August 10, 1973 JBO/gg

MEMORANDUM TO JUSTICE POWELL

Subject: Younger v. Harris Issues Presented in Cases Calendared for OT 1973

Your memo describing "Areas for Special Study" over the summer se forth as Topic 3 "The Scope of Younger v. Harris." You have included Steffel v. Thompson, 72-5581, and Allee v. Medrano, 72-1125, within that topic, since both cases raise Younger v. Harris issues. However, I believe the issues presented by those cases to be sufficiently distinct to warrant separate treatment. In brief, Steffel raises (it has been assumed a question whether the Younger v. Harris "bad faith/harrassment" test (explained more fully below) applies to the facts presented therein -- absence of a pending state prosecution. Allee, on the other hand, presents no question about the applicability of the Younger test since state prosecutions were present. Rather, Allee may require the Court to give further definition to the bad faith/harrassment test announced in Younger.

Since the issues differ substantially, this memo will address primarily the Steffel case. A separate short bench memo will be prepared for the Allee case. However, the somewhat lengthy background material presented herein will have relevance to Allee as well, and you may want to glance at this memo once again as you prepare for Allee.

The historical sketch presented below is oversimplified, undoubtedly to a fault. Consider it as the first stride in an effort to get up to running speed in this area; don't rely on it as definitive.

Following a brief glimpse at some of the relevant history, this memo will review quickly the Dombrowski development, its immediate aftermath, the Younger "correction," and a few post-Younger CA and USSC opinions, with a brief section on whether you have "tipped your hand" in this area in anything you have published to date. The memo then offers alternative analyses of the issue the Conference apparently believed to be presented by Steffel.

I think I understand why the Conference voted to grant in Steffel. The issue that Petitioner asserts to be presented by the case is the next logical matter to deal with in the continuing progression of Dombrowski/Younger developments. That is, should the bad faith/harrassment test, which clearly applies to cases where state prosecutions are pending prior to the outset of federal proceedings, be extended to cases where state prosecutions are threatened but not actually pending when federal relief is sought? The issue was explicitly reserved in Younger and associated cases. However, Steffel has a flaw as a vehicle to present this issue that leaves me with the strong suspicion that a dismissal of cert as improvidently granted would not be an inappropriate disposition. Mr. Steffel desires to engage in conduct -- distribution of antiwar literature on a privately-owned sidewalk at the entrance to a privately-owned shopping center -- that Lloyd Corp, Ltd. v. Tanner, 407 U.S. 551 (1972)

reveals to be subject to prohibition without infringement of the First Amendment. Thus, no matter what the controlling standard for federal court intervention, very likely no basis for intervention exists. And, accordingly, this memo closes with a short discussion of why I might dismiss as improvidently granted.

I. Some Skeletal History

Dombrowski and Younger have roots reaching back to the outset of the federal judicial system. In addition, they typify the "two steps forward, one step back" manner in which federal jurisdiction has continued to expand throughout the history of the country. To put these cases in some thing of a context, keep in mind several antecedents to the present jurisdiction of federal courts over suits by private litigants to enjoin state activity on federal constitutional grounds. *

A. Chisholm v. Georgia and the Eleventh Amendment.

But for the powers they granted to the federal government, the states retained the general sovereignty inherited from the Crown. This was of great practical importance at the outset of the republic, for at least one reason -- the exercise of sovereign immunity to shut off suits

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* The snippets of history presented here are covered in more coherent form and detail in many sources. I urge you to read J. Brennan's separate opinion in Perez v. Ledesma, 401 U.S. 82, 93 (1971), as you will need to become familiar with that opinion in any event. See particularly, pp. 104-130. You may also want to see Maraist, "Federal Intervention in State Criminal Proceedings: Dombrowski, Younger and Beyond," 50 Texas L. Rev. 1324 (1972).

against the states for defaulting on their public financing bond issues. The revolutionary war period and the immediately ensuing years were tough ones financially for the states, and many state bonds were defaulted. Via sovereign immunity, the States could prevent their own citizens from bringing suits on such bonds. (As there was at this time no federal question jurisdiction, there were no federal trial courts open to hear such suits by citizens against their own states).

