

October 1974

Developments in the Availability of Federal Remedies Against State Activities

Wayne McCormack

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal Remedies Commons](#)

Repository Citation

Wayne McCormack, *Developments in the Availability of Federal Remedies Against State Activities*, 16 Wm. & Mary L. Rev. 1 (1974), <https://scholarship.law.wm.edu/wmlr/vol16/iss1/2>

Copyright c 1974 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

William and Mary Law Review

VOLUME 16

FALL 1974

NUMBER 1

ARTICLES

DEVELOPMENTS IN THE AVAILABILITY OF FEDERAL REMEDIES AGAINST STATE ACTIVITIES

WAYNE McCORMACK*

Much confusion has surrounded the propriety of granting various federal court remedies against states, state courts, and state officials during the past decade. During the 1973 term the United States Supreme Court faced two cases raising questions of federalism in the granting of federal remedies for state action; the opinions in both cases fell short of resolving the difficulties, however. In particular, the use of declaratory judgments to affect pending or threatened state criminal prosecutions has varied in federal litigation. The non-intervention doctrine regarding injunctive relief and the abstention doctrine,¹ along with vague notions of comity, have inhibited federal courts from intervening into state court proceedings. In *Steffel v. Thompson*,² the Court authorized declaratory relief from allegedly unconstitutional prosecutions, but the broad range of opinions filed by the Justices leaves open questions regarding the effect of the remedy upon subsequent state proceedings. Similarly, the eleventh amendment and the closely related doctrine of sovereign immunity also have generated confusion when monetary relief is sought against a state. *Edelman v. Jordan*³ addressed this problem and, from the opinions in that case, an explanation of the amendment as a broad equitable guidepost for the courts can be extracted.

* B.A., Stanford University; J.D., University of Texas. Associate Professor of Law, University of Georgia.

1. See notes 32-45 *infra* & accompanying text.

2. 94 S. Ct. 1209 (1974).

3. 94 S. Ct. 1347 (1974).

DECLARATORY JUDGMENTS

*Steffel v. Thompson*⁴ breathed new life into the declaratory judgment remedy. When Steffel distributed handbills against the Vietnam War in the parking lot of an Atlanta shopping center in October 1970, the police threatened to arrest him and his friends for criminal trespass if they continued. Upon the return of the protesters two days later to pass out more handbills, the police again were called; Steffel left, but a friend stayed and was arrested for criminal trespass. Steffel then brought suit for declaratory and injunctive relief against enforcement of the criminal trespass statute as it was applied "to interfere with petitioner's constitutionally protected activities."⁵ The district court denied all relief,⁶ and Steffel appealed,⁷ claiming that declaratory relief should have been granted despite the refusal to allow injunctive relief. In an opinion by Justice Brennan, the Supreme Court held that the district court should

4. 94 S. Ct. 1209 (1974).

5. *Id.* at 1213-14.

6. The district court relied on a broad reading of *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), equating declaratory and injunctive relief and requiring a showing of bad faith harassment as a prerequisite for either form of relief. Without a showing of bad faith, "the rudiments of an active controversy between parties" did not exist. *Becker v. Thompson*, 334 F. Supp. 1386, 1389-90 (N.D. Ga. 1971).

7. Some difficult preliminary questions existed with regard to appellate jurisdiction. The case initially had been dismissed by a single district judge, whose ruling was appealed to the Court of Appeals for the Fifth Circuit despite the possibility that a three-judge court should have been convened and direct appeal taken to the Supreme Court. Since the request for injunctive relief was abandoned on appeal from the district court, the Supreme Court held that the court of appeals did not err by exercising jurisdiction on appeal. 94 S. Ct. at 1214 n.7.

The Court, stating that a three-judge court is required even when the statute is challenged as applied rather than on its face, *id.*, relied upon *Ex parte Bransford*, 310 U.S. 354 (1940), despite its seemingly opposite result. The salient language from *Bransford* reads:

It is necessary to distinguish between a petition for injunction on the ground of unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court.

Id. at 361. By looking at the nature of the plaintiff rather than the nature of the attack, as the language suggests, this distinction is understandable. If the plaintiff's claim is that no similar statute ever could be applied to him for reasons intrinsic to that particular plaintiff, such as his religious or governmental character, then the statute itself might be invalid in part, necessitating a three-judge court. *See, e.g., Query v. United States*, 316 U.S. 486 (1942) (military post exchange held constitutionally exempt from state sales taxes); *cf. Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) (direct appeal from state court). If the plaintiff could be reached by a uniformly applied statute, but claims discriminatory treatment by an administrator, then it is only the official's action that is being challenged. *Cf. Zucht v. King*, 260 U.S. 174 (1922) (no direct appeal from state court).

have entertained the request for a declaratory judgment.⁸ To understand fully the significance of the Court's holding first requires a delineation of the constraints that have been variously applied to requests for federal intervention, equitable as well as declaratory, into state proceedings.

Equitable Intervention

In *Dombrowski v. Pfister*,⁹ concerning four plaintiffs arrested but not prosecuted for violation of a state antisubversive statute, the Supreme Court confronted a unique case in which all prerequisites for equitable intervention were present. Although their offices had been ransacked and files seized pursuant to the arrests, the fact that the plaintiffs were never prosecuted precluded them from the legal remedy of asserting the unconstitutionality of the statute as a defense in a criminal trial. Continued arrests with hearings barred by a failure to prosecute accentuated the inadequacy of available legal remedies,¹⁰ while the "chilling effect" of the harassing arrests upon the political activities of not only the plaintiffs but also their colleagues constituted irreparable harm.¹¹ The traditional grounds for equitable intervention thus were present.

The Court later emphasized in *Cameron v. Johnson*¹² that the requisite irreparable harm would not be found lightly. In *Cameron* the plaintiffs in federal court were defendants in a pending state criminal trespass prosecution. The Supreme Court determined that they would be able to assert their constitutional claims in the state action, while any chilling effect on other political activities would be no more than the normal deterrent effect of any criminal statute.¹³ Indeed, some chilling effect upon the activities of persons who fall within or approach the ambit of the statute is the precise purpose of any criminal provision.¹⁴ *Cameron* therefore presented no traditional bases for equitable intervention; an adequate remedy existed in the state courts, and no abnormal irreparable harm had been demonstrated. In the years following *Dombrowski* there was

8. The Court, taking judicial notice of "the recent developments reducing the Nation's involvement in that part of the world," directed the district court on remand to consider first whether the case might be moot. 94 S. Ct. at 1216.

9. 380 U.S. 479 (1965).

10. *Id.* at 485-89.

11. *Id.*

12. 390 U.S. 611 (1968).

13. *Id.* at 619.

14. *Younger v. Harris*, 401 U.S. 37, 51-52 (1971).

nevertheless much intervention by the federal courts into state prosecutions, often with no more basis than a federal court's perception of the unconstitutionality of a state criminal statute.¹⁵

Dombrowski, where the federal relief was allowed because no other forum was available in which to present federal claims and where irreparable harm had been found because of the lack of opportunity to defend against a criminal prosecution, never was intended to be extended so far, however; *Younger v. Harris*¹⁶ brought the extension to an abrupt halt. In *Younger*, a state prosecution was pending for violation of a criminal anarchy statute of the type that previously had been declared unconstitutional by the Supreme Court.¹⁷ The district court held the statute's patent unconstitutionality sufficient to justify relief in light of the inhibitory effect that prosecutions would have on political activities.¹⁸ Because it was not shown that the statute's unconstitutionality would be unavailable as a defense to the prosecution, however, the Supreme Court saw no irreparable harm in the form of a chilling effect upon political activity other than the normal deterrent effect of a criminal statute.¹⁹

Younger was merely an example of a court of equity unwilling to intervene in the proceedings of another court system, whether under the same or a different sovereign, absent a demonstration of inadequate remedy for the plaintiff's claims in that other system. This traditional doctrine, founded historically on the Court of Chancery's disputes with the seventeenth-century courts of law,²⁰ unfortunately was recast by *Younger* to be required by "Our Federalism,"²¹ indicating that the American system had spawned unique doctrines. Some lower federal courts have viewed this language as a mandate to withhold all relief for constitutional claims whenever there is

15. See, e.g., *Karalex v. Byrne*, 306 F. Supp. 1363 (D. Mass. 1969); *Stein v. Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969); *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968).

16. 401 U.S. 37 (1971).

17. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio criminal syndicalism statute which punished advocacy and prohibited assembly to advocate action described in the statute held violative of first and fourteenth amendments).

18. *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968).

19. Two members of the Progressive Labor Party and a college history instructor intervened as plaintiffs in the federal suit, alleging that they would "feel inhibited" if the prosecution were not enjoined. The Supreme Court held that they were not proper parties because they had not been threatened with prosecution. 401 U.S. at 42.

20. See, e.g., 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 459-65 (6th ed. 1938); F. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION* 2-10 (1909).

21. 401 U.S. at 53.

either a possibility of interference with state court proceedings or the possible availability of a state court remedy.²² Such a broad reading of *Younger* is unwarranted since traditional equity principles allow proceedings of another court system to be enjoined under proper circumstances. Moreover, the Supreme Court never has required exhaustion of state judicial remedies,²³ but only withheld federal relief if it would disrupt a state proceeding that could itself provide an adequate remedy.²⁴

That the opinion in *Younger* is consistent with traditional equitable notions of non-intervention can be demonstrated by analyzing recent Supreme Court cases in which relief was granted against actions in nonjudicial systems. *Parisi v. Davidson*²⁵ allowed federal habeas corpus intervention into the proceedings of military courts-martial because the Court was unwilling to extend full comity to an adjudicatory system that was neither a court of law nor a court of another sovereign.²⁶ *Gibson v. Berryhill*²⁷ allowed federal injunctive relief against a state administrative proceeding to revoke the plaintiff's optometry license because the Court was unwilling to apply comity to a nonjudicial state proceeding. In each case comity was embodied in the traditional notion that equity, although it will not intervene in another court system, will protect against excesses of governmental agencies before they can inflict irreparable harm on an individual. In each case the Court dealt lightly with the question

22. See, e.g., *Simmons v. Jones*, 478 F.2d 321 (5th Cir. 1973) (refusing to compel county jury commissioners to comply faithfully with Georgia's statutory scheme for selection of traverse jurors because, as a matter of comity, the state courts should be given the opportunity to effect compliance); *Schwartz v. Wyffels*, 326 F. Supp. 284 (D. Ore. 1971) (student denied relief from school hair regulation because state courts were not impotent and the question was not substantially federal); *Veen v. Davis*, 326 F. Supp. 116 (C.D. Cal. 1971) (without a showing of special circumstances, injury, or bad faith prosecution, a federal court not to intrude into state criminal prosecutions).

