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Appellate Review of Three-Judge District Courts (Thoms v. Heffernan)

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APPELLATE REVIEW OF THREE-JUDGE DISTRICT COURTS

Thoms v. Heffernan

The statutory scheme authorizing three-judge district courts[1] provides for direct Supreme Court review[2] of decisions granting or denying injunctions against the enforcement of state statutes. Despite the broad language of the statute, the Supreme Court has always taken a very narrow view of its jurisdiction over direct appeals.[3] Concern over the Court's rising caseload has led, in recent years, to an even more restrictive interpretation on the direct review statute.[4] *Thoms v. Heffernan*,[5] a recent Second Circuit decision, illustrates the conundrum created by this restrictive approach.

William Thoms brought a class action seeking to enjoin the en-

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1 28 U.S.C. § 2281 (1970) requires the convening of a three-judge district court when a party seeks to enjoin state officials from enforcing state statutes.

Congress enacted the three-judge court legislation in response to a rash of injunctions against state regulatory and legislative policies issued by single federal judges. *See* Goldstein v. Cox, 396 U.S. 471, 476 (1970); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1962); Note, *Federal Jurisdiction — Three-Judge Courts — The Recent Evolution in Jurisdiction and Appellate Review*, 61 MICH. L. REV. 1528, 1529 (1963) [hereinafter cited as *Federal Jurisdiction*]; Note, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 539 (1963).

In order to convene a three-judge court, the plaintiff must allege in his complaint a substantial claim of unconstitutionality. Flast v. Cohen, 392 U.S. 83, 91 n.4 (1968); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); *Ex parte* Poresky, 290 U.S. 30 (1933); Note, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 551 (1963).

2 28 U.S.C. § 1253 (1970) provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

Direct Supreme Court review of these decisions was provided to guard against unwarranted judicial interference with state legislation and to insure that state statutes would be reviewed expeditiously. *Federal Jurisdiction, supra* note 1, at 1529. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1962). Moreover, the appellate jurisdiction of the Supreme Court is exclusive since the courts of appeals have jurisdiction over final decisions of district courts only if no direct review is available. 28 U.S.C. § 1291 (1970).

3 *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941); *Ex parte* Collins, 277 U.S. 565, 567 (1928).

The Court has noted that the requirement for three-judge district courts is not ". . . a measure of broad social policy to be construed with great liberality, but technical in the strict sense of the term and to be applied as such." Mitchell v. Donovan, 398 U.S. 427, 431 (1970) (per curiam), *quoting* Phillips v. United States, 312 U.S. 246, 251 (1941).

4 *See* McCann v. Babbitz, 400 U.S. 1 (1970) (per curiam), *dismissing appeal from* 310 F. Supp. 293 (E.D. Wis.); Gunn v. University Comm. to End the War in Viet Nam, 399 U.S. 383 (1970); Mitchell v. Donovan, 398 U.S. 427 (1970); Rockefeller v. Catholic Medical Center, Inc., 397 U.S. 820 (1970) (per curiam), *vacating* 305 F. Supp. 1268 (E.D.N.Y. 1969).

5 473 F.2d 478 (2d Cir.), *petition for cert. filed*, 41 U.S.L.W. 3555 (U.S., Apr. 9, 1973) (No. 72-1359). The panel majority consisted of Judges Mansfield and Oakes. Judge Timbers dissented.

forcement of a Connecticut statute prohibiting the desecration of the American and state flags.[6] The allegation of a serious constitutional issue and the request for injunctive relief required the convening of a three-judge district court.[7] The three-judge court declared the statute unconstitutionally broad, but declined to issue the requested injunction.[8] The court found "no reason to believe defendants will continue to enforce § 53-255 upon notice of this decision; accordingly, we *forbear* to enter an injunction restraining them from enforcing it."[9]