The diversity clause of Article III of the Constitution, however, could be read literally to allow out of state citizens to bring such suits. (This Constitutional grant of jurisdiction was implemented in the first federal judiciary act). No one expected this, in light of the historical stature of the doctrine of sovereign immunity. But the Court in Chisholm v. Georgia, 2 Dall. 419 (1793) shocked state governments by reading the diversity jurisdiction literally to allow such lawsuits.

The immediate result, given the supposed financial threat to the states, was the Eleventh Amendment. Read literally, that Amendment repeals that part of Article III allowing an out-of-state citizen to sue a state, directly overruling Chisholm v. Georgia. However, the Amendment has never been read literally. Rather, it has been taken as the promulgation of the doctrine of sovereign immunity on behalf of the state governments. The distinction makes a critical difference, for the doctrine of sovereign

immunity may be waived or evaded by judicially-created fictions -- whereas an outright repeal of a portion of Article III could in theory not be circumnavigated.

B. The Post Civil War "Revolution" in Federal Jurisdiction.

"During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws . . . . [The exception to this during the first century was USSC review of the state courts.] But that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers." Zwickler v. Koota, 389 U.S. 241, 245-46 (Brennan, J., for 8 Justices; Harlan, J., concurring). The "enormously increased powers" referred to by Justice Brennan included the federal question jurisdiction (1875) and the predecessor of today's civil rights federal jurisdiction statute, 28 U.S.C. § 1343 (originally the Civil Rights Act of 1871).* These were enacted roughly simultaneously with the adoption of the Fourteenth Amendment.

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* See, e.g., J. Stewart's discussion of the background of this statute in Mitchum v. Foster, 407 U.S. 225 (1972).

For approximately 100 years prior to the 1870s, the state courts served as the essentially exclusive forums for trial of cases involving federal rights, with review by this Court. Although the Constitution clearly allowed the creation of federal question jurisdiction (See, e.g., C.J. Marshall's opinion in Osborn v. Bank of the U.S.), Congress chose not to implement this constitutional grant until the post Civil War period. When Congress chose to take this step, via the general federal question statute (today 28 U.S.C. § 1331) and the Civil Rights Acts, the federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Zwickler, supra, 389 U.S. at 247. "In this expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because the state courts also have the solemn responsibility, equally with the federal courts [to protect federal Constitutional rights]." Id., at 248.

To oversimplify, the federal question and civil rights jurisdictional statutes represented an effort by Congress to insure the vindication of federal rights, primarily by guaranteeing the availability of a federal fact-finding forum that would be hospitable to the preservation of federal claims. Congress reacted to what it viewed as state court hostility to federal rights, expressed in fact finding and procedural hurdles that defeated the effectiveness of review by this Court. Thus, the federal

jurisdictional basis for today's Dombrowski/Younger situation came into being. All such cases today are either §1331 cases (general federal question) or § 1343(3) (federal civil rights).* In fact, almost all are the latter. See Mitchum v. Foster, supra.

C. Hans v. Louisiana and Sovereign Immunity Notions.

The lodging of original jurisdiction over federal question cases in the federal trial courts did not, however, automatically mean that private litigants could start suing state governments or state officials in federal courts on federal constitutional grounds. Harking back to the Chisholm v. Georgia controversy, the Court in 1890 decided that the Eleventh Amendment, as a promulgation of the doctrine of sovereign immunity, applied with equal force to the federal question jurisdiction as it did to the diversity jurisdiction at issue in Chisholm. Hans v. Louisiana, 134 U.S. L (1890). Thus, the Court blocked an effort by an in-state citizen to launch a federal question lawsuit against a state for a defaulted bond issue.* Sovereign immunity blocked such citizen-initiated federal constitutional lawsuits. Obviously, this doctrine couldn't last, if, as a matter of practical politics, federal constitutional rights were to receive appropriate judicial review.

D. Ex Parte Young: Springboard for Today's Litigation of the Fourteenth Amendment

* The "federal question" in such a lawsuit was the Constitution's Contract Clause.