23. See *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

24. See *Younger v. Harris*, 401 U.S. 37, 45-46 (1971); *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926). Of course, if there are no pending state court proceedings to be disrupted, then it is difficult to show irreparable harm, maximizing the importance of declaratory relief, which is available without the necessity of such a showing.

Cases holding that one challenging a criminal statute has no standing or presents no controversy (see notes 67-69 *infra* & accompanying text) might be explained more easily as cases in which no irreparable harm, necessary for equitable intervention, was shown. *Steffel* thus might broaden the traditional limits of the standing doctrine by focusing instead on the availability of particular forms of relief.

25. 405 U.S. 34 (1972).

26. As Justice Douglas succinctly stated: "[T]he Pentagon is not yet sovereign." *Id.* at 51 (concurring opinion).

27. 411 U.S. 564 (1973).

of whether the proceeding would provide an adequate remedy for the plaintiff's contentions.²⁸ Concurring opinions in each case emphasized that demonstration of the inadequacy of a nonjudicial remedy should not be necessary so long as there is a present controversy.²⁹ Even when dealing with nonjudicial proceedings of a co-equal branch of the federal government, a type of review which often requires exhaustion of administrative remedies,³⁰ the question of whether to grant equitable relief is basically a question of whether irreparable harm will result if relief is denied.³¹

Equity—Abstention Distinctions

In the years between *Dombrowski* and *Younger*, the Court continually distinguished between injunctive and declaratory relief in the context of federal claims against state prosecutions. The distinction originally was drawn in *Dombrowski* when the Court dealt separately with the questions of abstention and equitable jurisdiction. Under the heading of abstention the Court considered whether a declaratory judgment against the constitutionality of the state statute could be issued by the federal court when no prosecution had occurred. The abstention doctrine mandated a state adjudication if the statute was unclear as a matter of state law to allow the state courts to limit the statute by construction to avoid the constitutional questions,³² the Court not being concerned with establishing possible irreparable harm for the purposes of the abstention doctrine.³³ To find equitable jurisdiction, however, required a showing of irreparable harm and the lack of an adequate remedy at law.³⁴

The most articulate discussion of these principles came in

28. 411 U.S. at 574-75; 405 U.S. at 42.

29. 411 U.S. at 581 (Marshall, J.); 405 U.S. at 50-51 (Douglas, J.).

30. Exhaustion of federal administrative remedies often is required, partly because of separation of powers problems, partly for judicial economy, but most often because a case is not yet ready for equitable intervention. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425-27, 439-40 (1965).

31. The applicability of equitable principles in this context was demonstrated in *Sampson v. Murray*, 94 S. Ct. 937 (1974), although the Court's finding of no irreparable harm was troubling. In *Sampson*, a discharged probationary federal employee was held not to be entitled to interim relief of reinstatement pending Civil Service Commission review. If ultimately determined that she had been discharged wrongfully, the availability of backpay would prevent irreparable injury. *Id.* at 952-53. The Court emphasized, however, that jurisdiction to grant the requested relief would exist if the equitable prerequisites were met. *Id.* at 952.

32. See *Zwickler v. Koota*, 389 U.S. 241 (1967); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

33. 380 U.S. at 489-92.

34. *Id.* at 485-89.

Zwickler v. Koota,³⁵ in which the Supreme Court reversed a three-judge court decision to abstain in a challenge to a New York statute requiring political handbills to contain the publisher's name. The Court separated very clearly the question of abstention in a declaratory judgment action from the question of appropriateness of equitable relief. Abstention was not mandated because the statute was not susceptible to a limiting construction that could avoid the constitutional issue;³⁶ declaratory relief therefore could be granted without waiting for a state adjudication to clarify the statute as a matter of state law.³⁷ Equitable jurisdiction of the federal court, however, would be limited by traditional notions of non-intervention into the judicial processes of another court system.³⁸ The Court asserted: "[A] federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."³⁹

Thus, when denying equitable relief in *Cameron v. Johnson*,⁴⁰ the Court decided on the merits that the statute under which state prosecutions were pending was not unconstitutional on its face⁴¹ before considering the plaintiffs' contentions that enforcement of the statute violated their constitutional rights. The latter half of the opinion then discussed whether the state prosecutions would result in irreparable harm to the plaintiffs and their sympathizers if federal relief was not granted, leading to a finding that the state prose-

35. 389 U.S. 241 (1967).

36. *Id.* at 249-52.

37. *Id.* at 250-51.

38. See note 20 *supra* & accompanying text. The *Zwickler* Court relied heavily on *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), in which injunctive relief against enforcement of a city solicitation license ordinance had been denied. The ordinance was held invalid as applied to religious solicitation in a companion criminal case, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), but equity jurisdiction was precluded by the lack of "any injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Douglas v. City of Jeannette*, *supra* at 164. The Court in *Douglas* distinguished *Hague v. CIO*, 307 U.S. 496 (1939), as a case in which state officials had resorted to extralegal tactics similar to those later found in *Dombrowski*. 319 U.S. at 164.

39. 389 U.S. at 254. In *Zwickler* there was no pending prosecution that might be interrupted by federal equitable relief. Indeed, it was held on appeal after remand that the controversy was moot because the plaintiff did not show that he intended to continue hand-billing anonymously, leaving no current threat of prosecution. *Golden v. Zwickler*, 394 U.S. 103 (1969). Thus, declaratory relief was unavailable for the same reason that equitable relief was unavailable: there was no present controversy between the parties. Declaratory relief, of course, would have been available as it was in *Steffel*, if the plaintiff had contemplated further action and prosecution was threatened by the state against that action.

40. 390 U.S. 611 (1968).

41. *Id.* at 615-17.

cutions presented a complete and adequate remedy at law for the plaintiffs' federal claims.⁴²

These principles were confused, however, in a companion case to *Younger*, *Samuels v. Mackell*,⁴³ in which the Supreme Court held that declaratory relief ordinarily would not be available when equitable relief was unavailable. The Court equated the two forms of relief because declaratory relief presumably would have res judicata effects on the federal issues and could be followed by injunctive relief to "protect or effectuate" the federal court judgment by intervention into pending state proceedings.⁴⁴ The Court did note in *Samuels*, however, that it was leaving open the question, subsequently resolved in *Steffel*, whether declaratory relief could be issued in the absence of a pending state proceeding.⁴⁵

Steffel differed from *Samuels* because in *Steffel* there was no actual prosecution to be stopped by federal intervention, nor was there threat of irreparable harm to the plaintiff beyond the normal results of a good faith criminal sanction, although a present dispute did exist because of the threatened prosecution. In *Steffel* therefore the Court was presented with a situation in which equitable relief was unavailable, and indeed unnecessary, but in which an actual dispute necessitated clarification of the appropriateness of declaratory relief untrammelled by the confusing possibility of an equitable remedy that led the Court astray in *Samuels*. This distinction justi-

42. *Id.* at 620. The dissent argued that the record showed factually that the statute was not being used in good faith but rather that the state criminal process was being "abusively invoked 'without any hope of ultimate success, but only to discourage' the assertion of constitutionally protected rights." *Id.* at 623 (Fortas, J.), quoting *Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965).

43. 401 U.S. 66 (1971). *Samuels* was an action for injunctive and declaratory relief by defendants in pending state prosecutions under a criminal anarchy statute. The Court held that, where state proceedings had commenced, federal courts should apply the same equitable principles relevant to injunctive relief to a request for declaratory judgment.

44. The Court stated:

In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles 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.

Id. at 72-73.

45. *Id.* at 73-74.

fied the Court's holding that the request for declaratory relief should have been heard in *Steffel*.

Effects of a Declaratory Judgment on State Proceedings

Steffel's holding that a proper situation was presented for declaratory relief necessitates examination of the ultimate effects of such relief on subsequent state prosecutions. The inquiry requires some attention to historical background as well as reference to the language of the Declaratory Judgment Act⁴⁶ itself, which provides that the "declaration shall have the force and effect of a final judgment or decree"⁴⁷ and that coercive relief will be available when needed following the declaratory judgment.⁴⁸ Prior to passage of the Act, the Supreme Court had taken the position that the federal courts were prohibited from issuing declaratory judgments by the same principles that prohibit their rendering advisory opinions to other branches of government.⁴⁹ Nonetheless, some states simultaneously were developing noncoercive remedies, including the declaratory judgment, since such relief facilitated adjudication of rights without the necessity to commit an act that might subject litigants to substantial liability; it allowed parties to ascertain their future legal status or the potential rights and liabilities that would flow from anticipated conduct.⁵⁰ The declaratory judgment was to be a final ruling, binding through principles of *res judicata*, when the future point in time arrived or if the anticipated conduct in fact occurred.⁵¹

This history was traced briefly in *Steffel*, relating it to the developments of the early part of this century concerning injunctive relief against state regulatory measures. The Court found a close connection between the passage of the three-judge court act⁵² in 1910, to

46. 28 U.S.C. §§ 2201-02 (1970).

47. *Id.* § 2201.

48. *Id.* § 2202.

