortion statute, because there were prosecutions pending against him in state court), *with* Doe v. Bolton, 410 U.S. 179 (1973) (physicians against whom there had been no prosecutions or threats of prosecutions permitted to challenge a state's abortion statute). In both *Roe* and *Doe* the Court did not reach the question of whether injunctive relief against future enforcement of the statutes was warranted, since it assumed the state authorities would abide by its declaration of unconstitutionality.

295. 415 U.S. 452 (1974).

the shopping center called the police, who told plaintiff and his companion that they would be arrested if they did not cease handbilling. Plaintiff again left to avoid arrest, but his companion remained and was subsequently arrested on a charge of violating the Georgia criminal trespass statute. Plaintiff filed a civil rights action in Georgia federal court, requesting a declaratory judgment that the Georgia statute was being applied in violation of his first amendment rights and an injunction to prevent enforcement of the statute against his activities.[296]

The district court denied both declaratory and injunctive relief and dismissed the action, on the grounds that plaintiff had not established that the officers had acted or would act in bad faith and, consequently, had not established " 'the rudiments of an active controversy.' "[297] Plaintiff appealed only the denial of declaratory relief to the Fifth Circuit Court of Appeals, which affirmed, holding that the *Younger-Samuels* prerequisites for declaratory relief had to be established in order to obtain that remedy against a threatened criminal prosecution.[298] The Supreme Court granted certiorari and reversed.

The Court first held that the plaintiff's allegations were sufficient to establish an actual controversy within the requirements of article III of the Constitution and the Federal Declaratory Judgment Act. The threats of prosecution under the specific provisions of the state law plaintiff was challenging were adequate to make out such a controversy, without the necessity that he expose himself to arrest and prosecution to attack the statute. However, the Court did observe that with the United States' reduced national involvement in Vietnam it would be necessary for the district court on remand to determine whether that reduced involvement had so lessened plaintiff's inclination to distribute handbills to moot the case.[299]

The Court then held that the courts below had erred in determining that plaintiff's request for federal declaratory relief was to be judged by the *Younger-Samuels* standards. First, the Court pointed out that those decisions were based on principles of "equity, comity, and federalism," as well as the fact that normally the federal plaintiff would

296. *Id.* at 455-56.
297. *Id.* at 456.
298. *Id.* at 457. The Supreme Court observed that a three-judge district court should have been convened initially, since the complaint requested an injunction against a statute of statewide operation. However, since plaintiff only appealed from the denial of declaratory relief, the Court held that the court of appeals had properly exercised jurisdiction on appeal. *Id.* at 457 n.7.
299. *Id.* at 459-60.

have an adequate vehicle, in the form of the pending prosecution, with which to vindicate his constitutional rights.[300] As to the question of whether declaratory relief would be administered by a less stringent standard when no state proceeding was pending, the Court stated:

> 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. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing [*sic*] what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.[301]

The Court then held that the court of appeals had erred in treating the requests for declaratory and injunctive relief as the same. In so doing, it reviewed the history of the civil rights jurisdiction in federal courts and the history of the Federal Declaratory Judgment Act,[302] observing that the civil rights jurisdiction was designed after the Civil War to empower the lower federal courts to determine the constitutionality of state action and that the Declaratory Judgment Act was a partial response of Congress to both the hostility of the states toward injunctive relief after *Ex parte Young* and the dissatisfaction of federal plaintiffs with the necessity of proving the traditional prerequisites of an injunction.[303] Thus in the Court's view the Federal Declaratory Judgment Act was designed to mollify the states by providing a less intrusive federal remedy against unconstitutional state action and to make a federal anticipatory remedy easier to obtain against such state action by eliminating the traditional prerequisites for equitable relief. Then the Court stated:

> The only occasions where this Court has disregarded these "different considerations" [applicable to the granting of declaratory as opposed to injunctive relief] and found that a preclusion of injunctive relief inevitably led to a denial of declaratory relief have been cases in which principles of federalism militated altogether against federal intervention into a class of adjudications. . . . In

300. *Id.* at 460-61.
301. *Id.* at 462.
302. *Id.* at 463-69.
303. *Id.* at 463-66.

> the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on [the Civil Rights statutes]—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. . . . But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution has been commenced.[304]

Thus the Court at least strongly implied that it would be violating a duty Congress had imposed upon it to protect constitutional rights were it to reach any other result in *Steffel.* However, Mr. Justice Stewart, in a concurring opinion in which the Chief Justice joined, cautioned that the Court's opinion should not be interpreted as authorizing federal declaratory relief whenever a plaintiff alleged merely that he felt "chilled" in the exercise of his first amendment rights.[305]

Moreover, Mr. Justice Rehnquist, in an opinion with which the Chief Justice also joined, expressed the view that the Federal Declaratory Judgment Act was intended primarily to permit litigants to obtain a determination of their rights prior to the time an injury had occurred, rather than "to palliate any controversy arising from *Ex parte Young.*" In his view the Court's approval of the declaratory judgment procedure in the context of this case was consistent with the congressional intent behind the Act. He continued, however, to discuss several important issues. First, he indicated that the declaratory judgment procedure was designed to be an alternative to pursuit of potentially illegal activity. Thus, in his opinion, a federal plaintiff who continues to "violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal law suit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels.*"[306] Next, he expressed the opinion that it would be improper to interpret *Steffel* as sanctioning the automatic issuance of a federal injunction to enforce a prior declaratory judgment of unconstitutionality.[307]

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304. *Id.* at 472-73.
305. *Id.* at 476.
306. *Id.* at 480.
307. *Id.*

Finally, Mr. Justice Rehnquist maintained that the Court's decision in *Steffel* should not be read as supporting any circumvention of *Younger* by authorizing a federal court to treat disobedience of a declaratory judgment as bad faith and harassment of the kind that would permit an injunction.[308] In his view, continued belief in the constitutionality of a statute by state officials would not amount to the kind of bad faith discussed in *Younger*, and therefore the officials would remain free to enforce the statute in accord with their view of its validity. In short, in Mr. Justice Rehnquist's opinion any effect a federal declaratory judgment has should depend *entirely* upon the voluntary compliance of the state officials.[309]

In *Younger*, some members of the Court also indicated that a distinction might be drawn between the stringency with which federal interference was prohibited against state civil proceedings, as opposed to state criminal prosecutions. In his concurring opinion in *Younger*, Justice Stewart admonished that the Court was not dealing "with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."[310] He stated that "[t]he offense to state interests is likely to be less in a civil proceeding. A state's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party under a civil statute."[311] Although there has been no definitive resolution of this question by the Court since *Younger*, some members of the Court have indicated disenchantment with the distinction.[311a] In *Lynch v. House-*

308. *Id.* at 483.

309. *Id.* at 484. It should be noted that Mr. Justice White filed a concurring opinion in *Steffel* expressly to refute any notion that Justice Rehnquist's views were sanctioned by the majority opinion. In his view, a federal declaratory judgment that certain conduct is constitutionally immune should be accorded res judicata effect in any later prosecution for that conduct. Moreover, he expressed the opinion that a federal plaintiff need not rely on a plea of res judicata in the state proceeding, but might obtain an injunction to enforce the declaratory judgment against a recalcitrant prosecutor. *Id.* at 476-78.

310. 401 U.S. at 55.

311. *Id.* at 55 n.2.