Ex Parte Young, 209 U.S. 123 (1908), has been described as the one of the most important cases decided by the Court in the first half of the 20th Century. By an obvious fiction, it allows private citizens to sue state officials in federal court on federal constitutional grounds -- thus it detours Hans and allows the Fourteenth Amendment lawsuits so common today. The fiction is that a state officer who acts unconstitutionally acts outside the scope of his official duties. Thus, a suit to enjoin him from misbehaving constitutes a suit against him personally, rather than a suit against the state.*

The fiction

Ex Parte Young involved a suit against a threatened state prosecution. It was brought by a plaintiff with an obvious need to engage in a continuous course of conduct that would violate state law. The plaintiff was a railroad challenging a state rate regulation structure (backed up by criminal sanctions) as confiscatorily too low under the Fourteenth Amendment. The state Attorney General made it clear that the rate structure would be

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* To reach the result it wanted -- allowance of federal injunctive lawsuits by private citizens against the states -- the Court could simply have held the Eleventh Amendment to be modified by the Fourteenth. Instead, it chose the above fiction, probably because Hans and related cases were then so new.

enforced, and the fines and punishment were severe. At a time when "substantive" due process, Fourteenth Amendment challenges to state regulatory schemes were in vogue, the Court held that the railroad could not be forced to violate state law before obtaining judicial review of the scope of its constitutional rights. The sanctions (or "chill" in today's terminology) were too great. Preliminary federal review had to be available. The Ex Parte Young opinion makes clear, however, that such federal review in federal trial courts must be avoided where state prosecutions are pending, absent extraordinary circumstances.

Ex Parte Young in essence implied a federal cause of action from the Fourteenth Amendment. Relief was to be injunctive. The case is the fountainhead for today's federal intervention, civil liberties, equitable lawsuits against state officials -- including state courts.

A number of factors blunted the initial impact of Ex Parte Young. Congressional reaction produced several limitations, including the three judge district court provision for suits vs. the states (to avoid the spectre of a single district judge bringing an entire state program to a halt) and certain statutes blocking suit altogether where state taxes and defined administrative matters are at issue. Furthermore, Ex Parte Young occurred at a time when the Court had not found the Bill of Rights to be incorporated

against the states through the due process clause of the Fourteenth Amendment. Another limitation was traditional federal deference for state criminal proceedings, on equitable and comity grounds. See part I.G., below. Finally, federal declaratory judgment procedures were not available for a substantial period of time after Young.

In time, this Court essentially completed the process of applying the Bill of Rights vs. the states via the Fourteenth Amendment. And, the civil rights movement -- as well as resort to the federal courts for protection of any federal right -- became a fact of life. With that kind of nurturing, the seeds sown by Young came full flower into what we have in Dombrowski and Younger today.

E. The Development of Federal Declaratory Judgments

In 1934, Congress empowered the federal courts to grant declaratory judgments. Justice Brennan has argued at length that the legislative history behind this grant of jurisdiction makes clear that it was meant to allow citizens to obtain a definition in federal court of the scope of their federal rights without having to undergo state criminal prosecution -- except where state prosecutions are already pending. Perez v. Ledesma, 401 U.S. 82, 93 (1971) (Concurring and dissenting opinion of Brennan, J.). Thus, Justice Brennan believes that declaratory judgments, particularly

because they are purportedly less intrusive than injunctions, represet a Congressional endorsement of Ex Parte Young lawsuits to define federal rights, where no state prosecution is pending. The Court has made clear that declaratory judgments are essentially indistinguishable from injunctions where state prosecutions are pending, Samuels v. Mackell, 401 U.S. 66 (1971), but has not addressed Justice Brennan's view in a case where prosecution was threatened but not pending.

F. Douglas v. City of Jeannette: Traditional Equity and Comity Limitations on Federal Interference with State Criminal Prosecutions.