49. See *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289 (1928).

50. The remedy's primary advocates were Professors Borchard and Sunderland. See Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 105 (1918); Sunderland, *A Modern Evolution in Remedial Rights*, 16 MICH. L. REV. 69 (1917).

51. Relief also would be provided when all contingencies had occurred, although coercive relief had not been sought. See generally E. BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941); C. WRIGHT, *FEDERAL COURTS* 446-47 (2d ed. 1970).

52. 28 U.S.C. §§ 1253, 2281-84 (1970). Section 2283 provides: "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 its judgments."

Section 2281 provides:

deter injunctive relief against state regulatory measures, and the passage of the Declaratory Judgment Act in 1934, to provide a forum for litigating federal claims against state regulations without necessitating violations of those regulations and exposure to potential liability.⁵³ The legislative history demonstrated that "the declaratory judgment was designed to be available to test state criminal statutes in circumstances where an injunction would not be appropriate."⁵⁴

The effect of a declaratory judgment was considered only lightly by the *Steffel* majority in referring to its "persuasive force."⁵⁵ The Court reiterated the following language from an earlier opinion: "[E]ven though a declaratory judgment has 'the force and effect of a final judgment' . . . it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but it is not contempt."⁵⁶ The Court did not predict the results if a state prosecution were commenced subsequent to a federal declaratory judgment holding the enforced statute unconstitutional either on its face or as applied.

Two concurring opinions did assert views on the proper effect of declaratory relief. Justice White indicated that a federal declaratory judgment should bind a state court, the judgment being enforceable through injunctions against subsequent state prosecutions.⁵⁷ But, according to Justice Rehnquist, this approach would enable a federal court to bootstrap itself into providing equitable relief that it would be unable to offer if the suit had not been filed until a state prosecution had been commenced.⁵⁸

A significant difference exists, however, between an injunction issued as an initial matter against a pending state prosecution and

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

53. Justice Brennan, writing for the Court in *Steffel*, quoted his own opinion in *Perez v. Ledesma*, 401 U.S. 82, 111-15 (1971), in which he had explicated this connection more fully. 94 S. Ct. at 1219-20.

54. 94 S. Ct. at 1219-20, quoting *Perez v. Ledesma*, 401 U.S. 82, 112 (1971).

55. 94 S. Ct. at 1221.

56. *Id.* at 1221, quoting *Perez v. Ledesma*, 401 U.S. 82, 125-26 (1971).

57. 94 S. Ct. at 1225.

58. *Id.* at 1226-27.

an injunction issued to enforce a prior declaratory judgment: the latter is based upon a final judgment that is entitled to res judicata treatment. Justice Rehnquist thus too tightly constrained the declaratory judgment concept, particularly as it relates to equitable jurisdiction, by his belief that its only function is to clarify the law. That he felt the same considerations were involved in enjoining a state prosecution whether or not a federal declaratory judgment had been issued previously⁵⁹ is revealed by his perception of the judgment's value and effect as a nonbinding order.⁶⁰ This view cannot be reconciled with the Declaratory Judgment Act and the cases construing it, which demonstrate that the judgment indeed is "a binding order supplemented by continuing sanctions."⁶¹ It is precisely this nature that distinguishes the judgment from an advisory opinion and saves the constitutionality of the Act.⁶²

59. Justice Rehnquist observed:

If the rationale of cases such as *Younger* and *Samuels* turned in any way upon the relative ease with which a federal district court could reach a conclusion about the constitutionality of a challenged state statute, a preexisting judgment declaring the statute unconstitutional as applied to a particular plaintiff would of course be a factor favoring the issuance of an injunction as "further relief" under the Declaratory Judgments Act. But, except for statutes that are "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph" . . . the rationale of those cases had no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the state's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not.

Id. at 1227.

60. Justice Rehnquist wrote:

A declaratory judgment is simply a statement of rights, not a binding order supplemented by continuing sanctions. State authorities may choose to be guided by the judgment of a lower federal court, but they are not compelled to follow the decision by threat of contempt or other penalties. If the federal plaintiff pursues the conduct for which he was previously threatened with arrest and is in fact arrested, he may not return the controversy to federal court, although he may of course raise the federal declaratory judgment in the state court for whatever value it may prove to have.

Id.

61. See note 60 *supra*. The Act itself speaks of a final judgment supplemented by "further necessary or proper relief." 28 U.S.C. § 2202 (1970). See note 51 *supra* & accompanying text. In *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969), it was held that an injunction could be issued against state court proceedings following a declaratory judgment. The court noted that the anti-injunction statute, 28 U.S.C. § 2283 (1970), contained an express exception to effectuate judgments of federal courts. 413 F.2d at 1267.

62. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

More fundamental difficulties are revealed by Justice Rehnquist's footnoted explanation of the declaratory judgment's value if introduced in the state court:

The Court's opinion notes that the possible *res judicata* effect of a federal declaratory judgment in a subsequent state court prosecution is a question "not free from difficulty" . . . I express no opinion on that issue here. However, I do note that the federal decision would not be accorded the *stare decisis* effect in state court that it would have in a subsequent proceeding within the same federal jurisdiction. Although the state court would not be compelled to follow the federal holding, the opinion might of course be viewed as highly persuasive.⁶³

This language presents two separate problems. First is the question of what is made *res judicata* as a result of the judgment; to be constitutional the declaratory judgment must be *res judicata* of something approaching a case or controversy. A further question concerns the effect of the judgment on matters for which it is not *res judicata*, specifically, the extent to which a state court is bound under the principles of *stare decisis* by a constitutional law decision issued by a lower federal court; in a sense the latter question is the converse of *Erie Railroad Co. v. Tompkins*.⁶⁴

Res Judicata

To determine the *res judicata* effects of a federal declaratory judgment on subsequent state court proceedings, it is helpful to consider the facts presented in *Steffel* in light of the equitable principles enunciated in *Younger*. Assume for example that, after obtaining a declaratory judgment pertaining to the two prior incidents and without ever having returned to the shopping center, Steffel were to be arrested because of the prior incidents. To issue injunctive relief under these circumstances to protect the federal court's prior judgment is not the type of intervention into the proceedings of another court system that equity condemns; it is instead merely recognition of the prior jurisdiction of the federal court. The federal court's injunctive relief then can be used to effectuate its own judgment.⁶⁵

63. 94 S. Ct. at 1227 n.3.

64. 304 U.S. 64 (1938).

65. In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), the Supreme Court held that a federal court could not enjoin state court relitigation of claims decided previously by the federal court. The 1948 revision of the anti-injunction statute, however, provided an exception

If a declaratory judgment may be issued when a live dispute exists without expressing any disrespect for state courts, allowing a subsequent state prosecution to proceed after the issuance of such a judgment would permit state officials to express flagrant disrespect for the federal courts.

It would not do, however, to allow such bootstrapping by the federal courts on a broad basis. Although a federal injunction should be available to effectuate a federal court's judgment and thereby to protect the finality of judgments, subsequent injunctive relief serves this purpose only if the controversy before the state court is identical to that resolved in the prior federal suit, thus activating the res judicata doctrine.⁶⁶ To determine the issue of identity requires first a delineation of the "case or controversy" requirement and a differentiation between declaratory judgments of facial invalidity of a statute and a judgment of invalidity as applied.

It has long been the Supreme Court's policy that assertion of constitutional protection from criminal sanctions may not be tested without first committing the prohibited offense. This requirement has been cast in various terms, sometimes using "ripeness,"⁶⁷ more often "standing,"⁶⁸ and most often the straightforward question of whether the parties have satisfied constitutional "case or controversy" requirements.⁶⁹ For example, workers have been barred from challenging the federal restrictions on political activity prior to engaging in such conduct because the Court could not foresee all of the forms and consequences of their expected activities,⁷⁰ even though the statute was challenged on its face rather than as applied

for a federal court "to protect or effectuate its judgments," 28 U.S.C. § 2283 (1970), and this provision has been applied to enjoin relitigation following a declaratory judgment. *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969).

66. Lack of identity raises the question of stare decisis effects. See notes 87-128 *infra* & accompanying text.

67. See, e.g., *International Longshoremen's Local 37 v. Boyd*, 347 U.S. 222 (1954).

68. See, e.g., *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Tileston v. Ullman*, 318 U.S. 44 (1943).

69. See, e.g., *Boyle v. Landry*, 401 U.S. 77 (1971); *Poe v. Ullman*, 367 U.S. 497 (1961); cf. L. JAFFE, *supra* note 30, at 395.

70. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Justice Douglas, in dissent, urged that the case was particularly appropriate for a declaratory judgment regarding the present status of government workers. He emphasized that legal remedies would be inadequate for those "who must sacrifice their means of livelihood in order to test their rights to their jobs." *Id.* at 117. "The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one. And the present case seems to me a good example of a situation where uncertainty, peril, and insecurity result from imminent and immediate threats to asserted rights." *Id.* at 119-20.

to the specified future conduct.⁷¹

The need for an actual conflict also was demonstrated, shortly before *Steffel* was decided, when the Court held in *O'Shea v. Littleton*⁷² that no case or controversy was presented in a suit to enjoin state judges who allegedly exercised racial discrimination when setting bail and sentencing criminal defendants. In the strife-torn racial hotbed in which the case arose, there was undoubtedly a "live dispute."⁷³ What the Court found lacking, however, were believable allegations that the plaintiffs themselves would be subjected to unconstitutional prosecutions, regardless of the judges' past conduct.⁷⁴

71. The Court occasionally has recognized the existence of a live controversy based on an explicit threat of prosecution, but it has limited this approach to cases involving a challenge to the face of the statute, *see, e.g.*, *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), or at least a challenge of invalidity as applied to a class of persons whose claims to constitutional protection are intrinsic to themselves, as in the case of religious beliefs, *see, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In *Adler v. Board of Education*, 342 U.S. 485 (1952), the Court rejected a broad facial challenge to a New York statute, dealing with alleged subversives in public schools, with only Justice Frankfurter perceiving a justiciability problem. When portions of the law later were struck down, the Court explained *Adler* as "a declaratory judgment suit in which the Court held, in effect, that there was no constitutional infirmity in [the statutes] on their faces and that they were capable of constitutional application." *Keyishian v. Board of Regents*, 385 U.S. 589, 594 (1967).