311a. In a recent case, Huffman v. Pursue, Ltd., 43 U.S.L.W. 4379 (U.S. Mar. 18, 1975), the Court strongly suggested that the *Younger* criteria would apply equally to civil and criminal proceedings. *Huffman* itself involved only extension of the *Younger* criteria to civil proceedings closely "akin to . . . criminal prosecution[s]." *Id.* at 4383. However, the strong suggestion of the opinion was that the same criteria would be applied to civil proceedings generally, and, indeed, the dissenters assumed that this would be the Court's next step. *See id.* at 4385 (Brennan, J., dissenting). Nowhere did the Court establish the sort of rational decision-making criteria to govern

hold Finance Co.[312] the Court decided in the context of a request for injunctive relief against a state civil proceeding that the jurisdiction of the federal courts in civil rights actions is not limited only to cases in which "personal," as opposed to "property" rights are involved. While agreeing with this aspect of the Court's decision, Mr. Justice White, joined by the Chief Justice and Mr. Justice Blackmun, dissented on other grounds.[313] In the course of this dissent they expressed the view that *Younger* and its companion cases applied equally to state civil proceedings.[314] Subsequently, Mr. Justice Rehnquist, who had not participated in the decision in *Lynch*, indicated in an opinion in chambers that he was in general agreement with that view of the distinction.[315] Thus four members of the Court have indicated their view that the civil-criminal distinction is without substance.[316]

That the civil-criminal question remains open for determination seems clear from the Court's 1973 decision in *Gibson v. Berryhill*,[317] which also provides some additional indication how the *Younger-Samuels* restrictions should be applied by the district courts. In *Gibson* the Alabama Optometric Association filed charges with the Alabama Board of Optometrists against certain licensed optometrists who were the salaried employees of Lee Optical Company, seeking to have the optometrists' licenses revoked under Alabama law. The charges were filed after certain amendments were made to the Alabama statutes governing the practice of optometry. The previous statutory scheme had seemed to sanction the existence of commercial stores with optical departments, while the amendments cast the legitimacy of such enterprises in doubt. Two days after the charges were filed, the Alabama Board of Optometrists filed a state court action seeking to enjoin Lee Optical and thirteen of its employee-optometrists from the unlawful practice of optometry. The Board held its own administrative proceed-

declaratory and injunctive relief that are suggested by this article, though the majority opinion of Mr. Justice Rehnquist did suggest that federal relief might be available after a federal plaintiff had exhausted his state judicial remedies and been denied Supreme Court review of the state decision. *See id.* at 4383-84; *but see id.* at 4383 n.18. The dissenters argued that the Court was imposing an impermissible requirement of exhaustion of state judicial remedies in actions under 42 U.S.C. § 1983. *See* 43 U.S.L.W. at 4386-87 (Brennan, J., dissenting). *See also* Schlesinger v. Councilman, 43 U.S.L.W. 4432 (U.S. Mar. 25, 1975) (*Younger* criteria applied to requests for injunctions against court-martial proceedings).

312. 405 U.S. 538 (1972).

313. *Id.* at 556.

314. *Id.* at 561.

315. Cousins v. Wigoda, 409 U.S. 1201, 1206 (1972).

316. *But cf.* California v. LaRue, 409 U.S. 109, 124 n.2 (1972) (Marshall, J., dissenting).

317. 411 U.S. 564 (1973).

ings in abeyance pending the outcome of the state court suit. In that suit the individual optometrists were dismissed as defendants, but Lee Optical was enjoined from practicing optometry without a license and from employing licensed optometrists. Lee Optical appealed, but meanwhile the Board reactivated its proceedings against the individual optometrists. Those optometrists then filed a suit in federal district court seeking an injunction against further Board proceedings against them. The specific grounds were that the Alabama scheme permitting the Board to hear charges against the individual defendants was invalid because the Board was biased and could not give plaintiffs a hearing that would accord with the requirements of due process. A three-judge district court enjoined the Board from conducting a hearing on the charges against plaintiffs and from revoking their licenses to practice optometry. The district court found a substantial possibility of bias (i) in the fact that the Board had previously brought suit against the plaintiffs in state court on nearly identical charges, so that the members of the Board might have preconceived opinions on the cases, (ii) in the fact that if Lee Optical were forced to suspend business in Alabama, the individual members of the Board and other private practitioners of optometry would benefit financially, and (iii) because membership on the Board was limited to members of the Alabama Optometric Association, which in turn excluded from its membership optometrists who were employed by other persons or entities, with the result that plaintiffs were denied participation in the governance of their own profession. On appeal, the Supreme Court vacated the district court's judgment and remanded for reconsideration of the case in light of an intervening decision of the Alabama Supreme Court.

The Alabama decision held that nothing in that state's optometry law prohibited a licensed optometrist from accepting employment from a business corporation, and the Supreme Court felt that considerations of "equity, comity, and federalism" justified it in remanding to the district court for consideration of whether the state decision made the federal injunction unnecessary.[318] However, the Court agreed that *Younger* and its companion decisions did not preclude federal relief. It first considered the argument that the *Younger* principles should apply to restrict federal injunctions as stringently against state civil proceedings as against state criminal proceedings. The Court determined that the district court's conclusions about the propriety of federal relief

318. *Id.* at 580-81.

were correct in light of the latter court's finding of bias:

> Unlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying or related state law issues . . . *Younger* . . . contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger* . . . dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. Nor, in these circumstances, would a different result be required simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings.[319]

Apparently, state judicial review would be irrelevant because of the district court's finding that "irreparable injury" would result to the federal plaintiffs by the revocation by the Board of their licenses, together with the attendant publicity that would be associated therewith.[320] In addition, the Court went on to hold that the district court's finding of bias was correct on grounds of the Board members' pecuniary interest in the outcome of the proceeding.

Gibson is interesting primarily as an illustration of the operation of *Younger* bad faith criterion for equitable relief. Although it was clear that de novo state court review of the delicensing proceedings was available,[321] and although the adequacy and effectiveness of the state court processes to eliminate any prejudice that had existed in the administrative proceedings was not questioned by the Court, it seems clear that it was the additional burden of defending an initial proceeding before a biased tribunal that justified federal relief. The Board was basically in the position of an enforcement official who institutes proceedings against a defendant with no hope of success. Although the defendants could hope to win an ultimate decision before the state courts, the initial unwarranted proceeding was one that the ordinary burdens of citizenship did not require them to bear. However, because of the peculiar nature of the Alabama Board of Optometrists' composition, the case seems to have limited transfer value to other situations.

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319. *Id.* at 577 (footnotes omitted).
320. *Id.* at 577 n.16.
321. *Id.*

Only where plaintiffs are able to show that the members of an administrative or judicial tribunal possess a pecuniary interest in legal proceedings will the decision directly apply, although the Court did not foreclose the possibility that federal relief will also be proper when there is an objective demonstration of a substantial danger that a state tribunal has prejudged the facts of a case.[322]

A second decision of importance in illustrating the battles that continue to be fought over application of the *Younger-Samuels* criteria is *Allee v. Medrano*,[323] decided during the Court's 1973 Term. *Allee* was a civil rights action commenced against members of the Texas Rangers, members of the Starr County, Texas Sheriff's Department, and a Justice of the Peace in Starr County. The suit arose out of a labor dispute involving attempts by the United Farm Workers Organizing Committee to organize the predominately Mexican-American farmworkers of the lower Rio Grande Valley. A three-judge federal district court declared five Texas statutes unconstitutional and enjoined their enforcement against plaintiffs, and permanently enjoined the defendants from a number of other unlawful practices. On appeal the Supreme Court affirmed the district court's decree granting injunctive relief against police misconduct, but directed that the decree be modified to delete references to the five statutes held unconstitutional by the lower court. As to those statutes, the Court vacated the district court's judgment and remanded the case for further proceedings.

With regard to the injunction against police misconduct, the Court concluded that the district court had not misused its equitable powers:[324]

> We first note that this portion of the decree creates no interference with prosecutions pending in the state courts, so that the special considerations relevant to cases like *Younger v. Harris* . . . do not apply here. . . . Nonetheless there remains the necessity of showing irreparable injury, "the traditional prerequisite to obtaining an injunction" in any case.[325]

It is clear from the Court's opinion that, as the majority viewed the case,

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322. *Id.* at 578-79.
323. 416 U.S. 802 (1974).
324. *Id.* at 816.
325. *Id.* at 814. This passage from the Court's opinion, written by Mr. Justice Douglas, suggests that a different standard might be utilized to measure irreparable injury when no state prosecution is pending. However, since the Court expressly reserved this question for future decision later in its opinion, *Allee* cannot be interpreted as having resolved the question. *See id.* at 821 n.15.

the plaintiffs had made a sufficient showing of bad faith and harassment on the part of the authorities to satisfy *Younger*:

> [A] showing [of irreparable injury] was clearly made here as the unchallenged findings of the District Court show. The appellees sought to do no more than organize a lawful union to better the situation of one of the most economically oppressed classes of workers in the country. Because of the intimidation by state authorities, their lawful effort was crushed. The workers, and their leaders and organizers were placed in fear of exercising their constitutionally protected rights of free expression, assembly, and association. Potential supporters of their cause were placed in fear of lending their support. If they were to be able to regain those rights and continue furthering their cause by constitutional means, they required protection from appellants' concerted conduct. No remedy at law would be adequate to provide such protection.[326]

The Court remanded the questions concerning the five statutes for a determination of the appropriate standard for granting relief.