Douglas v. City of Jeannette, 319 U.S. 157 (1943), typifies the deference the Court paid to the conduct of legitimate criminal prosecutions (i.e., those not brought in bad faith or to harass) in state courts prior to Dombrowski. In that case, a religious group sought a federal injunction against the threatened enforcement of a city licensing scheme directed at soliciation. Although the Court held the licensing scheme unconstitutional in a companion case, the Court nevertheless held that the religious group was not entitled to a federal injunction against the threatened enforcement of the licensing scheme. Equitable intervention required an inadequate remedy at law, and that could not be shown, since the religious group could raise the issue "at law" as a defense to any criminal prosecution. Furthermore, concepts of comity required denial of relief, since criminal prosecutions are close to the heart of state sovereignty. The burden of enduring a good faith

criminal prosecution was not enough to warrant federal intervention; the term "chilling effect" was not used.

Thus, in 1943 Ex Parte Young clearly did not mean that federal courts could intervene in threatened or pending state prosecutions as a matter of course to prevent the "chill" of First Amendment rights. If Douglas were indubitably the law today, Steffel would be an easy case. However, federal court concern for the susceptibility of First Amendment rights to suppression has grown as government has grown, as Dombrowski indicates. And, it is not at all clear that all of Dombrowski was eliminated by Younger.

II. Dombrowski to Date.

A. Dombrowski v. Pfister: The Heyday of "Chilling Effect."

The holding of Dombrowski v. Pfister, 380 U.S. 479 (1965), cannot be viewed as startling -- a USDC may enjoin the activities of state authorities, including searches and seizures, arrests and repeated prosecutions, where those activities are a bad faith attempt to harass a civil rights group out of existence. However, distinguished civil libertarian that he is, J. Brennan employed language in the Dombrowski opinion indicating that the traditional, Douglas v. City of Jeannette deferential standards did not have to be applied when a First Amendment attack was made against a state statute. If the rule were otherwise, "the

hazard of loss or substantial impairment of those precious [First Amendment] rights may be critical." J. Brennan argued, in essence, that First Amendment rights were special and were particularly susceptible to the "chilling effect" of threatened prosecutions. Where prosecutions were actually threatened and where the targets of such prosecutions raised vagueness and/or overbreadth First Amendment challenges to the state law (and perhaps as well where they challenged the law as applied), "this challenge, if not clearly frivolous, will establish the threat of irreparable injury required by traditional doctrines of equity." Thus, federal intervention was permissible in the First Amendment area despite the Douglas v. City of Jeannette line of cases.

Dombrowski brought deluge to the lower federal courts, according to some commentators. E.g., Maraist, "Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski," 48 Texas L. Rev. 535 (1970). That point may not be provable statistically, but it is true that hundreds of litigants and a few lower federal courts read Dombrowski at its maximum, producing an unwarranted "blatant, mechanistic intrusion into the sphere of state sovereignty . . . ." Maraist, supra, at 606. This occurred although the Court on a number of occasions post-Dombrowski, pre-Younger attempted to refine the Dombrowski principles.

One of the cases from this Court in the interim between Dombrowski and Younger merits brief comment, because Judge Tuttle declared it to be

controlling in his concurring opinion in Steffel. Cameron v. Johnson, 390 U.S. 611 (1968) (Brennan for 7; Fortas, Douglas dissent). In Cameron, civil rights group sought to picket a state courthouse. They were arrested and prosecuted under a state antipicketing law. They brought suit in federal court seeking injunctive and declaratory relief on the ground that the law was vague and overbroad. The Court found the law neither vague or overbroad. Furthermore, the Court refused to find the case an appropriate one for federal intervention, because no bad faith or harrassment had been made out and because the mere possibility of erroneous application of the state statute was not enough to establish the inadequacy of state court review. Surprisingly, the Court did not hang the decision on the existence of pending state prosecutions presenting an available forum for review.

Cameron is strong precedent for refusing federal intervention in Steffel. The activity at issue in both cases is essentially identical. In neither case can it be said that state officials acted in bad faith. However, reliance solely on Cameron would be unwise. One, although the Court did not emphasize the point in Cameron, there were pending state prosecutions therein. That alone might have been enough to decide that case, and that factor is not present in Steffel. Furthermore, five justices in Younger and related cases made a point of distinguishing cases where state prosecutions are not pending. Finally, it would be odd indeed to decide Steffel on the basis of Cameron, ignoring the monumental effort undertaken by the Court in the Younger cases to restructure this area.