72. 94 S. Ct. 669 (1974).

73. Justice Douglas noted in dissent: "We know from the record and oral argument that Cairo, Illinois, is boiling with racial conflicts." *Id.* at 681. This was an understatement that does not reflect fully the scene of almost continuous violence over the past decade as it was portrayed in the pleadings and exhibits.

74. The Court implied that the plaintiffs could prevent future discrimination:

Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners. Important to this assessment is the absence of allegations that any relevant criminal statute of the State of Illinois is unconstitutional on its face or as applied or that plaintiffs have been or will be improperly charged with violating criminal law. If the statutes that might possibly be enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the allegedly illegal conduct charged. Apparently, the proposition is that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged

It is unclear why the Court would couch its *O'Shea* holding in terms of "case or controversy" and yet find a live dispute in *Steffel*. Both cases involved allegations of past conduct with an inference of anticipated similar future conduct; the only apparent difference is that *Steffel* included a challenge to the statute as applied while *O'Shea* did not. *Steffel* was unique in its recognition of a live controversy over whether a statute constitutionally can be applied to a plaintiff's future conduct, based upon an assertion that it will take the same form as past conduct and absent any challenge to the statute's facial validity. *Steffel* thus opened the door for those engaged in an active dispute with the state over the bounds of protected activity to litigate their claims of constitutional protection, at least with respect to past conduct, when they expect to engage in similar future conduct. The key problem thus becomes the extent to which such an adjudication will be res judicata with respect to future conduct, a question that turns initially on whether the challenge to the statute is facial or as applied.

The Court in *Steffel* did not address the question of the scope of res judicata effects as a whole but instead separated determination of the existence of a live controversy from consideration of the propriety of hearing a pre-enforcement challenge to the statute on its face. Regarding existence of a live controversy, the Court merely

with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.

Id. at 676.

This rationale almost completely rejects the idea that a criminal defendant is entitled to nondiscriminatory treatment even if guilty under a valid statute. Moreover, there were sufficient allegations that plaintiffs could expect to be arrested if they joined in protest activities arguably protected by the first amendment and that they would have difficulty presenting defenses if the defendants' discriminatory actions continued. One underlying reason for the Court's action appears to have been the presence of what it thought to be adequate remedies at law. The Court noted possible problems in later enforcement of equitable relief that would require intervention into state trials. 94 S. Ct. at 676. It also suggested statutory remedies such as substitution of judges, changes of venue, and direct and collateral review. *Id.* at 677-80. All of these seem manifestly inadequate, however. See Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. REV. 615 (1970). The Court also relied on the availability of disciplinary and criminal sanctions against the judges. 94 S. Ct. at 679. It seems odd, however, that these remedies, available to public officials, can be thought adequate to preclude equitable relief for private litigants.

Another explanation for the Court's holding might be expressed fear of a federal court's inability to police its orders. Citing only *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), (civil rights removal case), the Court stated: "The Court of Appeals disclaimed any intention of requiring the District Court to sit in constant day-to-day supervision of these judicial officers, but the 'periodic reporting' system it thought might be warranted would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." 94 S. Ct. at 679.

pointed to the threats made to Steffel and the prosecution of his friend. Citing only *Epperson v. Arkansas*,⁷⁵ a pre-enforcement facial challenge, it stated: "In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."⁷⁶

Regarding the nature of attack upon the statute, the state in *Steffel* urged: "[A]lthough it may be appropriate to issue a declaratory judgment when no state criminal proceeding is pending and the attack is upon the *facial validity* of a state criminal statute, such a step would be improper where, as here, the attack is merely upon the constitutionality of the statute as applied, since the State's interest in unencumbered enforcement of its laws outweighs the minimal federal interest in protecting the constitutional rights of only a single individual."⁷⁷ This argument was based on the Court's statements in *Cameron v. Johnson*⁷⁸ that the state should have the initial opportunity to decide guilt or innocence and that the mere possibility of the statute being applied erroneously does not threaten irreparable harm sufficiently to justify disruption of orderly state proceedings.⁷⁹ The *Steffel* Court noted, however, that this language referred to whether the state was proceeding in good faith in a pending state prosecution and stated that the issuance of declaratory relief when no proceeding was pending actually would be less disruptive in a challenge to the statute as applied than in a challenge to the face of the statute, since the latter might result in holding an entire state program unconstitutional.⁸⁰

The state more plausibly could have argued that a declaratory judgment that particular conduct is constitutionally protected might not be binding in a subsequent proceeding if the declaratory judgment action concerned only past incidents, not future conduct. A federal declaratory judgment can deal only with the facts litigated. To the extent that the declaratory judgment is prospective at all, it must be much like a letter ruling from the Internal Revenue Service regarding the taxability of a particular transaction; because the ruling is valid only "if the facts presented [therein] are true,"

75. 393 U.S. 97 (1968). See note 71 *supra*.

76. 94 S. Ct. at 1216.

77. *Id.* at 1223.

78. 390 U.S. 611 (1968). See notes 40-42 *supra* & accompanying text.

79. 390 U.S. at 621.

80. 94 S. Ct. at 1222-24.

it cannot foreclose taxation if there is any legally significant factual variation from the transaction as proposed to the Service.⁸¹

Similarly, a declaratory judgment that the trespass statute could not be applied to the type of handbilling in which Steffel had engaged previously might not be controlling if he were to be arrested later for handbilling at a different time in a different place. Such possible variances explain the Court's past reluctance to issue declaratory judgments in advance of conduct by the challenger.⁸² If a subsequent criminal prosecution differs in a constitutionally significant way from the facts presented in the declaratory judgment action, an injunction should not issue to effectuate the prior judgment;⁸³ such a case would concern *stare decisis* rather than *res judicata*, and the determination of the *stare decisis* effect of the declaratory judgment would be left initially to state, rather than federal, courts.⁸⁴ If the challenge to the statute was facial, of course, there would be no need later to determine whether the declaratory judgment would have *res judicata* effect on a criminal prosecution.

To illustrate these principles, assume that Steffel obtained the requested declaratory judgment, then returned to the same shopping center to distribute leaflets reflecting his views on prison reform. If, when again arrested under the state criminal trespass statute, he sought injunctive relief in federal court against his state prosecution, the injunction should be denied only if a constitutionally cognizable variance in the fact pattern could be shown. It should not be constitutionally relevant that the leaflets were on a different subject than in the prior litigation, but the state might be able to show that he was arrested only after an angry crowd threatened immediate harm to him and the store in which he was conducting his activities. The existence of a hostile crowd would be a constitutionally significant factual variance from the prior litigation. This distinction, of course, provides opportunities to evade federal declaratory judgments by alleging arguably frivolous factual disparities, but the hostile-crowd test, which saves this hypothetical police ac-

81. Rev. Proc. 72-3, § 13.02, 1972-1 CUM. BULL. 705.

82. See, e.g., *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961); *International Longshoremen's Local 37 v. Boyd*, 347 U.S. 222, 224 (1954). See generally C. WRIGHT, *FEDERAL COURTS* 449 (2d ed. 1970).

83. Justice Rehnquist's *Steffel* opinion would be correct in such a case. See notes 58-62 *supra* & accompanying text.

84. Apparently it has never been suggested that the *stare decisis* effect of a federal court's judgment in a separate dispute requires an injunction against state court proceedings to "protect or effectuate" the federal judgment. For a discussion of the *stare decisis* effects of federal rulings on subsequent state court actions, see notes 87-128 *infra* & accompanying text.

tion, is itself the result of the Supreme Court's own previously expressed attitudes regarding the arrest of an unpopular speaker.⁸⁵ In situations subject to a broader constitutional rule that makes fewer facts relevant, similar factual variations may not be constitutionally significant.

Steffel has created a whole new range of remedial problems for the federal courts, but most of these problems can be solved if it is remembered that a declaratory judgment is *res judicata* only of the situation presented to the court. Constitutionally significant changes in the fact situation should preclude bootstrapping issuance of federal injunctive relief, but variations without constitutional significance should leave a federal court free to issue injunctive relief to protect its own judgments.⁸⁶

Stare Decisis

The second question raised by Justice Rehnquist's footnote in *Steffel*⁸⁷ concerns the *stare decisis* effect of a federal declaratory judgment in a later state prosecution concerning facts sufficiently different to preclude application of *res judicata*. Some recent cases in which state courts have refused to follow constitutional interpretations by lower federal courts within their territorial jurisdictions raise what appears to be the converse of the doctrine of *Erie Railroad Co. v. Tompkins*.⁸⁸ In *Erie* the Supreme Court held that federal courts deciding issues of common law were bound constitutionally by the decisions of the highest court in the state in which they were sitting.⁸⁹ This rule was based upon the practical need for uniformity

85. Supreme Court precedents dealing with the hostile-crowd situation require a full factual development of the incident to enable the court to determine whether the police should have restrained the crowd or whether, in fact, it was the defendant's own "fighting words" that created the situation that resulted in his vulnerability to criminal prosecution. See *Gregory v. Chicago*, 394 U.S. 111 (1969); *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

86. It might be asked why this analysis does not apply when a state prosecution already is pending when federal declaratory relief is sought. See *Samuels v. Mackell*, 401 U.S. 66 (1971). In this situation the federal court must foresee whether it could effectuate its judgment by a subsequent injunction; if not, it would be issuing an advisory opinion. Although a declaratory judgment can be issued without showing irreparable harm, injunctive relief requires such a showing, nearly an impossibility in the normal criminal prosecution. Thus the court should avoid later difficulties by withholding declaratory relief initially.