More interesting than the majority's disposition of the case was a lengthy opinion by Chief Justice Burger, concurring in part and dissenting in part, in which Justices White and Rehnquist joined. These members of the Court concurred only in result of the remand to the district court. They dissented from the Court's affirmance of the district court's injunction against the police misconduct and attempted in their concurrence to deal with some of the issues left unresolved by the majority.[327]

On remand, the dissenters suggested that the Union would have to show standing and meet the other *Younger* criteria to obtain relief. With reference to the two unrepealed statutes, the concurring opinion agreed that if no state prosecutions were pending, the *Steffel* standards for declaratory relief would apply.[328] The concurring opinion then turned its attention to a definition of the *Younger* "burdens."[329] In this regard, the opinion concluded that federal courts should be sensitive to the exercise of prosecutorial discretion not to proceed to trial with less than an open and shut case against defendants.[330] Moreover, it concluded that while the bad faith nature of a prosecution might sometimes be inferred from concerted activity of prosecutors and po-

326. *Id.* at 814-15.
327. *See id.* at 821-22, 833-60.
328. *Id.* at 828.
329. *Id.* at 833-46.
330. *Id.* at 836.

lice, such an inference should not so readily be drawn on the basis of police action alone:

> When a policeman willfully engages in patently illegal conduct in the course of an arrest there still should be clear and convincing proof, before bad faith can be found, that this was part of a common plan or scheme, in concert with the prosecutorial authorities, to deprive plaintiffs of their constitutional rights. Willful, random acts of brutality by police, although abhorrent in themselves, and subject to civil remedies, will not form a basis for a finding of bad faith. The police may, of course, embark on a campaign of harassment of an individual or a group of persons without the knowledge or assistance of the prosecutorial authorities. The remedy in such a case would not lie in enjoining state prosecutions, which would provide no real relief, but in reaching down through the State's criminal justice system to deal directly with the abuses at the primary law enforcement level.[331]

Furthermore, the opinion then went on to observe that the injury to a federal plaintiff must be "great [and] immediate" and constitute "harassment," as well as being "irreparable," before a *prosecution* might be enjoined.[332] To the concurring members of the Court, this meant that when a statute is challenged on its face as invalid, the harm to the plaintiff may be demonstrated by pending prosecutions or the probability of future prosecutions, perhaps by proffering evidence of multiple arrests and prosecutions of persons other than the plaintiff.[333] However, where relief is sought against more than one statute on such grounds, the plaintiff must demonstrate the requisite injury under each statute challenged. When the challenge is to a statute as applied, rather than on its face, the concurring opinion observed that the requisite injury would have to derive from a single prosecution, and that it would be a rare case when a single prosecution alone would provide the necessary quantum of harm. Nor could the Union aggregate the injuries to all its members in order to demonstrate the required level of harm, since this would permit easy circumvention of *Younger*. On the basis of these views of the *Younger* standard the concurring Justices then concluded that no sufficient showing of bad faith or the necessary injury had been made before the district court, since with regard to some of the statutes all that had been demonstrated were single arrests of individuals, so that no danger of repeated arrests had been proved,[334]

331. *Id.* at 837-38.
332. *Id.* at 838.
333. *Id.*
334. *Id.* at 842.

while as to others the magnitude of the harm demonstrated was insufficient to satisfy *Younger*.[335] Moreover, the opinion stated that no bad faith had been demonstrated with regard to any of the *prosecutions* which resulted from the arrests, since the evidence of police misconduct did not illustrate an intensity of misbehavior which would "turn a series of prosecutions, apparently instituted in good faith . . . into a campaign of terror against the Union which could only be remedied by recourse to the federal courts,"[336] and other evidence as to prosecutorial misbehavior was scanty.

The opinions rendered by various members of the Court from *Younger* to *Allee* indicate that a wide difference in viewpoint exists on the Court as to the stringency with which federal injunctions and declaratory judgments should issue to restrain the enforcement of state laws. It should be noted, however, that the Justices uniformly continue to adhere to the traditional equity rubric of "great and immediate irreparable injury" even as they disagree in its application. Before examining which, if any, of the views expressed by the various members of the Court are correct, it will be instructive to examine one additional aspect of the Court's treatment of injunctions against state action. This is the Court's decision in *Mitchum v. Foster*,[337] holding that the Civil Rights Act is an "expressly authorized" congressional exception to the Anti-Injunction Statute.

D. Mitchum v. Foster

In *Mitchum* the prosecuting attorney of Bay County, Florida, brought a proceeding in state court to close a book store as a nuisance. The state court issued a preliminary order closing the store. Plaintiff, the owner of the bookstore, then brought suit in a Florida federal court, requesting declaratory and injunctive relief against the state proceeding under the Civil Rights Act, on the grounds that the state court was applying Florida law in an unconstitutional manner that would cause him irreparable injury. A three-judge district court decided that injunctive relief could not issue under the Civil Rights Act because it was barred by the Anti-Injunction Statute. On appeal, the Supreme Court reversed.

The Court reiterated the view expressed in its prior decisions that

335. *Id.* at 843.
336. *Id.* at 844-45.
337. 407 U.S. 225 (1972).

the Anti-Injunction Statute, when it applies, is an absolute prohibition against federal injunctions.[338] Thus, as the Court framed the issue, unless the Civil Rights Act was an expressly authorized exception to the statute, no federal injunctive relief could issue.[339] However, although prior decisions of the Court had explicitly and carefully reserved this question of statutory construction, the Court now interpreted *Younger v. Harris* and its companion cases as having resolved the issue for all practical purposes. Mr. Justice Stewart, for the Court, stated:

> While the Court in *Younger* and its companion cases expressly disavowed deciding the question now before us . . . it is evident that our decisions in those cases cannot be disregarded in deciding this question. In the first place, if [the Civil Rights Act] is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger*, as the appellant in that case argued, and there would have been no occasion whatever for the Court to decide that case upon the "policy" ground of "Our Federalism." Secondly, if [the Civil Rights Act] is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances.[340]

Thus the Court had in *Younger* used a statute, which it ultimately held in *Mitchum* did not bar injunctions against state proceedings, as one source of a policy that justified a denial of an injunction against a state proceeding; while in *Mitchum*, it used *Younger*, a case in which the Court refused to decide whether the Civil Rights Act was an expressly authorized exception to the Anti-Injunction Statute, as an authority which effectively decided that the Civil Rights Act was such an expressly authorized exception.

Fortunately, this extraordinary example of double bootstrapping was not the only ground upon which the Court based its decision in *Mitchum*. It next traced the history of the statute and its judicial construction through *Toucey v. New York Life Insurance Co.* From this history, it concluded the following:

> It is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal

338. *Id.* at 228-29.
339. *Id.* at 229.
340. *Id.* at 231.

> court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.[341]

The Court then proceeded to examine the history and purpose of the Civil Rights Act, in order to determine whether it met the test described. From this history it was clear that Congress was attempting to open the federal courts to persons whose constitutional rights were threatened by state action because the state courts were either incapable or unwilling to protect such rights.[342] In short, the purpose of the Civil Rights Act was to provide federal court protection where it was essential to safeguard federal constitutional rights from state infringement.