The threshold question in *Thoms* was whether the court of appeals had jurisdiction over a decision of a three-judge district court wherein that court *forbore* from issuing the requested injunction. By adopting a narrow construction of the direct appeal statute the Second Circuit interpreted the district court's forbearance as a postponement of the decision and not a grant or denial of the injunction.[10] Accordingly, the court found that it had jurisdiction. Since the district court had issued a declaratory judgment holding the state statute unconstitutional and it was impossible to know whether an injunction might ever be issued,[11] the court stated that it was the proper appellate forum just "as if only a declaratory judgment and not an injunction were sought in the first instance."[12]

Judge Timbers disagreed with the majority's reasoning and, in his dissent, suggested that the forbearance was similar to a denial of the

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[6] Thoms had expressed a desire to wear a vest that was made from an authentic American flag as a protest of America's Indochina policies. Thoms v. Smith, 334 F. Supp. 1203, 1206 n.5 (D. Conn. 1971), *aff'd sub. nom.* Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973). However, 28 CONN. GEN. STAT. ANN. § 53-258a (Supp. 1972) prohibited the placement, for exhibition or display, of any inscription, symbol, or advertisement on the flags. It also provided that anyone who "publicly misuses, mutilates, tramples upon, or otherwise defaces, defiles, or puts indignity upon any of such flags . . ." is subject to punishment. *Id.*

The statute the plaintiff originally complained of was 28 CONN. GEN. STAT. ANN. § 53-255 (1960). Both statutes are identical in substance, but section 53-258a calls for stiffer penalties. Although the statute under attack had technically been repealed, the Second Circuit allowed the action to continue because the threat to the plaintiff had actually increased. 473 F.2d at 483 n.1.

[7] 28 U.S.C. § 2281 (1970). *See* note 1 *supra.*

[8] Thoms v. Smith, 334 F. Supp. 1203, 1211 (D. Conn. 1971), *aff'd sub nom.* Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973).

[9] 334 F. Supp. at 1211 (emphasis added).

[10] 473 F.2d at 480, *citing* Goldstein v. Cox, 396 U.S. 471, 478 (1970). There the Court held that direct appellate jurisdiction is to be "narrowly construed," and noted that "[t]his admonition . . . requires us to resolve all reasonable doubts against direct appealability of a judgment to the Supreme Court." 473 F.2d at 480.

[11] The Second Circuit considered the possibility that notwithstanding the declaratory judgment the state might choose to enforce the statute. If this should happen, Thoms would be permitted to renew his request for an injunction and the court believed that such relief would probably be ordered by the three-judge district court. 473 F.2d at 480 n.1.

[12] *Id.* at 481.

injunction.[13] Moreover, Judge Timbers objected to the district court having the ability to determine which appellate court would review its decision by forbearing from entering an injunction.[14]

The decision of the Second Circuit on the question of jurisdiction accords with the Supreme Court's construction of the direct review provision.[15] In *Gunn v. University Committee to End the War in Viet Nam*,[16] it was held that because the district court had not issued either an injunction or an order granting or denying one, the Supreme Court had no power at all over the case. The Court has also held that an order granting or denying only a declaratory judgment is not directly appealable to the Supreme Court, even if injunctive relief was once requested.[17]

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13 *Id.* at 487. Judge Timbers contended that if the three-judge court forbears from issuing an injunction, it loses its jurisdictional basis and should dissolve itself but he failed to cite any authority for this proposition. An approach whereby a court's jurisdictional basis is eliminated by virtue of its subsequent holding is unsound. Once the jurisdictional predicate is satisfied the court acquires the power to adjudicate. In several cases dealing with three-judge district courts, the Supreme Court has held that where such a court issues a declaratory judgment, appeal may be taken to a court of appeals even though injunctive relief was once requested. *See* McCann v. Babbitz, 400 U.S. 1 (1970) (per curiam); Mitchell v. Donovan, 398 U.S. 427, 430 (1970) (per curiam). Thus, the relevant authority appears to be inapposite to the dissent's approach.

14 473 F.2d at 487. The majority in *Thoms* refused to characterize the district court's decision in this way. Rather, they assumed that the forbearance was based upon the reasoning that a declaratory judgment issued under the facts of this case does not offend comity as much as an injunction does. *Id.* at 481. See note 41 *infra* and accompanying text, where the viability of this proposition is discussed.