B. The "February Sextet:" The Deflation of Dombrowski

Younger came down as part of a package of six cases. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971). Judge Goldberg of CA 5 coined the phrase "February Sextet" to refer to these cases, and the label has stuck. Despite their tremendous length, you will have to read these cases with some care.

With regard to the problem presented in Steffel, the February Sextet do at least the following significant things:

1. Justiciability requirement. The Younger cases quite correctly require a litigant to have a well-defined and clearly-threatened interest before federal intervention may even be considered. A person who has not had an on the scene run-in with the police or other state officials but who wants to have a federal court scan the state statutes for him in advance is out of court. The Court made this clear with regard to the intervenors in Younger and all the plaintiffs in Boyle v. Laundry. Mr. Steffel meets this test, given that he has twice been driven off the scene by threat of arrest.

2. Deflation of the Dombrowski language. With repeated use of a phrase he apparently created for the occasion, "Our Federalism," J. Black for the Court in Younger (the lead opinion of the 6) explicitly walked away from Justice Brennan's sweeping, civil libertarian language in

Dombrowski. In essence, J. Black expressed the view that the "chilling effect" on First Amendment rights emphasized by Justice Brennan in Dombrowski "should not by itself justify federal intervention." Rather, the correct standards were those announced in such cases as Douglas v. City of Jeannette -- deference to state criminal proceedings as a matter of equity and comity. Subjection to a single, good faith criminal prosecution was not enough to merit federal intervention. Where a state criminal proceeding is pending, the only grounds for federal intervention are a demonstration that the prosecution was brought in bad faith or as harassment, a demonstration that the state statute is flatly unconstitutional no matter how applied, or other extraordinary circumstances in which the necessary irreparable harm appears in the absence of the usual prerequisites of bad faith or harassment.

3. Reservation of the threatened prosecution case. Although the general tenor of J. Black's opinion in Younger (particularly the reference back to cases such as Douglas) would appear to mean that Steffel should be affirmed, the issue is left in doubt by the repeated reservations by numerous Justices in the February Sextet of the threatened prosecution case. In Younger itself, J. Black declared: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41. Justices Stewart and Harlan noted in a concurring opinion in Younger

that the Court did "not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from future state criminal prosecutions." 401 U.S. at 55. And, J. Brennan, joined by JJ. Douglas and Marshall in a concurring opinion in Perez v. Ledesma, repeatedly emphasized that the line was to be drawn between pending prosecution cases and threatened prosecution cases. 401 U.S. at 93 et seq.

It is this reservation of the threatened prosecution case that leaves open the possibility that something of Dombrowski survived the sextet. Obviously, if the Younger cases take the Court all the way back to Douglas v. City of Jeannette, Steffel is an easy case. But, there are a number of indications, in addition to the express reservation of the question in the Younger cases, that this is not true. One of these is J. Brennan's belief that declaratory judgment actions require special treatment, as expressed in his concurring opinion in Perez v. Ledesma. Others are CA and USSC opinions since Younger.

C. Threatened Prosecution Cases Since the Sextet.

The Court has made two tangential references to the threatened prosecution case since Younger, but it has not (obviously) issued a major opinion precisely on the point. In Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 509-10 (1972), J. Brennan for the Court noted that the Younger cases "were premised on considerations of equity practice and comity that

have little force in the absence of a pending state proceeding." In Doe v. Bolton, Jan. 23, 1973, J. Blackmun in his opinion for the Court held that the physician-appellants "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." Steffel cites these statements in his brief, * but they can hardly be viewed as definitive statements of the Court's position on the threatened prosecution issue. They are, rather, indications that, for various reasons, the Court chose not to face the issue head on in those opinions.

Steffel is right that the CA opinions on this issue since Younger have for the most part come out in his favor. The most well-known of these cases is probably Judge Coffin's opinion in Wulp v. Corcoran, 454 F. 2d 826 (1st Cir. 1971).

D. Relevant Pronouncements by J. Powell

Your slate is not totally clean in this area. There are two opinions to keep your eye on if you write anything in Steffel. First, note that the protestors in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), were in essentially the same position as Steffel -- driven off the scene by threat of arrest but not actually arrested. They brought a federal injunctive lawsuit which the Court took on the merits; you made no mention whatsoever

True - it was not raised.