Read with *Younger* and its progeny, *Mitchum* represents more than a simple case of statutory construction. Rather, it represents an essential step on the part of the Court in retaining for itself an almost complete discretion to regulate state-federal relationships in the area of anticipatory relief for violation of constitutional rights. *Younger* and its companion cases made clear that, for the time being at least, federal courts would constrict their intrusions into pending state criminal prosecutions. But *Mitchum* insured that the trend represented by *Younger* could be reversed at any time by a manipulation of the standards governing equitable relief. Along with the Court's reservation since *Younger* of the questions whether federal injunctive relief against threatened prosecutions or state civil proceedings would be administered according to a strict or liberal standard, its decision in *Steffel* opening the way for declaratory relief against future prosecutions, and the reservations upon the scope of declaratory and injunctive relief expressed by various members of the Court in concurring and dissenting opinions, the decisions cast far more shadow than light upon the status of federal anticipatory adjudication of constitutional rights. It remains to be seen, however, whether the questions reserved by the Court and the various positions taken by the Justices in concurrence and dissent suggest, together or separately, any coherent principle by which federal

341. *Id.* at 236-38 (footnotes omitted).
342. *Id.* at 238-42.

anticipatory remedies may be governed. It is to this inquiry that we now turn.

V. YOUNGER AND ITS PROGENY: A CRITIQUE OF THE COURT'S APPROACH

From the foregoing discussion, at least one criticism of the Supreme Court's approach in *Younger*, its companion cases, and subsequent decisions should be apparent. The Court has retained the ancient chancery principles of great and immediate irreparable injury as a measure of the propriety of federal injunctive relief against pending state prosecutions. Moreover, it will probably retain those principles as a measure of federal injunctive relief against future state prosecutions as well, and it has already extended the principles to federal declaratory relief against ongoing state prosecutions in contravention of the intention of the architects of the declaratory judgment procedure. As observed earlier, the use of the traditional chancery doctrines in the context of a modern procedural system tends to obfuscate, rather than clarify, the analytical factors which should be taken into account in determining the propriety of both remedies. The only remaining question is whether the distinctions suggested by the Court in *Younger* and subsequent cases provide the basis for a rational system by which federal declaratory and injunctive relief may be administered.

With regard to the distinction suggested between injunctive relief against future, as opposed to pending, state prosecutions, it is difficult to believe that any such distinction provides a viable means of preventing the sort of harm to state interests that the Court was concerned about in *Younger*. The distinction seems based upon the feeling expressed by Justice Brennan's dissenting opinion in *Perez v. Ledesma* and repeated by him in *Steffel v. Thompson* that when no state proceeding is pending, considerations of "equity, comity, and federalism have little vitality." However, it is difficult to see why such considerations have "little vitality" in the absence of a pending proceeding. If the concern for state interests is directed to the disruption that a federal injunction causes to good faith state law enforcement processes, there is often very little difference between halting a pending or a future prosecution. When the term "pending prosecution" is used, one too readily envisions a packed courtroom in which a criminal trial is actively underway, replete with empaneled jury, subpoenaed witnesses, and other standard accoutrements. The disruption that would be created

by a federal injunction against such an action is obvious, but it seems unlikely that this will often be the situation confronting a federal court requested to halt a pending prosecution. More often it seems that the only occurrence that will distinguish a pending from a future prosecution is the filing of an indictment or an information. The disruption caused by federal intervention at this stage of the proceeding is to police and prosecutorial resources which have been expended in preparing a case against the accused party, but which must suffer the delay incident to a federal civil proceeding before they may come to fruition. Yet these resources will often be expended to the same extent prior to formal institution of a criminal action; and, therefore, in many cases the disruption to state interests caused by preventing a future prosecution is just as great as if the prosecution is pending.

Perhaps, however, the distinction between pending and future proceedings is based not primarily upon the actual disruption to state activities that a federal injunction will cause, but upon a view that declining relief against future prosecutions will violate some duty or obligation imposed upon the federal courts by Congress. This view is represented by Mr. Justice Brennan's opinion for the Court in *Steffel v. Thompson.* It will be recalled that there, in addition to expressing the lack of vitality which the concerns of "equity, comity, and federalism" possessed in the absence of a pending prosecution, Justice Brennan stated that concerns of federalism *compelled* the federal courts to intervene in order to protect federal rights premised on the Civil Rights Act.[343] Of course, Justice Brennan was speaking in the context of a request for federal declaratory relief, but if one concedes that the irreparable injury requirement is not a valid means of determining the propriety of federal injunctive relief, and if one accepts the Court's assumption, in *Samuels v. Mackell,* that a declaratory judgment will often have the same practical effect as an injunction, the statement seems equally applicable to both remedies. In effect, it is a statement that declining federal relief against future prosecutions when it is requested under the Civil Rights Act would be tantamount to a refusal by the federal courts to exercise a jurisdiction which Congress has commanded them to exercise. If true, of course, this would be a serious disregard by the federal courts of the paramount obligation to submit to that degree of control which the Constitution gives Congress the right to exercise over them. But is the statement, in fact, an accurate representa-

343. *See* text accompanying note 304 *supra.*

tion of the obligations conferred by Congress upon those courts?

It is true that the Supreme Court has, in past decisions, suggested that in actions brought under the Civil Rights Act the federal plaintiff need not exhaust state judicial and administrative remedies before obtaining federal relief.[344] And it is also true that Justice Brennan relied upon these authorities in determining in *Steffel* that federal declaratory relief was compelled against future prosecutions under the circumstances of the case.[345] However, it seems that this view does not adequately come to grips with the true nature of the obligations imposed upon the federal courts in Civil Rights Act cases. To be sure, once all the conditions of a Civil Rights Act claim have been properly met, it would disregard the duty imposed by the Act if federal courts nevertheless sent a plaintiff to state court to litigate his claim. But the conditions of a civil rights action have always included the discretionary standards applicable to a request for declaratory or injunctive relief, and these standards have always reflected concern for the legitimate operation of the state systems. Thus the Court has required federal plaintiffs to defend good faith state criminal actions in the absence of "extraordinary circumstances" justifying a conclusion that "great and immediate irreparable injury" would result without federal action. As the discussion in previous sections has indicated, it has declined injunctive relief under this standard against future prosecutions and, with *Younger* and *Samuels*, has declined both declaratory and injunctive relief against pending prosecutions under the standard. It is therefore clear from past practice that the Court has never considered that it had an absolute obligation to afford federal anticipatory relief against state action in civil rights suits, without regard to the discretionary principles which it has formulated from time to time to govern the administration of declaratory and injunctive relief. Nor is the burden imposed upon constitutional rights by this view a small one. It is well and good to say that defense of a good-faith state criminal prosecution is merely an ordinary burden of citizenship, but to the average citizen it is a substantial burden nevertheless, and one he may well attempt to avoid even by relinquishing his constitutional rights.

If the Court in *Steffel* was somehow attempting to draw a distinction between the adequacy of state courts to protect constitutional rights in criminal, as opposed to state anticipatory actions, the rationale seems

344. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). *But see* Gibson v. Berryhill, 411 U.S. 564 (1973).

345. *See* text accompanying note 304 *supra*.

equally wrong. It is true that the Court has in the past justified refusal of federal anticipatory relief by reference to the efficacy of state judicial processes to vindicate constitutional rights by way of defense in criminal cases. But it is difficult to see why these processes are not equal to the task of protecting constitutional rights in anticipatory actions as well. The same judges who are expected to safeguard constitutional liberties by upholding defenses in criminal prosecutions administer state declaratory and injunctive relief, and the same appeals are available for errors of law in both kinds of cases. If the state processes are adequate in the first case, it seems they should be considered adequate in the second. And there is, consequently, no apparent reason why the Supreme Court should consider, as a factor relevant to the propriety of federal anticipatory relief, the adequacy of the state courts in criminal cases and not consider the adequacy of state anticipatory remedies against future state action. Had the Court ever examined the availability and adequacy of state anticipatory remedies, it would in many instances have been hard pressed to find much of an objective nature wrong with them. As long as declaratory and injunctive relief were found to be available according to the same standards applicable in federal courts, minus any concerns of federalism, then the Court could hardly have denied the general efficacy of state anticipatory remedies to vindicate constitutional rights. And if some subtle, undetectable, but feared defect exists in state court processes in cases where anticipatory relief is sought, it is difficult to see why the same defect is not present in a criminal action.