Judge Timbers also cited Abele v. Markle, 342 F. Supp. 800, 804-05 (D. Conn. 1972), where the three-judge district court granted only declaratory relief because "there is no reason to believe the state will not obey our mandate." There, the Second Circuit panel remanded the case to the district court to reconsider the decision not to issue the injunction. Abele v. Markle, 452 F.2d 1121 (2d Cir. 1972), *vacated and remanded*, 410 U.S. 951 (1973). The *Thoms* majority distinguished *Abele* on the grounds that the district court majority was split on the question of injunctive relief, while in *Thoms* all three judges agreed to forbear. 473 F.2d at 481.

15 *See* notes 3 & 4 *supra*.

16 399 U.S. 383, 390 (1970). The district court had declared the Texas statute involved unconstitutional, but stayed its mandate pending action by the state legislature at its next session. 289 F. Supp. 469, 475 (W.D. Tex. 1968). The Supreme Court dismissed the direct appeal noting that "until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided. . . ." 399 U.S. at 388. This reasoning would not apply to *Thoms* where the court actually issued a declaratory judgment against the state statute because although no injunction was granted, the rights of the parties were adjudicated.

It is also significant to note that in *Gunn*, the Court warned three-judge district courts of the jurisdictional problems created when declaratory relief is granted but injunctive relief is refused. The Court noted that failure to issue an injunction under such circumstances is "unfortunate at best." 399 U.S. at 390. Had the district court in *Thoms* heeded this admonition and issued an injunction along with its declaratory judgment, a complex jurisdictional wrangle could have been avoided.

17 399 U.S. at 390-91. McCann v. Babbitz, 400 U.S. 1 (1970) (per curiam); Mitchell v. Donovan, 398 U.S. 427, 430 (1970) (per curiam); Rockefeller v. Catholic Medical Center, Inc., 397 U.S. 820 (1970) (per curiam).

Nonetheless, the Court has on occasion taken a different approach. It has said that its appellate jurisdiction depends on whether the three-judge court was properly convened.[18] Direct appeal would then be based on whatever grounds were given for the granting or denial of the injunction.[19] This approach seems more consonant with the congressional intent to have the Supreme Court review expeditiously decisions affecting the validity of state statutes.[20] However, the Court has insisted on technical compliance with the statutory language in order to keep its caseload within manageable proportions.[21]

In *Mitchell*, the Court ruled that the statutory term "injunction" found in the direct appeal section, 28 U.S.C. § 1253, does not embrace "declaratory judgment." 398 U.S. at 430. However, *Mitchell* is distinguishable from *Thoms* on the facts. The plaintiffs sought to enjoin the enforcement of a Minnesota statute prohibiting the placement of Communists on the election ballot. The plaintiffs' original request covered only the 1968 election. When they tried to renew their action after the 1968 election in order to cover future elections, the district court ruled that their request had become moot. *Id.* at 428-29.

McCann and *Rockefeller* offer more direct support for the *Thoms* decision. In *Rockefeller*, the three-judge district court stated that: "Since the state has shown a desire to comply with applicable federal requirements, the court may assume that it will abide by a judicial determination of rights without having to be compelled to do so by injunction." 305 F. Supp. 1268, 1271 (E.D.N.Y. 1969). Thus, the court granted a declaratory judgment striking down a New York statute temporarily freezing rates for in-patient hospital services provided to Medicare patients but denied a requested injunction. *Id.* The Supreme Court held that no direct appeal was available, but vacated the judgment below in order to allow the lower court to issue a fresh decree which could be appealed to the court of appeals. 397 U.S. 820.

In *McCann*, the Court, citing *Mitchell* and *Gunn*, dismissed an appeal from a decision of a three-judge court granting a declaratory judgment but denying an injunction against the enforcement of the Wisconsin abortion statute. 400 U.S. 1 (1970) (per curiam), *dismissing appeal from* 310 F. Supp. 293 (E.D. Wis. 1970).