87. See notes 63-64 *supra* & accompanying text.

88. 304 U.S. 64 (1938). Much of the discussion on the converse *Erie* doctrine is based on a paper submitted for course credit at the University of Georgia School of Law by Mr. J. Stanley Hawkins.

89. 304 U.S. at 79.

of decisions within each state⁹⁰ as well as the jurisprudential notion that law derives not only from legislative sources but also from judicial decisions.⁹¹

Although these aspects of the *Erie* rationale would appear to support according a similar precedential value to federal court pronouncements of constitutional law, the state courts have not always considered themselves constrained by federal court opinions. In 1964 for example, the Court of Appeals for the Fifth Circuit decided in *Hornsby v. Allen*⁹² that a local governmental agency acts in a quasi-judicial capacity when considering a liquor license application and that fundamental due process requirements therefore are applicable to such administrative proceedings.⁹³ The court declared ineffective the Georgia legislature's attempt to classify a liquor license by statute as a privilege subject to the unfettered discretion of the licensing authority.⁹⁴ In 1972, however, the Georgia Supreme Court enforced the legislature's privilege language in *Massell v. Leathers*,⁹⁵ reversing an injunction issued against a city that had refused to issue a liquor license. The court stated that since the permits constituted a privilege, the question of whether to issue a permit falls within the broad discretion of the municipality's governing authority.⁹⁶ After reciting the relevant Georgia law, the court summarily distinguished as inapposite United States Supreme Court cases involving administrative due process⁹⁷ and concluded

90. *Id.* at 74-75.

91. *Id.* at 79.

92. 326 F.2d 605 (5th Cir. 1964).

93. *Id.* at 608.

94. GA. CODE ANN. § 58-718 (1965) provides, in pertinent part:

The privilege of manufacturing, distributing and selling by wholesale or retail of beverages provided in this Chapter is purely a privilege and no business legalized by this Chapter shall be conducted in any county or incorporated municipality of this State without a permit from the governing authority of such county or municipality, which said authority is hereby given discretionary powers as to the granting or refusal of such permits.

The statute was not declared unconstitutional; rather, the court held that the privilege language was not sufficient to eliminate the requirement for due process and directed the trial court to evaluate the procedures of the licensing authority to determine whether due process was accorded to applicants. 326 F.2d at 609, 612.

95. 229 Ga. 503, 192 S.E.2d 379 (1972).

96. *Id.* at 503, 192 S.E.2d at 380, citing *Harbin v. Holcomb*, 181 Ga. 800, 184 S.E. 603 (1935).

97. 229 Ga. at 504, 192 S.E.2d at 380. The *Massell* court distinguished its case from *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (refusal of the state board of bar examiners to allow petitioner to take bar exam), *Sherbert v. Verner*, 374 U.S. 398 (1963) (South Carolina statute abridged appellant's rights to the free exercise of religion), and

tersely: "The case of *Hornsby v. Allen* is not controlling on this court."⁹⁸ In a vigorous dissent,⁹⁹ Justice Gunter noted the death of the "right-privilege" doctrine in *Goldberg v. Kelly*,¹⁰⁰ including the Supreme Court's approval of *Hornsby* in *Goldberg*.¹⁰¹ Even Justice Gunter, however, did not assert that *Hornsby* was controlling authority.

Another example of the reverse side of the *Erie* coin arose in New York, where, in *United States v. Paroutian*,¹⁰² the Court of Appeals for the Second Circuit held that, to be admissible, evidence found after an illegal search must have been discovered on the basis of something other than information obtained in the illegal search,¹⁰³ actual reliance upon a source of information, independent of that illegally obtained, had to be shown to "cure the taint."¹⁰⁴ A decade later, however, in *People v. Fitzpatrick*,¹⁰⁵ the Court of Appeals of New York, while acknowledging the existence of the contrary federal court holding,¹⁰⁶ specifically approved the "inevitable discovery" rule¹⁰⁷ condemned in *Paroutian*. Justices White and Douglas dissented from the United States Supreme Court denial of certiorari in *Fitzpatrick*,¹⁰⁸ with Justice White expressing concern that the *Paroutian-Fitzpatrick* conflict of authorities might pose a dilemma

Shapiro v. Thompson, 394 U.S. 618 (1969) (state one-year residency requirement for welfare benefits denied equal protection).

98. 229 Ga. at 504, 192 S.E.2d at 380.

99. *Id.*, 192 S.E.2d at 380.

100. 397 U.S. 254 (1970).

101. *Id.* at 262 n.9.

102. 299 F.2d 486 (2d Cir. 1962).

103. The court emphasized the need for actual reliance upon untainted evidence, stating: On the other hand, a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities.

Id. at 489.

104. "[T]he burden shifted to the government, which then was under an obligation to prove that its evidence had an independent origin." *Id.*

105. 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, cert. denied, 94 S. Ct. 554 (1973).

106. *Id.* at 506, 300 N.E.2d at 142, 346 N.Y.S.2d at 797. The court's citation indicates that it considered *Paroutian* sufficiently analogous to support a contrary result, but the case was not viewed as controlling authority.

107. For a general discussion of the "inevitable discovery" rule, see Maguire, *How to Unpoison the Fruit*, 55 J. CRIM. L.C. & P.S. 307, 313-17 (1964).

108. 94 S. Ct. 554 (1973).

for New York state law enforcement officials.¹⁰⁹

Realistically, however, there is no dilemma, only the potential for waste of judicial effort. If law enforcement officials follow the state rule, they will see inmates who were convicted on the basis of "inevitably discovered" evidence released as a result of habeas corpus petitions submitted to lower federal courts following the rule of *Paroutian*. By use of the federal habeas remedy, improperly convicted inmates will be able to avail themselves by collateral attack of a federal rule that might not be invoked on appeal of the state court conviction.¹¹⁰ In the area of criminal procedure at least, state courts may disregard lower federal court precedent only at the risk of having their decisions effectively overturned, a process that allows the federal courts to instruct the state courts in federal law.

A more difficult problem is presented to Georgia licensing authorities by the *Massell-Hornsby* conflict. Need they supply the *Hornsby* procedural requirements before denying a petition for a liquor license or revoking a license previously granted? At the moment, the answer depends pragmatically on whether the licensee or applicant brings suit in federal rather than state court, resulting in the anomaly of a federal rule of law that means different things to different persons in the same community, depending on the sagacity of their respective lawyers. Perhaps of further significance, the federal courts have taken the almost unanimous position that a state court adjudication would preclude a subsequent federal court action, even on constitutional grounds.¹¹¹

A few state courts do consider themselves bound on issues of federal law by the decisions of federal courts sitting in their jurisdiction. In *Handy v. Goodyear Tire & Rubber Co.*,¹¹² the Alabama Supreme Court stated, without any discussion, that it was bound by a prior construction of the National Industrial Recovery Act by the Court of Appeals for the Fifth Circuit.¹¹³ Likewise, in a case in which the issue was whether an employee was engaged in interstate commerce and therefore entitled to benefits under the Federal Employer's Liability Act, the Utah Supreme Court stated:

If, therefore, there is a decision from a federal court which is

109. *Id.* at 555.

110. See *Townsend v. Sain*, 373 U.S. 293 (1963).

111. See cases cited in *Moran v. Mitchell*, 354 F. Supp. 86, 88 (E.D. Va. 1973). *Contra*, *Ney v. California*, 439 F.2d 1285 (9th Cir. 1971).

112. 230 Ala. 211, 160 So. 530 (1935).

113. *Harper v. Southern Coal & Coke Co.*, 73 F.2d 792 (1934).

decisive of the question here, and especially if the federal decision is one that is more recent than the one cited from a state court, it is our duty to follow the federal court rather than the state court, since the question involved is one upon which the federal courts have the ultimate right to speak.¹¹⁴

In *Waller v. Eanes' Administrator*¹¹⁵ the Supreme Court of Appeals of Virginia was called upon to enforce a federal statute that had been declared unconstitutional by a federal district court sitting in Virginia. Because the federal court's decision had not been appealed, the state court viewed its holding as "settled law in this jurisdiction."¹¹⁶

The great majority of jurisdictions that have dealt with the question hold that they are not bound by lower federal court decisions.¹¹⁷ Despite the apparent lack of unanimity on the question, few of the courts following the majority rule have expressed doubt concerning its validity,¹¹⁸ though it has been argued that the conflict of authority between state and federal holdings which the majority rule may spawn at least is no more harmful than the existing differences among the federal district courts themselves.¹¹⁹ Only occasionally has the rule been rationalized by reference to the overall scheme of a federalized court system.¹²⁰

114. *Kuchenmeister v. Los Angeles & S.L.R.R.*, 52 Utah 116, —, 172 P. 725, 727 (1918).

115. 156 Va. 389, 157 S.E. 721 (1931).

116. *Id.* at 395, 157 S.E. at 723.

117. See Annot., 147 A.L.R. 857 (1947).

118. For example, in *Commonwealth v. Masskow*, 290 N.E.2d 154, 157 (Mass. 1972), the Supreme Judicial Court of Massachusetts disposed of the issue summarily by stating: "We are of course bound by decisions of the Supreme Court on questions of federal law, but we are not concluded by decisions of other Federal courts, although we give respectful consideration to such lower Federal court decisions as seem persuasive," citing two earlier Massachusetts decisions.

119. *E.g.*, *People v. Stansberry*, 47 Ill. 2d 541, 544, 268 N.E.2d 431, 433, cert. denied, 404 U.S. 873 (1971) ("[O]ftentimes there is a conflict between decisions of the various Federal courts on constitutional matters and until finally determined by the United States Supreme Court there can be no definitive ruling by which a State court can be bound.").