The true obligation imposed upon the federal courts, and particularly the Supreme Court, in actions for declaratory and injunctive relief is the intellectual obligation of developing rational, functional standards to govern the administration of the discretionary remedies. In this, by retention of the "irreparable injury" standard and the suggestion of irrational distinctions between pending and future proceedings, the Court has failed. The development of a functional approach would ignore neither the obligation to protect constitutional rights, nor the availability of anticipatory relief in the state systems. Rather, it would take into account these factors and all others which have a bearing upon the ability of the federal courts to provide anticipatory remedies for violations of constitutional rights without unnecessarily interfering with legitimate state interests. Certainly Justice Brennan's opinion for the Court in *Steffel* did not adequately consider the sort of legitimate interests the states might have in retaining initial constitutional adjudication in their

own courts in actions for anticipatory relief. His opinion stated that the Court had not in previous decisions measured federal declaratory and injunctive relief by the same standards except in cases where "principles of federalism" required it, as in cases involving the enforcement of state tax laws and cases involving pending state criminal prosecutions. However, his explanation why principles of federalism are weaker in cases involving declaratory relief against future state criminal proceedings seems unsatisfactory. He stated, for one thing, that federal declaratory relief would have a less intrusive effect on the administration of state criminal laws. This is true, for the reasons given above concerning the relative freedom of action that a declaratory judgment, which does not carry the contempt sanction, gives the law enforcement officials. However, it is somewhat beside the point. The question is whether a *federal* declaratory judgment is necessary, and proper evaluation of this issue requires an analysis which focuses upon the need for *federal* anticipatory relief as opposed to state anticipatory relief. Mr. Justice Brennan's opinion also stated that it would deny the congressional purpose to make declaratory judgments available where injunctions are inappropriate, if declaratory and injunctive relief against future prosecutions were both measured by the irreparable injury standard. This is also true, but again it does not address the central issue, which is what standard *is* appropriate to measure the propriety of *federal* declaratory and injunctive relief. In this regard, he argued that only where principles of federalism had compelled it had both forms of relief been refused according to the same standard. Apparently this did not violate Congress' intent. But it is difficult to understand why Congress would approve of the courts taking "principles of federalism" into account in cases involving the collection of state taxes and pending state criminal prosecutions, but not in all other cases. If principles of federalism are relevant, they should be taken into account wherever they appear. To be sure, they may be less compelling in certain cases than in others, but Justice Brennan never adequately explained why they should be considered less compelling in cases where declaratory relief against future state proceedings is requested, and the reason is not apparent. On the contrary, if one considers the states' possible interests in retaining cases involving requests for anticipatory relief against constitutional violations in their own courts, he finds some compelling factors. As observed in the introduction to this article, state judges are bound to enforce the federal constitution in preference to state laws when the two conflict. Moreover, state courts are the only

institutions which can authoritatively construe state laws so that they will meet the requirements of the federal Constitution. Therefore, the states have a very substantial interest in seeing that initial constitutional adjudication will take place in their own courts, rather than federal courts, in order that state laws are construed whenever possible in a manner which insures that they operate constitutionally. Nor does this interest simply extend to state laws which are unclear and which may, after narrowing construction, be clarified in a constitutional manner. Even laws which are apparently clear may, in the absence of fair warning problems, be saved by the application of state rules of construction which narrow or add to their operation to cure constitutional deficiencies.[346] In addition, there is also the consideration that state judges cannot be expected enthusiastically to exercise their responsibility of protecting federal constitutional rights when federal courts frequently interpose themselves between state courts and the processes of constitutional adjudication. Under such circumstances the federal courts come to be regarded as the paramount guardians of federal constitutional rights, while state judges are often regarded as biased and perhaps even venal. Yet it is clear that unless Congress extends federal jurisdiction to include all cases in which a federal constitutional question arises during the course of state court proceedings, state judges must, of necessity, perform the function of safeguarding federal rights in a large variety of cases. It is impossible to believe that their ability or willingness to perform such a function will be enhanced by a federal remedial standard which does not take into account the adequacy of state anticipatory remedies to protect federal rights and thus cuts state judges off from a significant portion of the responsibility to safeguard such rights.

The Court might have articulated a standard which takes into account the availability of state anticipatory relief and at the same time meets obligations conferred upon it by Congress to protect civil rights if it had, in the cases from *Younger* through *Steffel*, adhered closely to the minimum standard of federal interference which that obligation requires. This minimum standard was hinted at in *Mitchum v. Foster*, when the Court considered the purposes of the Civil Rights Act to interpose the federal courts between state action and a citizen when it is essential to protect constitutional rights.[347] If the Court had viewed fed-

346. *Cf.* Wisconsin v. Constantineau, 400 U.S. 433, 443, 445 (1971).

347. *See* Huffman v. Pursue, Ltd., 43 U.S.L.W. 4379 (U.S. Mar. 18, 1975), in which the Court strongly intimated that the civil-criminal distinction was invalid, though not for the reasons given in the text. *Huffman* is briefly discussed in note 311a *supra*. *See also* Schlesinger v. Councilman, 43 U.S.L.W. 4432 (U.S. Mar. 25, 1975) (*Younger* criteria applied to requests for injunctions against court-martial proceedings).

eral injunctions and declaratory judgments together as anticipatory remedies, each with unique characteristics, the resulting standard would have been more coherent and intellectually honest than the one employed. It would allow the two different remedies to be administered according to rational, discretionary standards which take into account the need to protect federal rights and the adequacy of the state courts to provide both anticipatory relief for constitutional violations and relief for such violations by way of defense in a state coercive action. In all likelihood, the standard would have forbidden federal anticipatory relief except where it is the *only* effective means of preventing the denial of a constitutional right. Under such a standard, the unique *federal* characteristics of declaratory and injunctive relief would have been preserved, while insuring both protection of state interests and protection of constitutional rights. Of course, under the principle stated, federal relief would not be forthcoming more readily against a future than against a pending proceeding, since the essential question would not focus upon such a distinction. Furthermore, federal relief might well be denied even in cases where it would be appropriate under *Younger* and its progeny, since the availability of state anticipatory remedies for constitutional violations would be a part of the total evaluation of the propriety of federal remedies. When state courts are open to a federal plaintiff and there is no demonstrable deficiency in the remedies provided by such courts, federal relief would be unavailable. Only where state anticipatory relief is nonexistent, saddled with procedural obstacles, or otherwise ineffective to protect federal constitutional rights would a federal court intervene.

Enough has been said thus far to demonstrate that the Court's suggested distinction between injunctive and declaratory relief also provides no rational standard by which those remedies can be administered. Insofar as the distinction envisions retention of the traditional chancery principles to govern injunctive relief, it is deficient for reasons already given. And insofar as it fails to encourage procedural analysis of the remedies as functionally different forms of relief, one form carrying the contempt sanction for its violation and the other not, it is equally deficient. Moreover, as suggested above, a coherent standard must take into account the unique features of both remedies as *federal* remedies in order to comply with the obligations imposed by Congress on the federal courts to protect constitutional rights, to avoid unnecessary interference with the legitimate operations of the state courts, and to provide intellectually honest principles to govern the administration of

federal anticipatory relief. This, a distinction between declaratory and injunctive relief based upon the irreparable injury standard does not accomplish.

Likewise, the distinction between civil and criminal proceedings does not provide the kind of standard necessary to a coherent, functional administration of the remedies. It will be recalled that in *Younger* Mr. Justice Stewart suggested that classification of conduct as criminal might indicate the seriousness with which a state views "prompt and unencumbered enforcement of its law." However, it is doubtful whether this is really so. It is clear that statutes concerning commitment of the mentally ill, juvenile delinquency, and other matters of legitimate state interest often provide for proceedings technically classified as "civil" in nature. Yet in terms of their importance both to the state and to the private citizens who are affected by them, proceedings under these statutes can hardly be deemed less important than proceedings traditionally labelled criminal. Nor would a distinction be appropriate between cases in which the state is a formal party and those in which it is not. A state might well have antitrust laws, the enforcement of which it deems vital to the commercial well being of its citizens, and yet determine that such laws can most effectively be enforced by private civil suits. Other deeply rooted state policies might also be left to vindication through private civil actions. Indeed, it would be folly to permit the federal courts to adjudge the propriety of federal anticipatory relief depending upon their view of the relative "seriousness" with which the state views the enforcement of certain of its laws. How can a federal court determine which a state is "more serious" about, enforcement of traffic laws through conviction of violators in criminal proceedings, or enforcement of such laws through civil actions in tort? Whichever is most important to the state, it seems certain that the federal courts are not the proper institutions to make a choice between them.