[18] Lynch v. Household Fin. Corp., 405 U.S. 538, 541 n.5 (1972); Allen v. State Bd. of Elections, 393 U.S. 544, 560 (1969); Moody v. Flowers, 387 U.S. 97, 99 (1967); United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285, 287 (1963); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 376-77 (1949); Rorick v. Board of Comm'rs, 307 U.S. 208, 212 (1939); Palmetto Ins. Co. v. Connecticut, 272 U.S. 52 (1926). Applying this approach to *Thoms*, where the federal question was substantial thereby warranting a three-judge district court, appeal should have been directly to the Supreme Court and not the Second Circuit.

[19] *See* Brucker v. Fisher, 49 F.2d 759, 761 (6th Cir. 1931). Thus, it should not matter that the three-judge court in *Thoms* denied the request for an injunction because of reasons of comity. Both a denial on grounds of comity and a denial on the merits have the effect of allowing the state to enforce its statute. *See* Oldroyd v. Kugler, 461 F.2d 535, 539 (3d Cir. 1972).

[20] *See* note 2 *supra*.

[21] *See* Goldstein v. Cox, 396 U.S. 471, 478 (1970); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 375 (1949); Phillips v. United States, 312 U.S. 246 (1941).

Direct appeals now constitute 20% of the Supreme Court's docket. 41 U.S.L.W. 2094-95 (August 22, 1972). However, even when the three-judge statute was enacted and the federal caseload was far less than it is today, Congress was aware "it was imposing a severe burden on the courts." *Ex parte* Collins, 277 U.S. 565, 569 (1928). Nonetheless it chose to do so. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 562 (1969). This imposition was apparently based on a feeling that certain classes of cases were so important that the Supreme Court should be required to review them. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 (1964).

The application of apparently conflicting standards by the Supreme Court has led to a split among the circuits. The Fifth Circuit has held that if the allegations of unconstitutionality are substantial, the three-judge court must then determine the validity of the state statute and the only review of that decision is by the Supreme Court.[22] On the other hand, the Tenth Circuit, in *Petusky v. Rampton*,[23] accepted jurisdiction of an appeal from a three-judge court decision dissolving a temporary restraining order. The court reasoned that since there was no order granting or denying an injunction, the Supreme Court would refuse jurisdiction. Yet the First Circuit ruled that an order requiring a federal agency to return property forfeited pursuant to a federal statute was an order granting an injunction for purposes of the three-judge court statute.[24]

One panel of the Third Circuit has ruled that an appeal from a declaratory judgment issued by a three-judge court, which denied injunctive relief, is to the court of appeals.[25] However, in *Oldroyd v. Kugler*,[26] a case remarkably similar to *Thoms*, another Third Circuit panel held that the mere fact that a three-judge court has not explicitly denied an injunction is not dispositive. The court ruled that inasmuch as the three-judge court was properly convened and part of the judgment was a decision on the merits, the case was directly appealable to the Supreme Court.[27]

The First Circuit, while recognizing both the Supreme Court's interest in limiting its caseload and the need to reform present three-judge court legislation, observed that: "Congress has not seen fit to alter its provisions, and while it remains on the books, there is value in not frustrating both its purpose and its predictability of operation." Melendez v. Shultz, 486 F.2d 1032, 1034 (1st Cir. 1973). Indeed, the Court's policy of attempting to regulate its direct review docket "has not resulted in a clear definition of the jurisdictional scope of the three-judge court. Instead, it has substantially complicated the problem of the litigant who seeks to invoke the jurisdiction of the appropriate federal court . . ." *Federal Jurisdiction, supra* note 1, at 1530.

Chief Justice Burger has been reported as favoring the total elimination of the three-judge courts because of their disruptive effect on the federal judicial system. He also disapproves of direct appeals to the Supreme Court without benefit of intermediate appellate review. 41 U.S.L.W. 2094-95 (August 22, 1972).

The Second Circuit has also suggested the need for repeal or amendment of the three-judge court provisions. Nieves v. Oswald, 477 F.2d 1109, 1111 (2d Cir. 1973) (Feinberg, J.). *See* p. 389, *infra*, for a detailed treatment of *Nieves*.