120. In *Kenna v. Calumet, H. & S.R.R.*, 206 Ill. App. 17 (1917), *aff'd*, 284 Ill. 301, 120 N.E. 259 (1918), the court reasoned:

If by this counsel mean (and apparently they do) that we are bound by the decisions not only of the United States Supreme Court, but also of the inferior federal tribunals, we are unable to sustain their contention. In providing a system of federal judicature, the Constitutional convention of 1787 first adopted a resolution which would have vested it exclusively in the Supreme Court of the United States and inferior federal tribunals. The provision in regard to inferior federal courts was, however, stricken out for the reason that it was thought that in interest of economy all original federal jurisdiction should be left to the State courts. While a compromise was effected which left the creation of inferior

There is little doubt that state tribunals are an "integral part of the federal system of judicature",¹²¹ that they are not bound by federal law decisions of the federal courts does not follow, however. The rule's real genesis stems from a more fundamental feature of all judicial systems. In complete court systems there are inferior and superior tribunals, with the latter having power to review the former's decisions in an appellate procedure. These appellate courts ultimately establish authoritative legal rules, maintaining the integrity of those rules by their power to correct erroneous rulings of inferior courts. Thus all states recognize the binding authority of the Supreme Court of the United States because of that court's appellate review power.¹²² Because lower federal courts cannot review directly state court litigation, there is little opportunity to enforce decisional rules on that level.¹²³ In criminal cases the federal habeas

federal tribunals to the discretion of Congress, that body, when organized, adopted, and has since adhered to, a policy of conferring jurisdiction on inferior federal courts in a limited portion of the cases falling within the Nation's judicial power, while leaving a large, if not the greater, portion to be determined by the tribunals created and maintained by the States—an arrangement greatly to the financial advantage of the federal government. It thus transpires that the State courts are, in fact and by intention, an integral part of the federal system of judicature, and exercise exclusive original jurisdiction in many, and, with one exception, concurrent jurisdiction in all the remaining federal civil causes, subject as to the latter to a power of removal in certain instances. We are of the opinion, therefore, that the conclusions reached in regard to federal questions by the federal tribunals inferior to the United States Supreme Court, while persuasive, are not binding upon us, but that in the consideration of such questions the State courts are bound only by the decisions of the United States Supreme Court.

Id. at 25-26.

121. *Id.* State courts must hear federal question cases despite any state policy that might be disrupted by granting relief. *Testa v. Katt*, 330 U.S. 386 (1947); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912); *Clafin v. Houseman*, 93 U.S. 130 (1876).

Alexander Hamilton wrote:

When in addition to this we consider the State Governments and the National Governments, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive, that the State Courts would have a concurrent jurisdiction, in all cases arising under the laws of the Union, where it was not expressly prohibited.

THE FEDERALIST No. 82, at 574 (H. Dawson ed. 1863).

122. This principle was established despite bitter opposition from the state courts. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

123. It might be possible for a defeated state court litigant to file a subsequent action in federal court and not be barred by *res judicata*. *See McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974). Congress presumably could grant appellate review power or allow collateral attack

corpus remedy provides review power to some extent, since the federal court may relitigate all legal issues to determine the constitutionality of a state conviction.¹²⁴ In this sense lower federal courts do exercise appellate review, although cast in the form of a collateral decision, indicating that, at least in criminal cases, state courts can be confined by the practical, if not theoretical, stare decisis effect of a federal declaratory judgment.¹²⁵

Beyond the power of review by habeas corpus proceedings, jurisprudential concepts militate in favor of federal court dominance within their territorial boundaries on matters of federal law. Similar state court authority was recognized in *Erie* largely because the state law is what the state courts say it is;¹²⁶ in an Austinian sense, they create law by decreeing the commands of the sovereign.¹²⁷ As a corollary, the federal courts are part of a sovereign federal government whose commands cannot be negated by individual state governments.¹²⁸ Requiring state courts to adhere to lower federal court pronouncements of federal law does not make the state court any more subservient than is the federal court on issues of state law under *Erie*. Each is merely authoritative on those matters within its sovereign realm. In the *Steffel* context, therefore, a declaratory judgment of a lower federal court could control subsequent state court application of the controverted statute, even if a factual difference or a change in parties precluded invoking res judicata concepts.

MONETARY RELIEF

As with its handling of the declaratory judgment, the Supreme Court in its 1973 term raised questions concerning the longstanding

of state court decisions on all federal question cases. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 166-67 (1970); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973). See also *Dent v. United States*, 8 Ariz. 413, 76 P. 455 (1904) (state court held itself bound by federal court of appeals' construction of statute giving the Secretary of the Interior rulemaking power regarding use of public forest reservations, where the statute gave the federal court appellate jurisdiction over the state court).

124. See *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Brown v. Allen*, 344 U.S. 443, 506 (1953) (Frankfurter, J., dissenting); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1113-18 (1970).

125. Stare decisis implies, however, that the state court should be given the initial opportunity to decide an issue free of a federal injunction. See note 84 *supra* & accompanying text.

126. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1933).

127. See J. AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. 1885).

128. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958); *Sterling v. Constantin*, 287 U.S. 378, 397 (1932).

problem of the availability of monetary relief against states or state officials in the exercise of their official duties. *Edelman v. Jordan*¹²⁹ was a private challenge to state procedures for awarding welfare payments in a manner conflicting with the requirements of the federal act under which the program was administered.¹³⁰ The plaintiffs sought both prospective relief, to require future compliance with federal law, and retrospective relief, to require payment of amounts wrongfully withheld since the effective date of the federal legislation. The court of appeals reversed the district court's denial of retroactive relief, holding that the payment of these past due amounts was a form of "equitable restitution" not barred by the eleventh amendment.¹³¹ The Supreme Court, however, viewed the award as one of legal damages against the state, rather than equitable relief against the officials, because it was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."¹³²

Although *Edelman* appears to be a regression in the expansion of constitutional remedies, a close reading reveals its consistency with previous developments in this difficult area of eleventh amendment restrictions upon suits to enforce federal claims against states and state officials. The breadth of some of the Court's language, however, at a time when the lower courts needed guidance from a tightly drawn opinion, is regrettable.

129. 94 S. Ct. 1347 (1974).

130. In a companion case, the Supreme Court indicated that the state procedures also might constitute a denial of equal protection. *Hagans v. Lavine*, 94 S. Ct. 1372 (1974). See *Edelman v. Jordan*, 94 S. Ct. 1347, 1351 n.1 (1974).

131. *Jordan v. Weaver*, 472 F.2d 985, 993 (7th Cir. 1973). U.S. CONST. amend. XI provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the language of the amendment refers only to suits by citizens of "another State" and of "any Foreign State," it consistently has been held applicable to suits against a state by its own citizens at least since *Hans v. Louisiana*, 134 U.S. 1 (1890).

132. 94 S. Ct. at 1358. Traditionally, a distinction has been drawn between damages, which are not available against a state, *Hans v. Louisiana*, 134 U.S. 1 (1890), and equitable relief, which may be available even if it depletes the state's treasury. See, e.g., *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952); *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). But see *In re Ayers*, 123 U.S. 443 (1887); *Louisiana v. Jumel*, 107 U.S. 711 (1883). See generally McCormack, *supra* note 123, at 277-85.

Even though the state was not named as a party in *Edelman*, the Court had little difficulty invoking the eleventh amendment bar, relying on the following language from *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, (1945): "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." 94 S. Ct. at 1356.

Modern eleventh amendment analysis proceeds most often from *Ex parte Young*,¹³³ in which the Supreme Court held the eleventh amendment inapplicable to suits against state officers who allegedly acted unconstitutionally, since the state could not authorize unconstitutional action and thus the officer could not benefit from any state immunity from suit.¹³⁴ It often has been said that the eleventh amendment created a form of sovereign immunity for state governments;¹³⁵ the terms of the amendment, however, only purport to withdraw a portion of the Supreme Court's diversity jurisdiction following *Chisholm v. Georgia*.¹³⁶ An expansive reading of the amendment is totally unwarranted by its history, which indicates that the amendment was not intended to reclaim the delegation of sovereignty extended to the federal government under the terms of the Constitution.¹³⁷ A narrower reading would provide no immunity to states in those areas in which they have, by ratification of the Constitution, accepted the legislative or judicial sovereignty of the United States. The failure of this rationale to win favor in the Supreme Court, however, coupled with recognition of equitable jurisdiction over state officers under the *Ex parte Young* rationale, has generated confusion.

Prospective and Retroactive Relief

Not only has the Court occasionally provided remedies against prospective state conduct, it also has granted some relief, including money damages, to individuals aggrieved by past state action.¹³⁸ A

133. 209 U.S. 123 (1908).

134. *Id.* at 149-61.

135. See e.g., *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Hans v. Louisiana*, 134 U.S. 1 (1890). Although occasional casual references have been made to sovereign immunity concepts of the eleventh amendment, most commentators, upon careful analysis, contend that the amendment should not be read so broadly. See C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); L. JAFFE, *supra* note 30, at 220-22; Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183 (1908).

136. 2 U.S. (2 Dall.) 419 (1793) (state held amenable to suit by citizens of another state).

137. See *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973). See also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821), where the court stated: "That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment . . . We must ascribe the amendment, then, to some other cause than the dignity of a state." Chief Justice Marshall then demonstrated that the "other cause" was the shielding of states from payment of their heavy debts. *Id.* at 407.

138. No clear examples of this form of relief exist, but in several cases similar to *Edelman* the Court has affirmed without discussion lower court awards of retroactive payments. See

functional analysis of Supreme Court cases demonstrates that the Court has attempted to distinguish between those remedies which would authorize wholesale invasion of the state treasury or substantially disrupt state revenue programs and those remedies which could provide only individualized relief from a particular state revenue action.¹³⁹ If the Court consistently provided relief for individualized grievances, then the eleventh amendment would be merely a warning to proceed carefully in structuring equitable remedies to avoid endangering an entire state revenue program.