None of the further opinions expressed by the various Justices since *Younger* seem any more helpful in articulating a workable standard for federal anticipatory relief than those discussed above. Certainly Justice White was correct in his concurring opinion in *Steffel*, when he rejected Justice Rehnquist's suggestion that federal declaratory relief have only a limited res judicata effect. Whatever standard is developed to govern federal relief, it seems that when such relief is appropriate its finality and efficacy should not be limited in any such artificial manner. Nor was Chief Justice Burger's opinion in *Allee v.*

Medrano more effective in establishing a coherent standard. Although it was instructive in indicating how one wing of the Court felt the *Younger* standards should be applied, it did not assist in providing a functional, unifying principle by which federal anticipatory relief might be administered in all future cases. The other opinions expressed from time to time by various Justices are equally unhelpful, but no further purpose would be served by a detailed critique of each one. Rather, it will be more helpful to proceed to a discussion of a possible solution to the problems of federal declaratory and injunctive relief, a solution which, hopefully, will provide the kind of functional, analytical approach to those remedies which the Court has rejected in *Younger* and its progeny.

VI. Conclusion: A Functional Standard To Govern Federal Anticipatory Relief

A functional standard for federal anticipatory relief against state action involves two basic inquiries: (i) an inquiry whether anticipatory relief is justified and, if so, whether that relief should be declaratory or injunctive relief; and (ii) assuming that anticipatory relief of some sort is justifiable against state action, should that relief issue from a *federal* court.

With regard to the first inquiry, the standard that should guide the court's exercise of discretion is simply that traditionally used to determine the propriety of a declaratory judgment—*i.e.* whether anticipatory relief will serve a useful purpose in resolving a dispute between the litigants, in resolving some uncertainty or controversy surrounding the plaintiff's rights, or in otherwise avoiding peril or insecurity which threatens the plaintiff. The "useful purpose" standard would be employed initially to determine the general propriety of all anticipatory relief, both declaratory and injunctive, since the traditional chancery principles governing the injunction would be discarded. Only when there is demonstrated the need for an order possessing the special functional characteristics of the injunction would a distinction be drawn between the two forms of relief.

In applying the "useful purpose" standard, it may be expected in general that anticipatory relief will be found proper in the same sorts of cases that are now appropriate for declaratory relief, and will be denied where a declaratory judgment would now be refused. Thus, for example, if there is already another action pending involving the same

controversy when relief is requested, anticipatory relief will generally be inappropriate. This is so because the action for anticipatory relief will usually not serve any function that could not be performed by the prior filed action. If the prior action is criminal, the suit for anticipatory relief will not dispel the peril and insecurity it poses for the plaintiff, since resolution of the anticipatory action in favor of the plaintiff would accomplish no more than could be done by way of defense in the criminal proceeding, and a resolution against the plaintiff would leave the criminal prosecution intact. Likewise, if the prior action is a civil suit, no more can usually be accomplished by the anticipatory proceeding than could be attained by defense of the first filed suit or the filing of a counterclaim for anticipatory relief therein. Only where anticipatory relief will perform some useful function that the prior action cannot perform will such relief be proper. Using the *Younger* standards by way of example, this might occur when state authorities undertake a criminal prosecution or civil proceeding in bad faith for purposes of harassment. Since, by definition, the authorities have instituted the proceeding without hope of success, a successful defense will not avoid the peril and insecurity posed by their actions. They may continue to file other proceedings in bad faith in the future, and the nature of their actions raises a reasonable possibility that they may undertake activities in connection with the first proceeding that would even thwart a successful defense, such as perjuring themselves at trial. Similarly, if proceedings are brought under a statute which is "patently and flagrantly" unconstitutional, the strong inference of bad faith and the unusual nature of the burden imposed by the proceeding would justify anticipatory relief. And if multiple proceedings are brought, anticipatory relief may be necessary to insure that the plaintiff need only bear the burden of defending a single one of them successfully. Of course, when proceedings are merely threatened under the circumstances described above, it is apparent that anticipatory relief will serve a useful purpose in resolving the threatened peril to plaintiff's rights. As indicated previously, however, an actual threat should not be an indispensable prerequisite to obtaining anticipatory relief, since such relief is proper any time it will be useful in resolving a live dispute or controversy and such a dispute or controversy may be established short of the necessity of proving a formal threat. Another situation in which anticipatory relief will be appropriate is represented by the facts in *Gibson v. Berryhill.* When the plaintiff can demonstrate objective facts indicating that there is a danger of bias in the tribunal assigned to adjudi-

cate the prior pending action, anticipatory relief is necessary to dispell the peril posed by the action. A defense of the action before the biased tribunal will obviously not achieve the same effect, since the very peril or insecurity complained of arises from the characteristics of the tribunal itself.[348]

Once it has been established that anticipatory relief in some form is justifiable, the next question becomes whether that relief should be in the form of a declaratory judgment or an injunction. Ordinarily, a declaratory judgment should be the preferred form of relief in such a situation, since, as previously indicated, that form does not carry the sanction of contempt for its violation. Consequently, it affords protection against a judicial decree of unintentionally broad scope and leaves law enforcement officials some freedom, in extraordinary cases, to proceed against the plaintiff for activities apparently covered by the decree, but which they believe to be outside the legitimate scope of the order. Moreover, in the case of a federal declaratory judgment against state action, the initial preference for a noncoercive remedy demonstrates confidence in the good faith of state authorities and their willingness to comply with the court's decree, thereby reducing the abrasive effect of such an order to state interests. In order to obtain an injunction, as opposed to a declaratory judgment, it should be the plaintiff's burden to demonstrate the existence of facts which establish one of two broad propositions: (i) that the sanction of contempt is necessary to coerce obedience to the court's decree; or (ii) that an injunctive order in the form of a temporary restraining order or preliminary injunction is necessary to protect the plaintiff from injury during the pendency of litigation. The first proposition is again typified by the *Younger* bad faith and harassment standard. When officials are alleged to be proceeding or threatening to proceed against the plaintiff in bad faith or for purposes of harassment, a declaratory judgment that their acts are unconstitutional will not adequately remove the peril and insecurity of which the plaintiff complains. Officials who proceed in such a manner cannot be trusted to obey the court's decree voluntarily. Therefore, the contempt sanction is necessary in order to coerce them into obedience. Similarly, when they proceed, or threaten to proceed, under a patently and flagrantly unconstitutional statute, their behavior will ordinarily indicate an absence of good faith law enforcement motives, thereby justifying a coercive form of relief. When actual or threatened

348. *See* text accompanying notes 317-22 *supra*.

multiple prosecutions under an unconstitutional law are the objection raised by the plaintiff, an injunction may or may not be needed, depending upon the circumstances of the case. If the prosecutions are threatened under circumstances where the plaintiff may obtain a declaration of his rights prior to the time it is necessary for him to act in violation of the law, injunctive relief will probably not be necessary. However, if he is engaging in ongoing conduct which he must cease at great loss or suffer the burden of defending multiple proceedings, an injunction may be necessary to prevent the institution of proceedings against him pending the final resolution of his constitutional claim. The need for the contempt sanction in these circumstances may well depend upon the willingness of the prosecuting officials to institute a single test suit to determine the validity of the law. The benefit sought is not insulation of the plaintiff's continuing conduct from punishment if his claim is ultimately held to be without merit, but merely the assurance that the dispute may be resolved in an orderly fashion, without an unnecessary and burdensome multiplicity of suits all dealing with the same issue simultaneously. If multiple proceedings are actually pending against the plaintiff at the time he seeks relief, and it is apparent that the multiple actions will have the effect of preventing plaintiff from engaging in constitutionally protected conduct, an injunctive order is also necessary, albeit one of a narrower scope. The aim is, again, to insure orderly resolution of the dispute, without imposing the burdens of simultaneous multiple litigation upon the plaintiff. Thus the injunction should simply require the suspension of all but one of the suits and prohibit the institution of others, until such time as the plaintiff's defense can be tested in a single action. Thereafter, of course, if the plaintiff loses the single action, he is subject to prosecution for all the acts he has committed in violation of the law. If bias in a tribunal charged with the responsibility of adjudicating the plaintiff's claim is the objection, as in *Gibson v. Berryhill*, an injunction is also necessary to force the discontinuance of proceedings in the prejudiced forum. However, if the plaintiff is only threatened with the commencement of such proceedings, a declaration either that the law he is threatened under is invalid, or that the tribunal which will hear the claim against him is unfit, may suffice to discourage resort to the tainted forum.