The long-sought revision of the three-judge court statutes may be at hand. *See* note 28 *infra*.

22 Coleman v. Yokum, 442 F.2d 351, 353 (5th Cir. 1971) (per curiam); Mayhue's Super Liquor Store v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970).

23 431 F.2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913 (1971).

24 Melendez v. Shultz, 486 F.2d 1032 (1st Cir. 1973).

25 YWCA v. Kugler, 463 F.2d 203 (3d Cir. 1972) (per curiam).

26 461 F.2d 535 (3d Cir. 1972), *rev'g* 327 F. Supp. 176 (D.N.J. 1970), wherein the Third Circuit reversed a three-judge court's dismissal for lack of jurisdiction of the plaintiff's attack on the constitutionality of the New Jersey flag anti-desecration statute.

27 *Id.* at 539.

The majority opinion in *Thoms* apparently has rejected the "properly convened" line of cases in favor of the cases which have given an extremely narrow construction to the direct appeal provision, section 1253. By not remanding the three-judge court's "forbearance" the Second Circuit has ratified its approach. The effect of this portion of *Thoms* will be to further limit the availability of direct Supreme Court review of three-judge district court decisions. Additionally, the jurisdictional maze in which the court found itself enmeshed and the conflicting precedents which exist serve to illustrate the need for revision of the statutes governing the three-judge district courts.[28]

Having concluded that direct appeal to the Supreme Court was unwarranted, the *Thoms* panel grappled with the question of finality. Insofar as the three-judge court forbore from issuing an injunction, its decision was susceptible to the charge that it was not a final decision and therefore not reviewable. This claim was rejected by the Second Circuit, which held that the three-judge court's decision was a final

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[28] The Senate has passed and sent to the House of Representatives a bill that would repeal sections 2281-82 and 2284. Instead the bill would require a district court of three judges to meet only when: "otherwise required by an Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative bodies." S. 271, 93d Cong., 1st Sess. § 3 (1973). Thus, a single district judge could hear suits attacking the constitutionality of most federal and state statutes.

In presenting the bill to the Senate, Senator Hruska noted that:

> Our Federal judicial system is today experiencing a virtual explosion of litigation. It is therefore essential that Congress do all that is prudent to refine and streamline the operations of our courts so as to facilitate the notion that for every wrong there will exist a remedy which will be pursued with deliberate haste. The elimination of the three-judge court requirement in certain anachronistic situations . . . is one positive innovation that pursues this goal.

119 CONG. REC. 11, 114 (daily ed. June 14, 1973).

The bill is a significant improvement over the present three-judge court statutes. The jurisdictional problems that the Second Circuit was confronted with in *Thoms* would be effectively avoided. Thoms' allegations did not concern the constitutionality of an apportionment, thus not requiring a three-judge district court under the Senate's proposal. Secondly, the bill does not continue the distinction presently made between actions seeking injunctions and actions seeking declaratory relief. The bill, which speaks of actions "challenging" apportionments, would apparently require a three-judge court to meet regardless of the form of the requested relief.

S. 271 would not eliminate the requirement that appeals from three-judge court decisions be taken directly to the Supreme Court. However, since the number of three-judge cases would be sharply limited, there would be a corresponding reduction in the caseload of the Supreme Court.

The bill, which has the support of Chief Justice Burger and of the Judicial Conference, has been the subject of hearings by a subcommittee of the House Judiciary Committee.