* Steffel also cites Roe v. Wade, January 23, 1973, the other abortion case. However, there is essentially no language in that case that is helpful to him.

of any Younger v. Harris problems in your opinion for the Court. This means only that the issue must not have been briefed or argued in that case. Nevertheless, the case can be read as holding by implication that Steffel was entitled to a hearing on the merits in federal court. Paradoxically, Steffel does not press this argument.

Also keep in mind your dissenting opinion in Lake Carriers, supra. 406 U.S. at 513-17. There you noted that the existence of "an immediate choice between the possibility of criminal prosecution or the expenditure of substantial sums of money" that might prove unnecessary "presents a classic case for declaratory relief. . . ." Id at 514. Referring to this language, Steffel claims that he is in a precisely analogous "between the devil and the deep blue sea" position. He has a strong point; the cases are not easily distinguishable. In Lake Carriers the majority noted that it was not certain the state would prosecute. That seems to be certain in Steffel. But the distinction doesn't do you much good, since you emphasized the possibility of prosecution in your Lake Carriers dissent.

It could also be said in Lake Carriers that members of the Association were required by their trade to engage in a continuing course of conduct that would repeatedly violate the criminal statutes at issue. They couldn't afford to stop while they underwent the first criminal court test. Steffel, on the other hand, could "afford" to forego his activity pending outcome of his criminal trial. But, as J. Brennan would quickly point out, his exercise of First Amendment rights would have been foreclosed in the interim.

In short, if you hold for Steffel, your Lake Carriers opinion will be helpful. If you go the other way, be prepared to meet its citation against you.

III. An Analysis of the Issue for which Cert was Granted in Steffel

On the basis of the prior precedents, I believe the Court will split along two lines of analysis on the issue presented in Steffel (assuming that issue is reached -- see part IV, infra).

A. The Nationalist, Interventionist Position.

Those who take this line of analysis will argue that by virtue of 28 U.S.C. §§ 1331 (federal question), 1343(3) (civil rights), and particularly 2201-02 (declaratory judgment), the federal courts are presumed to be open to First Amendment claims like Steffel's unless some overriding policy requires them to refuse jurisdiction. A pending state prosecution that will provide a suitable forum for protection of the rights at issue is such an overriding factor, given the historical deference to state criminal proceedings. But, the presence of state declaratory judgment procedures in cases where no state criminal trial is pending (such as this case) will not be a basis for declining federal jurisdiction. A litigant's choice of forum must be respected.

This line comports with the literal meaning of the federal jurisdictional statutes. An historical argument can be made in support of it (See J. Brennan in Zwickler v. Koota, inter alia), but such an argument fails to explain

why the Court for so many years between the 1870s and Dombrowski adhered to the Douglas v. City of Jeannette position. Douglas was, you will remember, a threatened prosecution case.

This line also appears administratively simple. If a party files his federal suit before criminal proceedings are actually pending, he obtains federal review (assuming he has sufficient personal involvement to meet the justiciability standards laid down in Younger v. Harris and Boyle v. Laundry). On the other hand, if the state moves first, the federal court must stay out.

This supposed simplicity may be misleading, however. When does the state prosecution actually commence? Arrest? Indictment? Probably the line ought to be drawn at arrest, where there is no indication that the state will not move forward with the normal procedures of prosecution.

J. Harlan has criticized line drawing in this area on the basis of the pendency of prosecution as an incentive to unseemly races to the courthouse door. That criticism has a surface appeal, but it won't hold up if the line is drawn at arrest. Prior to arrest, no "race" is possible since no state proceedings will be possible. (However, prior to arrest a party seeking a federal definition of the scope of his constitutional rights will have a difficult time meeting the justiciability requirements of Younger and Boyle v. Laundry.). After arrest and assuming no bad faith, there

likewise would be no race, since the federal court would not act.