In addition to the situations described in the preceding paragraph, there are other circumstances where the plaintiff may need anticipatory relief in the form of a temporary restraining order or preliminary in-

junction to preserve his rights pending litigation. Since the declaratory judgment is purely a final, rather than an interlocutory, remedy and since the necessity for interim relief is usually present only when action is being taken or is threatened which will injure the plaintiff unless it is immediately and forcefully stopped, anticipatory relief in the form of an injunctive order will often be necessary in such circumstances. The defendants will be protected by requiring that plaintiff demonstrate a need for the injunction to preserve the status quo or otherwise protect him from injury pending final resolution of his claim, that he demonstrate a probability of success on his claim in the main litigation, and that he post a bond sufficient to reimburse costs and damages to any defendant who is later found to be wrongfully enjoined.

Once the court has determined that anticipatory relief should issue and the form which it should take, the next inquiry is whether the anticipatory relief should be federal or state. In this determination, the federal courts should be guided by the principle that federal anticipatory relief should not issue against state action unless that relief is the *only* effective remedy for the denial of a constitutional right. Adherence to this principle will meet the obligations of those courts to protect constitutional rights in suits brought under the civil rights laws by insuring that *federal* remedies will be available when others are not effective. It will also insure that there is a minimum of federal interference with the operation of the state judiciaries in our unique dual system of courts. This last assurance will be given by refusing federal anticipatory relief whenever state anticipatory relief of the proper form and scope is available to protect the plaintiff's constitutional rights. Procedurally, by determining first, in the manner suggested above, whether anticipatory relief is justifiable in a particular case and, if it is, what form it must take to afford adequate protection to the plaintiff, the federal court will be prepared to examine the availability and efficacy of existing state anticipatory remedies in the case, in order to determine whether it should intervene or leave the matter entirely to the state courts for resolution. In this process of examining the availability of state anticipatory remedies, there are two broad categories of situations in which the state remedies will be ineffective to protect constitutional rights. First, state anticipatory relief will not be effective to guard civil rights when it is either nonexistent or saddled with procedural obstacles which unduly narrow its availability. Second, even if it is not burdened with formal procedural obstacles, if state relief is demonstrably not available in practice, it is ineffective to protect civil

rights and federal anticipatory relief of the proper scope should issue.

In the first category, the obstacle most likely to render state anticipatory relief ineffective is the retention by the state of outmoded rules to govern the availability of anticipatory relief. For example, in an actual controversy where declaratory relief would serve a useful purpose in dispelling the peril or insecurity posed to the plaintiff by a criminal law, but where a state requires a formal threat of prosecution before it will issue such relief, the state declaratory remedy is ineffective to protect civil rights where no such threat has been made, and a federal declaratory judgment should issue. This conclusion follows from the facts (i) that the federal court, before examining the efficacy of the state remedy, has already concluded that declaratory relief would serve a useful purpose in dispelling the peril and insecurity posed to the plaintiff by the law, and (ii) that state declaratory relief is unavailable because of the state procedural rule. Therefore, in order effectively to protect civil rights and comply with the congressional purpose behind the Federal Declaratory Judgment Act, the federal court must issue declaratory relief. Of course, federal relief should not be available merely on the grounds that state declaratory relief has or probably will be denied. As long as the state adheres to remedial principles which do not obstruct useful anticipatory relief for constitutional violations, it should be free to decline relief without federal interference. Thus, if a state would ordinarily deny declaratory relief against a prior pending action on the grounds that such relief would serve no useful purpose, federal relief will not generally be warranted, since anticipatory relief of any sort is usually inappropriate under these circumstances. Only if a state denies, or would probably deny, relief against a prior pending action when such relief would serve a useful purpose must the federal court issue a remedy.

If the form of anticipatory relief needed is injunctive, rather than declaratory, the state procedural obstacles most likely to bar federal relief will be the traditional chancery principles. Thus when a state retains a distinction between the propriety of injunctions against infringement of personal and property rights, a federal court should issue injunctive relief to protect those rights excluded from protection under state law if an injunction is the form of anticipatory relief needed. Similarly, if the "imminent irreparable injury" standard would probably be employed by a state court to deny useful injunctive relief from constitutional violations, the federal courts should step in to provide injunctive protection. However, federal injunctive relief should not be

granted in cases, where, although a state would place the traditional chancery principles between a plaintiff and injunctive relief, declaratory relief will suffice to protect the plaintiff's rights, and that form of relief is available under state law. If, after the granting of state declaratory relief, it subsequently appears that the contempt sanction is in fact necessary to coerce obedience to the court's decree and an injunction is still unavailable under state law, the federal court should step in with injunctive relief if necessary to protect constitutional rights.

An injunction may also be necessary to provide protection to a plaintiff, pending the final determination of his legal claims, in the form of a temporary restraining order or preliminary injunction. If the state will provide him the requisite form of injunctive order to preserve the status quo pending the final disposition of litigation he has commenced, then no federal relief is necessary. If, however, the state places unnecessary obstacles in the way of such interlocutory relief, or denies the relief under circumstances where it is apparent that constitutional rights will be destroyed before the normal processes of trial and appeal can be pursued, a federal injunction should issue to prevent the injury. For example, if state authorities are disrupting or threatening to disrupt a plaintiff's legitimate exercise of his first amendment rights, and upon application by him to a state court a temporary restraining order or preliminary injunction to prevent the disruption pending full litigation is refused, a federal court should step in to issue the appropriate relief. Although a final state injunction against the authorities may ultimately be granted, the plaintiff requires immediate injunctive intervention to prevent the loss of first amendment rights pending the litigation. The state court has, by its refusal to issue such relief, placed the plaintiff in the position of having to give up his constitutional rights in order to litigate them. Consequently, assuming that no relief is available from the state's appellate courts, or that there is no time to pursue otherwise available avenues of appeal, injunctive relief from a federal district court is the only effective means of preventing the denial of a constitutional right. If, on the other hand, relief is available from the state appellate system under circumstances where the plaintiff has time to obtain it before losing his rights, a federal court should stay its hand. Moreover, first amendment rights, like other rights, need not always be exercised immediately in order to be preserved. Only where the facts indicate that there is some need for their immediate exercise should a federal court intervene upon a state's refusal to issue temporary relief. Thus, one may distinguish between the need for immediate

exercise of first amendment rights in the midst of an election campaign, or upon some date of particular symbolic significance to the speech in question, and the need in situations like those existing in *Steffel v. Thompson*, where no urgency to distribute handbills at the particular time or place is apparent from the facts. Of course, if it is demonstrated that the authorities are acting or threatening to act against plaintiff's activities whenever, wherever, and however they are engaged in, so as effectively to preclude all exercise of first amendment rights during the litigation or so narrowly constrict them that they will be valueless, then federal injunctive relief would be proper. Finally, it should be noted that the propriety or impropriety of a state court denial of interim relief may also depend upon the clarity with which first amendment rights are being infringed or, conversely the extent to which a state may permissibly regulate the time, place, and manner of such activities. Refusal of temporary relief under circumstances where the state has the authority to regulate the activity in question, for example, parading in the streets, may demonstrate only that the plaintiff's claimed right to exercise his rights in a particular manner or at a particular place and time, ought not succeed. Temporary relief issued from a federal court under such circumstances would virtually destroy the state's reasonable right to regulate the use of its streets. Thus, while a federal court should make an independent judgment on the facts to determine whether the state is exercising a reasonable regulatory power or attempting to nullify the legitimate exercise of first amendment activity, it should be wary lest it intervene where the plaintiff's activity is merely being subjected to reasonable conditions.