For proposals put forth by the American Law Institute and by the Judicial Conference see ALI, STUDY OF DIVISIONS OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1374 (1969); REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78-79 (1970).

judgment appealable to the court of appeals.[29] The court noted that the issue of constitutionality was the controlling question in the case and that the district court had ruled on that issue. The fact that the plaintiff might be able to renew his request for an injunction should the state enforce the statute did not make the declaration of unconstitutionality less than final.[30]

The Second Circuit's decision is supported by the Supreme Court's determination that a "final" decision does not have to be the last possible order in the case.[31] Thus, the question of finality is to be viewed in a practical rather than technical light. The most important considerations are whether piecemeal review is likely and whether justice will be denied by virtue of a delay.[32] While *Thoms* presented no problems as to piecemeal review, delay in determining the constitutionality of the statute could cause a further chilling of the first amendment rights asserted by Thoms.[33] Accordingly, the court deemed the three-judge court's decision as final in order to protect the appellee's first amendment rights.[34] Furthermore, as the court pointed out, it would have been anomalous to treat the district court's decision as a declaratory judgment for jurisdictional purposes and then decide that the lower court's order was not final.[35]

Thoms also involved a problem as to the plaintiff's standing to bring the action. Thoms informed several state officials by letter of his intention to wear an American flag sewn into a vest. Three officials did not respond to the letter. Two replied that they intended to enforce the law.[36] The Second Circuit ruled that Thoms thereby faced a credible threat of enforcement and so had standing to seek relief in federal court.[37]

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29 28 U.S.C. § 1291 (1970) provides that the courts of appeals have jurisdiction over appeals from final judgments of district courts, except where direct review by the Supreme Court is available.

30 473 F.2d at 481.

31 Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949).

32 Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

33 473 F.2d at 482.

34 *Id.*

35 *Id.*

36 *Id.* at 484; 334 F. Supp. at 1206-07. Of the two state officials who replied, one doubted that the proposed conduct would lead to Thoms' arrest. The other told Thoms "go ahead and do it, and, . . . *if* you're in violation of the statute we'll lock you up." 334 F. Supp. at 1207 (emphasis added).

37 473 F.2d at 484. In first amendment cases, "it is possible that . . . courts may rely on a credible threat of enforcement and plausible allegations of intent or desire to engage in the threatened activities as sufficient predicates for justiciability." National Student Ass'n

At the same time Thoms brought his federal class action, Connecticut had commenced criminal proceedings against one Van Camp for violation of the flag desecration statute.[38] This aspect of *Thoms* raised the question of whether it was proper for a federal court to declare the Connecticut statute unconstitutional while the issue was pending in the state court system. The Second Circuit determined that the district court could properly issue a declaratory judgment striking down the statute in question as unconstitutional.[39]

Recently, the Supreme Court has considered the circumstances under which a federal court may interfere with ongoing state proceedings. In *Younger v. Harris*,[40] the Court held that federal courts should not enjoin the enforcement of a state statute where there are pending state criminal proceedings against the federal plaintiff absent a showing of irreparable injury which is both "great and immediate."

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v. Hershey, 412 F.2d 1103, 1111-12 (D.C. Cir. 1969). However, Thoms really did not face a credible threat of enforcement. Both state officials who bothered to reply to the letter indicated some doubt that he would be prosecuted. The effect of *Thoms* in this regard is to allow a plaintiff to create his own standing. Connecticut would have been in a better position if its officials had not bothered to reply to Thoms at all.

Thoms' position is similar to the position of the co-plaintiffs in Younger v. Harris, 401 U.S. 37, 41-42 (1971), who had not been indicted, arrested or threatened by the prosecutor. Instead, they alleged that they felt inhibited by the existence of a state statute on the books and by the existence of the prosecution against Harris. The Supreme Court held these allegations were not sufficient to make the co-plaintiffs proper parties. *Id.* at 42. In this light it is interesting to consider the Second Circuit's observation in *Thoms* that "there had been a series of prosecutions against persons symbolically expressing their views on various subjects, resulting in jail sentences in two instances and fines in three others." 473 F.2d at 485. The court should not have considered these other prosecutions factors in determining whether or not Thoms had standing. *Younger* stated that prosecutions against others are not sufficient to create standing and that "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. . . ." 401 U.S. at 42 (1971).

[38] Van Camp had been arrested and convicted for wearing an American flag, around which was bordered the words "For God and Country," on the seat of his pants.

The state court proceedings resulted in the upholding of the constitutionality of the statute. State v. Van Camp, 6 Conn. Cir. 609, 281 A.2d 584 (App. Div.), *certification of appeal denied*, 161 Conn. 591, 280 A.2d 536 (1971). Van Camp never requested Supreme Court review.