Edelman perpetuates a distinction based on the pervasiveness of the remedy by authorizing only prospective relief. It is not clear, however, why prospective relief that invades a state treasury is permissible under the eleventh amendment while similar retroactive relief is not. If the eleventh amendment were a complete jurisdictional bar, then prospective relief also should not be available since jurisdictional questions must be determined before a remedy can be framed.¹⁴⁰ But if the eleventh amendment stands only as a principle of limited immunity, then its impact can be assessed in particular cases under traditional concepts of appropriate relief.

The eleventh amendment has not been viewed as a true jurisdictional bar,¹⁴¹ despite its reference to "judicial power"; thus an avenue deliberately may have been left open for the recovery of monetary relief when "equitable jurisdiction" is appropriate.¹⁴² The Court

94 S. Ct. at 1359 & n.13. Some damage awards against state officials have been authorized where indemnification by the state was likely. See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Lane v. Wilson*, 307 U.S. 268 (1939). With the added factors of a suit by a federal entity and a separate fund in the state treasury, the Court ordered monetary relief in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

139. See L. JAFFE, *supra* note 30, at 221.

140. See *Bell v. Hood*, 327 U.S. 678 (1946). Of course, the term "equitable jurisdiction" often is used loosely to describe the proper circumstances under which equitable relief may be granted, but this question is not truly one of jurisdiction, which involves the power of the court to grant relief.

141. The Court in *Edelman* did reject a contention that the state was foreclosed from raising an eleventh amendment argument by its failure to raise it in the trial court, saying that the "defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." 94 S. Ct. at 1363.

142. The *Edelman* Court noted:

The Court of Appeals, in upholding the award in this case, held that it was permissible because it was in the form of "equitable restitution" instead of damages, and therefore capable of being tailored in such a way as to minimize disruptions of the state program of categorical assistance. But we must judge the award actually made in this case, and not one which might have been differently tailored in a different case, and we must judge it in the context of the important constitutional principle embodied in the eleventh amendment.

Id. at 1357.

emphasized that retroactive and prospective relief each impact differently upon the state treasury, noting particularly the substantial effect of retroactive relief upon the finite amount of state funds available to operate a welfare program.¹⁴³ Moreover, the passage of time would make the payment of previously unpaid welfare benefits less valuable to the recipient, while accumulation of retroactive payments would become increasingly burdensome to the state.¹⁴⁴ The considerations of the *Edelman* Court were phrased in the language of equity, balancing state concerns against the individual's interests in a particular form of relief. This balancing of the equities by the Court implicitly rejects a jurisdictional analysis of the eleventh amendment, intentionally holding open the possibility of relief in a more appropriate case. The "important constitutional principle embodied in the eleventh amendment"¹⁴⁵ is in fact careful application of ancient equitable doctrines.¹⁴⁶

The Court phrased its test for determining when relief is appropriate in terms that would foreclose most awards of retroactive payments. An award of retroactive welfare payments resembled an award of damages against the state because it was "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."¹⁴⁷ The Court acknowledged that it repeatedly had authorized prospective equitable relief necessitating payment of money from the state treasury, but distinguished those cases because of their "ancillary effect on the state treasury" as a "necessary result of compliance with decrees which

143. *Id.* at 1357 n.11.

144. *Id.* The *Edelman* Court here quoted from *Rothstein v. Wyman*, 467 F.2d 226, 235 (2d Cir. 1972):

The second federal policy which might arguably be furthered by retroactive payments is the fundamental goal of congressional welfare legislation—the satisfaction of the ascertained needs of impoverished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.

145. See note 142 *supra*.

146. The court of appeals had stated that a court "[i]n determining whether to order the retroactive payment of benefits [is] exercising [its] equity powers and hence must engage in a balancing process." *Jordan v. Weaver*, 472 F.2d 985, 993 n.14 (7th Cir. 1973). Although the state did not raise an argument based on equitable principles, apparently only attempting to establish a jurisdictional bar, the court of appeals briefly scanned the equities and noted the state's awareness that the payments were being withheld in contravention of the federal requirements. *Id.*

147. 94 S. Ct. at 1358.

by their terms were prospective in nature.”¹⁴⁸ Much emphasis was placed upon whether the breach of obligation by state officials occurred before or after a court decree,¹⁴⁹ implying that only a court could place an enforceable legal obligation upon a state official to conform to federal law. The distinction between a breach of judicially imposed duties and a breach of statutory duties is unclear, however; a statutory duty is as much a decree of the sovereign federal government as is a court-imposed duty. The only difference between the two might be the greater clarity with which the judicially imposed obligation is stated, but this distinction merely recognizes the relevance in an equity proceeding of the defendant’s knowledge that he is violating a federal duty, whether statutory or judicial. Such knowledge should be only one factor to be balanced in a purely equitable approach.

The Waiver Rationale

One disturbing aspect of *Edelman* is that even the dissenters, except Justice Brennan, thought it necessary to find a waiver by the state of its eleventh amendment immunity. This waiver rationale¹⁵⁰ has gained popularity steadily in the past decade in cases dealing with enforcement of federal statutory duties against state officials. In *Edelman* the Court admitted that a waiver could be found by state participation in a federal program, but only “‘by the most express language or by such overwhelming implications from the text [of the federal statute]’”¹⁵¹ The waiver theory originated in *Parden v. Terminal Railway*¹⁵² when an injured employee of a state-owned railroad recovered benefits provided by the Federal Employer’s Liability Act. The eleventh amendment was held inapplicable to areas that came under congressional control, since the states had delegated those aspects of sovereignty to the federal government; because operation of a railroad in interstate commerce fell under Congress’ commerce power, the state could not claim sover-

148. *Id.*

149. *Id.*

150. The waiver theory indicates that eleventh amendment immunity is not a jurisdictional bar, since subject matter jurisdiction of the federal courts cannot be created by waiver or consent. *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379 (1884); *People’s Bank v. Calhoun*, 102 U.S. 256, 260 (1880); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804). *But see* note 141 *supra*. Analogizing to sovereign immunity, however, the eleventh amendment would leave a state free to consent to suits of a certain kind.

151. 94 S. Ct. at 1361, *quoting* *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

152. 377 U.S. 184 (1964).

eign immunity.¹⁵³ Unfortunately, the Court also ruled that, by its operation of a railroad within the Act's interstate commerce coverage, the state had waived its right to rely upon sovereign immunity.¹⁵⁴ The addition of this waiver rationale has caused difficulties ever since.

The Court reasoned in *Parden* that Congress had "... conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court, as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit."¹⁵⁵ Reliance on a governmental-proprietary distinction bolstered this waiver theory:

[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. . . . States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation.¹⁵⁶

This reasoning indicates that a state may assert its immunity if engaged in activities that are "uniquely governmental." Modern governmental activities, however, are increasingly difficult to distinguish from private activities. For example, were the welfare payments in *Edelman* more closely related to private charitable activities or to traditional governmental benefits? Is it "governmental" to hire employees or is it instead something not exclusively within the realm of state activity since private employers act similarly? Does characterization of employment as "uniquely governmental" depend upon the type of activity in which the employees are engaged with the result that a state hospital employee might work under a waiver of sovereign immunity while a state highway worker would not? By tracing the Justices' individual views, a strong tendency to frame the test in terms of a governmental-proprietary distinction can be found. The majority in *Parden* consisted of Justice Brennan and four others no longer on the Court.¹⁵⁷ The dissenters, Justices White, Douglas, Harlan, and Stewart, three of whom remain on the

153. *Id.* at 192.

154. *Id.* at 192-97.

155. *Id.* at 192.

156. *Id.* at 196-97.

157. Justices Warren, Black, Clark, and Goldberg joined Justice Brennan's opinion for the Court.

Court, have found new allies in Justices Marshall, Rehnquist, Blackmun, and Burger. This new-found support appeared in both *Edelman* and a 1973 case, *Employees v. Department of Public Health and Welfare*.¹⁵⁸

In *Employees*, Justice Douglas found that Congress did not intend to sanction private suits against state employers for recovery of backpay when it amended the Fair Labor Standards Act to extend minimum-wage coverage to state agencies.¹⁵⁹ Over Douglas' dissent, the Court previously had held in a declaratory judgment that Congress could regulate the wages and hours of state employees in hospitals and schools, although foreseeing serious questions about the availability of particular forms of relief for state violations of these regulations.¹⁶⁰ In *Employees*, the Court held that, by not mentioning specifically the availability of state employees' suits, Congress did not intend to require a waiver of sovereign immunity as a condition of continued operation of schools and hospitals under the terms of the Act.¹⁶¹ This strict requirement of an unequivocal waiver evolved from the ruling in *Parden* that the state had waived its sovereign immunity by operating in an area in which Congress had conditioned the right.¹⁶² Following this reasoning, however, leads to the assertion that, if Congress cannot withhold the right of a state to conduct an activity, then it should not be able to impose conditions upon the conduct of the activity.¹⁶³ Thus, regardless of Congressional intent, no waiver would be found in the employment of people to perform essential governmental services. Since the waiver rationale implies that Congress cannot regulate what it cannot prohibit, the Court's subsequent insistence in *Edelman* upon a clear waiver of immunity presages difficulty for future attempts by private parties to assert the full force of federal regulatory measures against state governments.

For example, after the *Employees* decision, Congress amended

158. 411 U.S. 279 (1973).

159. *Id.* at 285. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831, amending 29 U.S.C. § 203(d) (1970).

160. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

161. 411 U.S. at 284.

162. *Id.* at 282-83.