Some commentators critize the natiqnalist/interventionist position on the ground that line drawing between threatened and pending state prosecutions is not meaningful. If you know for a fact that the state will ultimately prosecute in good faith, what does it matter whether the indictment has not actually been handed down? There will be a state forum. E.g., Hart & Wechsler, The Federal Courts and the Federal System 1046-47 (2d ed. 1973). However, this criticism presumes that one can be certain that the state will prosecute. I doubt this in many cases, and it seems a risky barrier to the delineation of First Amendment rights.

B. The "States Rights" Approach

This approach is based on the Douglas v. Cameron line of cases, and those who endorse it will draw heavily upon J. Black's language in his opinion for the Court in Younger. This approach will require the federal courts to avoid intervention in any case in the absence of a demonstration of bad faith, harrassment, or a hopelessly unconstitutional state statute. Such an analysis would be based on traditional deference to state criminal proceedings and would emphasize the avoidance of friction in federal/state relationships. It would take the Court back completely to the pre-Dombrowski position, and it would plainly produce an affirmance in Steffel.

Those expousing the nationalist position will argue that the decision to risk a degree of federal/state friction was reached a century ago in the post Civil War broadening of federal jurisdiction. They may also be

expected to argue that the Younger question in threatened prosecution cases cannot be divorced from one's view of the appropriate scope of First Amendment rights. That is, subjection to a single, good faith criminal prosecution will create too much of a threat to First Amendment rights, which are particularly susceptible to "chill".

C. A Recommended Approach

By own view is a mixture of J. Brennan's concern for First Amendment rights * and J. Black's caution in interfering with state sovereignty in the enforcement of criminal law. I would not apply the Younger v. Harris standards to the threatened prosecution case. But I would make it fairly difficult to obtain federal intervention in such a case by applying the following rules.

(1) One, federal intervention would not be possible (in the absence of bad faith/harassment) after arrest by state authorities. I would not draw the line at indictment. Unless a party could demonstrate that arrest would not lead to meaningful review by a state court (because the state intended to arrest but not prosecute or because the decision of the state court would be ignored by state officials or because the state court was "hostile"), federal intervention would not be permissible.

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* For reasons too lengthy to present here, I think it plain that only First Amendment rights (as compared to, e.g., equal protection rights) merit special concern in the Dombrowski sense.

Obviously, demonstrating that meaningful state review was not possible would be exceedingly difficult (it would in particular be almost impossible to demonstrate state court hostility).

(2) Two, the justiciability requirement of Younger, and Boyle v. Landry should be read very strictly. That is, a party seeking intervention would have to eliminate any uncertainty as to whether he was going to engage in the allegedly protected activity. Actual, on-the-scene prohibition by state officials would be a prerequisite, and the party seeking review would have to be a principal actor in whatever expression was at issue. Perhaps more than one encounter would be required. An unequivocal intention by the state to ban the activity would have to appear. In short, the party seeking federal intervention would have to show a certainty of arrest or prohibition of the activity before intervention would be allowed. Note that this requirement read together with the arrest rule greatly narrows the category of potential federal plaintiffs. If they push their activity to the point of arrest, they are restricted to state court. If they fail to push their activity essentially to the point of arrest, they fail to establish justiciability.

(3) Third, I would not endorse any notions in Younger that there are some state statutes so clearly unconstitutional that their mere language creates a basis for federal intervention. No matter how offensive the statutory language at issue, I would still require a demonstration that the allegedly protected activity will take place and that the state will attempt enforcement

of the challenged statute. Certainly the states should have the latitude to ignore their own unconstitutional statutes without having the federal courts do their house cleaning.

IV. The Correct Disposition of Steffel.

My fourth rule in the above analysis is obvious -- the activity desired to be pursued must be clearly protected under the First Amendment before federal intervention can even be considered. I think Steffel fails this test, in light of Lloyd Corp, Ltd. v. Tanner, 407 U.S. 551 (1972). Steffel's handbilling had no relationship to the shopping center's operations. It took place on a privately-owned sidewalk, according to the respondent's brief (Petitioner's brief does not directly deny this). True, the sidewalk circled the outside of the center, but I see nothing in Lloyd Corp. making that determinative. Petitioner has not demonstrated that "adequate alternative avenues of communication" did not exist. In light of this, I might well dismiss cert in Steffel as improvidently granted.

JBO