[39] 473 F.2d at 482-83.

[40] 401 U.S. 35, 46 (1971). The policy of restricting the issuance of injunctions in this situation is based on both traditional equity jurisprudence and principles of comity. *Id.* at 43-44. From equity principles flows the requirement that in order to obtain an injunction a plaintiff must show irreparable injury. *Id.* at 45-46. Where comity is also involved, the Court has added the requirement that federal courts should not issue injunctions unless the irreparable injury is both "great and immediate." *Id.* at 46. Bad faith prosecution and harassment by state officials clearly fall within the purview of "great and immediate" irreparable harm.

If the Second Circuit in *Thoms* had found *Younger* applicable it is submitted that the appellee would not have been able to demonstrate such injury since he had not been prosecuted, nor had he made any allegations of harassment. Indeed, the only contact he had with state officials were communications which he initiated.

This holding was extended to proscribe declaratory judgments in *Samuels v. Mackell.*[41]

Both the three-judge district court and the Second Circuit in *Thoms* ruled that *Younger* and *Samuels* are limited to situations where the state proceeding is aimed at the federal plaintiff himself and do not apply when state proceedings are pending against other defendants.[42] In so ruling, the Second Circuit stated that if federal antici-

41 401 U.S. 66 (1971). The Court's holding in *Samuels* appears to be a retreat from its earlier position announced in Zwickler v. Koota, 389 U.S. 241 (1967). There the Court held that the question of whether declaratory relief is proper should be considered apart from the question of whether injunctive relief is appropriate.

However, the Court in *Samuels* was careful to limit its holding to situations where there are pending state prosecutions. Nevertheless, the Court did recognize that absent unusual circumstances, an injunction and a declaratory judgment would have similar effects and would result in the same frustration of state criminal proceedings. 401 U.S. at 73. *Accord,* Mitchell v. Donovan, 398 U.S. 427, 433 (1970) (per curiam) (Douglas, J., dissenting):

> The declaratory judgment may well contain a "thou shalt not" as commanding as any injunction. Or its refusal may be as definitive an adjudication as the refusal of an injunction. . . . Where . . . the three-judge court was properly convened, I would think that any action it took, which was denying or granting an injunction or its equivalent, would be properly here under 28 U.S.C. § 1253.

42 473 F.2d at 482-83; 334 F. Supp. at 1205-06. Both courts relied on the statement in *Younger* that: "We express no view about circumstances under which federal courts may act when there is *no prosecution* pending in state courts at the time the federal prosecution is begun." 401 U.S. at 41 (emphasis added).

The Supreme Court's use of the words "no prosecution" may be interpreted in two ways. Either the Court meant no prosecution against only the federal plaintiff, or no prosecution pending against anyone. Noting that *Younger* and its brethren did not resolve the question in *Thoms,* the Second Circuit adopted the former interpretation.

> [T]he Supreme Court intended to leave open the question of whether the requirement of bad faith or of other extraordinary circumstances evidencing irreparable injury, which the *Younger* group of cases affirmed for anticipatory federal court intervention in pending suits, applies when *no* state criminal proceeding is pending against the federal plaintiff.

473 F.2d at 483.

The *Younger* decisions were motivated by considerations of equity, *i.e.,* no injunctive relief will lie where there is an adequate remedy at law, and comity, *i.e.,* federal courts should not invade areas of state concern. In view of the fact that Thoms was not involved in a state proceeding, traditional equity reasons for restricting the issuance of an injunction did not apply. There was no danger of irreparable injury nor was there any other proceeding to be compromised by an inconsistent decision. However, the principles regarding respect for state sovereignty remain very much in force. The *Younger* court noted that federal courts do not have unlimited power to review state laws and determine their validity before the state courts are asked to enforce them. It is seldom appropriate for federal courts to "exercise any such power of prior approval over the legislative process." Younger v. Harris, 401 U.S. 37, 52-53 (1971). Federal courts are not allowed to unduly interfere with legitimate state activities. *Id.* at 44.