Beyond a demonstration that state anticipatory relief of the proper form and scope is flatly unavailable or burdened with dysfunctional procedural obstacles when anticipatory relief in some form would be essential to preserve constitutional rights, it should always be open to a federal plaintiff to demonstrate that state remedies which are available in theory are not available in practice. Ordinarily, such a demonstration will be exceedingly difficult to make, and the most fruitful challenges to deficiencies in state anticipatory remedies will be based upon the unavailability of such remedies under state law or the existence of restrictive state rules governing their issuance. However, there may arise circumstances in which state law enforcement, prosecutorial, and judicial authorities combine in efforts to deprive a plaintiff or class of plaintiffs of federal constitutional rights, under circumstances where state anticipatory remedies appear to be open under governing principles of

state law, but where the actions of the authorities will pervert the normal operation of the governing principles. Such behavior is, of course, tantamount to bad faith and harassment on the part of the state officials, but with the twist that judicial authorities, whose duty it would ordinarily be to provide relief from official harassment, are also involved. There may be no objective facts indicating that the state tribunal is composed of biased personnel, as there was in *Gibson v. Berryhill*, but the concerted effort on the part of the entire law enforcement apparatus to deprive a plaintiff of his rights may be demonstrable by circumstantial evidence. For example, it may be demonstrated that state law enforcement and/or prosecutorial officials have been making arrests without probable cause and seeking convictions without hope of ultimate success and that the state judiciary, through inaction, such as actual refusals of anticipatory relief in clear cases where it is justified to halt the harassment, is effectively, if not consciously, participating in the lawless action. If such a demonstration can be made, a federal court should intervene to halt the lawless action in order to provide essential relief for constitutional violations where state processes, through design or negligence, have broken down. Other situations may also exist where state judicial processes may be deemed ineffective to protect constitutional rights, but it should be emphasized that no presumption of ineffectiveness on the part of the state judiciaries should be engaged in. Federal relief should only be available when the plaintiff is able to demonstrate the inefficacy of state courts in a manner similar to that described above.

It should be noted, however, that the model described above is not the only possible system that might be constructed to govern the administration of federal anticipatory relief. On the contrary, it would be possible to create an internally consistent remedial scheme in which federal relief would be available against state action on a far broader basis than outlined above. The core of such a scheme would be a presumption against the efficacy of the state courts to protect constitutional rights, with the result that the federal courts would administer anticipatory relief without regard to the availability or efficiency of state courts to perform the same function. The presumption would be founded upon a fear that state bias against federal civil rights would be manifested in the form of state court prejudice against litigants who seek to vindicate those rights, with the consequent denial of the civil rights in subtle and undetectable ways. In short, this alternative model would hold it essential that federal courts administer anticipatory relief for

constitutional violations in all cases where their aid is sought, in order to prevent pervasive, but imperceptible, denial of federal rights.

Although this alternative model would constitute a rational, coherent method of determining the appropriateness of federal relief, always assuming, of course, that its empirical foundations are sound, the implications of the model for the total working of our dual judicial system are unacceptable. In the first place, if it is indeed true that state judges are prejudiced against federal constitutional rights in ways that will produce damage to those rights in state proceedings for anticipatory relief, then it is equally true that such prejudice exists in the context of state criminal prosecutions. Therefore, in order to eliminate the detrimental effects of the prejudice, federal courts would have to assume the total responsibility for adjudicating constitutional issues, even to the extent of halting state criminal trials whenever some constitutional issue which would normally be raised by way of defense is presented instead to a federal district court for adjudication in the context of an anticipatory proceeding. In short, the "useful purpose" test which now governs declaratory relief would have to be modified in its application, because of the assumption of state court prejudice, to permit federal relief any time it is requested against state action under the Civil Rights Act. Before the role of the state courts in protecting constitutional rights and enforcing their own criminal laws is thus nullified, it should be clear that such rights cannot be protected in any other way.

In fact, when one focuses upon the kinds of prejudice against federal rights that might exist in a state proceeding, it becomes difficult to believe that the scope of federal anticipatory adjudication of constitutional rights envisioned by the alternative model would afford significantly more protection than a system which permits more latitude to the state courts. If prejudice on issues of law is what is feared, then it seems clear that such prejudice can be remedied through the ordinary processes of appellate review. And it seems clear that, in most instances, issues of law, as opposed to issues of fact, will be the primary points of dispute in state or federal proceedings for anticipatory relief. Consequently, constitutional rights can be as effectively vindicated through a process of anticipatory adjudication in the state courts, with ultimate appeal of any errors of law to the United States Supreme Court. Where facts are at issue, they are likely to be at issue in a state criminal proceeding before a jury. However, jury bias against a criminal defendant cannot be eliminated by federal anticipatory adjudica-

tion of constitutional issues which could be asserted by way of defense in the criminal proceeding. If the federal court sustains a criminal defendant's constitutional arguments, he has received no more than he would ultimately have obtained through assertion of the defense in the state court, with appeal of any errors of law to the Supreme Court if necessary. And if the federal court rejects his constitutional arguments, or in any way narrows his defense to anything less than an absolute right to be free of all prosecution, the possibility of jury bias remains when the criminal proceeding is ultimately tried. Only in the rare situation where disputes of fact exist in the context of a state anticipatory proceeding is there even a theoretical possibility of eliminating bias by resort to a federal court. However, as previously indicated, where factual disputes exist, it will most often be the case that an analysis of the need for anticipatory relief will reveal that such relief will serve no useful purpose.[349] Furthermore, even the theoretical possibility of help from a federal court depends upon the assumptions that the state judge will prejudge the facts against the plaintiff and that a federal judge would be immune from any similar bias. Moreover, the rarity of the circumstances in which this sort of "correctable" state court bias exists, coupled with the likelihood that such bias will be accompanied by other, more objective indicia of prejudice, such as the creation of unwarranted procedural hurdles for the plaintiff, which would justify federal relief in any event, or arbitrary application of state law to a situation it was not designed to cover under circumstances where a state appellate court might well reverse the trial court for errors of law, make this possibility a slender reed upon which to rest a federal remedial scheme which eliminates virtually all significant state court participation in the processes of federal constitutional adjudication. The first model proposed, on the other hand, has the virtue of providing federal anticipatory relief only when such relief will serve a useful purpose *and* it

349. Since a judgment of nonapplicability would be res judicata only as to the precise factual situation upon which the issue was litigated, a subsequent prosecution would not be dismissed if a different course of conduct or change in circumstances were proved. The same argument is not applicable where the facts are disputed, since in that situation a declaration may be virtually without utility. A determination of these factual issues in favor of the plaintiff might be available as a defense to a subsequent prosecution; but an adverse determination, being based on a preponderance of the evidence, would probably not be binding in a criminal prosecution where proof beyond a reasonable doubt is required for conviction. There may, however, be circumstances where the plaintiff's rights are in such jeopardy and in need of clarification that the presence of controverted factual issues should not be controlling.

Developments in the Law, 62 HARV. L. REV., *supra* note 88, at 871-72 (footnotes omitted).

can be *objectively demonstrated* that the state systems are somehow deficient in protecting constitutional rights.

In *Younger v. Harris* and its companion cases, the Supreme Court of the United States attempted to establish a trend away from extensive federal anticipatory intervention into legitimate state affairs. Although this trend is itself salutary, the doctrine evolved by the Court is unacceptable in its retention of outmoded chancery principles to govern the administration of federal injunctive and declaratory relief from pending state prosecutions and in its failure to articulate a rational standard for federal anticipatory remedies against state action in all cases. To meet the obligations imposed upon the federal courts by Congress in the Civil Rights Act and the Federal Declaratory Judgment Act in a rational and intellectually honest way, and to meet the Supreme Court's institutional obligation to insure the smooth working of our dual system of state and federal courts, the Court must begin to move away from the approach it has taken to federal anticipatory remedies since *Younger*. This article has proposed one means whereby it may do so. Whether the proposals made here are sound must be determined by time and the criticism of others. That the approach taken by the Court is unsound is, however, clear. Further evolution by the Court of discretionary principles by which federal courts administer anticipatory remedies should be undertaken with this in mind.