163. A substantial body of commentary argues that the receipt of a benefit cannot be conditioned upon forbearance of an individual's constitutional rights. See, e.g., Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). But a strategic waiver of constitutional rights may be made if knowing and voluntary, and the Court seems to require such a waiver of state sovereign immunity.

section 16 of the Fair Labor Standards Act specifically to permit private suits against public employers for back pay wrongfully withheld in violation of the minimum-wage or maximum-hours provisions.¹⁶⁴ It is extremely doubtful that this provision can survive intact; most members of the present Court seem firmly committed to the *Parden* waiver rationale, with three of them, including Justice Douglas,¹⁶⁵ having applied it in dissent in *Edelman*.¹⁶⁶ Regarding regulation of employment, two extreme theories of state-federal relations are represented: Justice Brennan's view that the states have waived all sovereignty in the field of interstate commerce and Justice Douglas' view that the tenth amendment¹⁶⁷ immunizes all state actions from federal regulations. Except for these two Justices, the Court seems to be compromising by looking for a waiver in each particular activity subject to congressional regulation, indicating a return to a governmental-proprietary distinction to "draw the constitutional line between the state as government and the state as trader."¹⁶⁸

Suits by the Federal Government

Another issue suggested by *Edelman* is whether a suit by the United States might be precluded by state immunity. The Court repeatedly has asserted that the eleventh amendment is no jurisdictional bar to suits by the United States against a state government.¹⁶⁹ Yet even in upholding regulation of state activities by the Fair Labor Standards Act, the Court expressed some doubt regard-

164. Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(1), 88 Stat. 55, amending 29 U.S.C. § 203(d) (1970).

165. In *Edelman* Justice Douglas relied on the waiver rationale of *Parden* without mentioning his dissent in that case. Apparently, in *Parden* he was concerned with state immunity from regulation, not litigation, later developing his position on regulation, premised upon the tenth amendment, in *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (dissenting opinion). Presumably, this distinction also explains Justice Douglas' opinion in *Employees*. See notes 159-61 *supra* & accompanying text.

166. Justices Marshall and Blackmun found a waiver bolstered by the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), which they read to provide generally for implied remedies in federal statutes. 94 S. Ct. at 1369.

167. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

168. *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting), quoting *New York v. United States*, 326 U.S. 572, 579 (1946) (Frankfurter, J.).

169. See, e.g., *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Texas*, 143 U.S. 621, 641 (1892). The Court in *Edelman* endorsed the proposition that the eleventh amendment is not now interpreted to bar suits against a state by the United States. 94 S. Ct. at 1359 (dictum).

ing the availability of adequate enforcement remedies,¹⁷⁰ doubt that could be extended to question whether the United States can sue to obtain backpay for employees damaged by violations of the Act. It is already accepted that a state cannot act as *parens patriae* for its citizens in suits against the United States¹⁷¹ or against commercial entities under federal law;¹⁷² although the United States may act as *parens patriae* for its citizens against private employers, it might not be accorded that position against state governments in economic affairs. Although the Court has indicated that the right of the federal government to recover against a state government under a federal statute exists to the full extent of the power of Congress to enact the statute,¹⁷³ the prior cases of this type have involved either state commercial activities beyond the scope of traditional governmental action¹⁷⁴ or protection of some distinctly federal interest such as that in interstate disputes,¹⁷⁵ governmental taxing power,¹⁷⁶ or protection of federal proprietary interests.¹⁷⁷

When the federal government has a proprietary interest, the Court has been conscious of the correlative interest of the state, indicating an unarticulated reliance on equitable principles. For example, in *United States v. North Carolina*,¹⁷⁸ the federal government attempted to recover interest on state bonds from the date of maturity to the date of redemption. The Court dealt strictly with state law by holding that the post-maturity interest would not be available, but indicated that something like sovereign immunity influenced its holding, stating that interest "is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers."¹⁷⁹ In light of *Edelman*, this language implies that consent to suit will be just as necessary when the federal government is the plaintiff as when an employee is the plaintiff.

170. *Maryland v. Wirtz*, 392 U.S. 183, 200 (1968).

171. *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

172. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

173. *United States v. California*, 297 U.S. 175, 183-84 (1936).

174. See, e.g., *United States v. California*, 297 U.S. 175 (1936) (application of Safety Appliance Acts, 45 U.S.C. §§ 2,6 (1970), to state railroad).

175. See, e.g., *Sanitary Dist. v. United States*, 266 U.S. 405 (1925); *United States v. Texas*, 143 U.S. 621 (1892).

176. See, e.g., *Department of Employment v. United States*, 385 U.S. 355 (1966); *New York v. United States*, 326 U.S. 572 (1946).

177. See, e.g., *United States v. North Carolina*, 136 U.S. 211 (1890).

178. *Id.*

179. *Id.* at 216.

Some decisions in the area of intergovernmental immunities have recognized a distinction between regulation and taxation. Federal regulation of state activities has been upheld more easily as nondiscriminatory than has taxation, which often raises the specter of destroying one government through taxation by another.¹⁸⁰ Although suits by the Secretary of Labor to recover backpay for employees arguably are merely a means to obtain relief that could not be obtained by the employees themselves, the remedy is as essential in the regulatory program of the federal government as are suits to enforce future compliance with federal law. Hopefully, the eleventh amendment and sovereign immunity will continue to be viewed not to bar federal suits to obtain relief for past wrongs. The only limitation upon these suits should be through traditional principles of equitable relief, permitting the state in an appropriate case to plead that the equities weigh in its favor rather than in favor of the federal government.

Distinguishing Legal from Equitable Relief

While reaffirming the need to distinguish between equitable and legal relief in *Edelman* during its 1973 term, the Court also provided some guidance for characterizing particular forms of relief in *Curtis v. Loether*.¹⁸¹ In *Curtis* the Court held that a defendant in a suit for damages flowing from racial discrimination under the fair housing provisions of the Civil Rights Act of 1968¹⁸² is entitled to a jury trial. For the purposes of determining the legal or equitable nature of an issue with regard to the seventh amendment,¹⁸³ the court cautioned: "[W]e need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief."¹⁸⁴ Rather than a mechanical test depending on the presence of a request for monetary damages, therefore, the Court relied upon historical analogy to

180. See *United States v. California*, 297 U.S. 175, 184-85 (1936):

The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce.

181. 94 S. Ct. 1005 (1974).

182. 42 U.S.C. § 3612 (1970).

183. U.S. CONST. amend. VII provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"

184. 94 S. Ct. at 1009.

equate racially discriminatory housing with dignitary torts traditionally tried with the help of a jury.¹⁸⁵ It characterized the statutory duty of nondiscrimination as a "new legal duty," authorizing compensation to a plaintiff for injury resulting from the defendant's wrongful breach.¹⁸⁶ By its own resort to historical analogy, the Court acknowledged the usefulness of such a method to indicate the legal or equitable nature of a particular claim.¹⁸⁷

One other tool the Court found to be "instructive"¹⁸⁸ was a comparison of the housing discrimination claim in *Curtis* to lower court decisions that had found jury trial to be unnecessary in the determination of liability for reinstatement and backpay under Title VII of the Civil Rights Act of 1964.¹⁸⁹ These cases had theorized that backpay may be awarded through the court's "clean-up" powers following equitable relief of reinstatement,¹⁹⁰ since it was a form of restitution "requiring the defendant to disgorge funds wrongfully withheld from the plaintiff."¹⁹¹ Of course, this description easily could have been applied to the welfare benefits wrongfully withheld in *Edelman*.¹⁹² Historically, however, restitution has encompassed only the return of money wrongfully taken by the defendant from the plaintiff. Possibly, the state would have a stronger equitable defense against retroactive payment of welfare benefits than backpay awards because of the greater impact that retroactive welfare payments would have upon the state treasury and the arguably greater claim of a present or wrongfully discharged employee to backpay.

It is often dangerous to borrow a concept from one area of the law and apply it in another, such as application of the equitable characterization of backpay awards for seventh amendment purposes to the question of equitable relief against a state government under the eleventh amendment. The analysis in *Curtis*, however, is noteworthy for its reliance upon historical analogies to determine whether a form of relief under statutory provisions is "legal" or "equitable."

185. *Id.*

186. *Id.* Similar language was used in *Edelman*, see note 132 *supra* & accompanying text.

187. The Court also recognized that insistence upon a jury trial could dismember some statutory schemes, such as those in bankruptcy and administrative proceedings. 94 S. Ct. at 1008-09.

188. *Id.* at 1009.

189. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).

190. See *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970).

191. 94 S. Ct. at 1010.

192. The court of appeals had characterized the relief sought as "restitution." See note 131 *supra* & accompanying text.

Reliance upon history could be extremely helpful to an assessment of the propriety of relief in many contexts, since the English common law allowed many forms of equitable relief to control governmental action even when they impinged upon the treasury of the Crown.¹⁹³

CONCLUSION

In its October 1973 term, the Supreme Court considered the availability of two remedies that have proved troublesome for the federal courts: the declaratory judgment affecting state criminal prosecutions, and the award of monetary damages against a state or state official. An understanding of each remedy requires careful distinction between legal and equitable doctrines. *Curtis v. Loether* illustrated the importance of historical analysis when such distinctions are drawn, especially in actions against states or state officials, such as in *Edelman v. Jordan*. In this context, the meticulous application of equitable principles demonstrates that the eleventh amendment should operate as something other than an absolute immunity against suit for states. Only when the impairment of the state's treasury would outweigh the equities of the deprived plaintiff's claim should the eleventh amendment bar the action; a similar analysis lends credibility to the retroactive-prospective distinction used in *Edelman*.

Appreciation of the difference between the doctrines of abstention and equitable non-intervention was furthered by *Steffel v. Thompson*, setting forth more clearly the proper grounds for declaratory and equitable relief to prevent infringement of federal constitutional rights by state criminal sanctions. Although concurring opinions in *Steffel* have raised questions regarding the effects of a declaratory judgment once granted, these questions can be answered by applying concepts of *res judicata* and *stare decisis*. Careful adherence to principles of *res judicata* will permit subsequent enforcement of a declaratory judgment in cases of identical disputes, while *stare decisis* effects can be given to the federal judgment in other situations. Proper respect thus can be maintained for the judgments of lower federal courts and the anomaly of differing rules of federal law within the same jurisdiction can be eliminated.

193. L. JAFFE, *supra* note 30, at 211.