The *Thoms* court itself noted that the *Younger* group of cases suggest that, "absent a showing of bad faith enforcement on the part of state officials, federal courts should not 'reach out' and declare state statutes unconstitutional on their face." 473 F.2d at 482. Yet in affirming the grant of declaratory relief to Thoms, the Second Circuit permitted such a reaching out.

The teaching of *Thoms* seems to be that those potential plaintiffs who wish to test the constitutionality of state statutes in federal courts are in a better position by not com-

patory relief was not available, the plaintiff would be forced to commit acts that he believes are constitutionally protected under pain of criminal prosecution.[43] The court also noted that a prosecution against someone else might not resolve the plaintiff's doubts about his own constitutional rights.[44] Since the state had not yet committed resources to the prosecution of Thoms, his choice of forum should be given significant weight.[45]

The Second Circuit's holding on this issue is open to question in that Thoms did not and was not required to show either irreparable harm or harassment by state authorities.[46] The same constitutional claims that Thoms was attempting to raise were being raised by Van Camp in the state proceeding.[47] Given the Supreme Court's policy of restricting the availability of injunctive and declaratory relief, it would be paradoxical if the state defendant, with his greater personal stake in the outcome, could not obtain federal intervention, while someone like Thoms, with less personal involvement, could obtain federal relief. Nonetheless, the effect of the Second Circuit decision is to exclude the applicability of *Younger* and *Samuels* when the federal plaintiff is not the subject of a pending state prosecution. As such, *Thoms* creates a broader access to federal anticipatory relief.

The doctrine of abstention provides that if a definitive ruling in a state court on an unsettled question of state law would settle a controversy and avoid the consideration of constitutional issues, the federal courts should exercise discretion and stay their proceedings.[48] The *Thoms* panel felt that abstention did not apply because the resulting

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mitting the prohibited act. Rather, once the plaintiff can establish a "credible threat of enforcement," which was easily established in *Thoms*, *see* notes 36 & 37 *supra*, and accompanying text, he is assured of a federal forum since the heavy burdens imposed by *Younger* and *Samuels* will not be demanded of him.

43 473 F.2d at 483. Such acts really would be avoidable but, if done, would cast a greater burden on the plaintiff.

44 *Id.* In *Thoms*, this argument is supported by the fact that Van Camp never appealed his conviction to the Supreme Court.

Connecticut has filed a petition for certiorari to review the Second Circuit's decision in *Thoms*. The Supreme Court thus will have an opportunity to rule on the constitutionality of the state statute and on the technical legal issues. Thoms v. Heffernan, 473 F.2d 478 (2d Cir.), *petition for cert. filed*, 41 U.S.L.W. 3555 (U.S. Apr. 9, 1973) (No. 72-1359).

45 *Id.*

46 Although the state had arrested others, the state had done nothing to Thoms, and Thoms was the one who initially brought his case to the attention of the state authorities. *See* 334 F. Supp. at 1206-07.

47 *See* note 38 *supra*.

48 Reetz v. Bozanich, 397 U.S. 82 (1970); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967); Note, *Doctrine of Abstention: Need of Reappraisal*, 40 NOTRE DAME LAW. 101 (1964).

delay might cause a chilling of the very rights the plaintiff sought to protect.[49] Additionally, there were no state proceedings against the plaintiff, and the state proceedings that existed against Van Camp had resulted in the upholding of the statute.[50]

Given the court's treatment of the propriety of declaratory relief, the ruling of the Second Circuit on this issue was entirely proper. If the state statute is not subject to an interpretation which would avoid the constitutional questions, the federal court should exercise its jurisdiction.[51] In the absence of such an alternative, there is no need to have the state courts adjudicate the claim first.[52] As the court noted, the Connecticut statute involved in *Thoms* was broad enough to apply to clothing resembling the flag.[53] Thus, even a narrow interpretation of the statute would not have excluded the plaintiff's proposed activities from the sweep of the statute's coverage.

Once the court had dispensed with the procedural aspects in *Thoms*, it was able to proceed to the merits. The Second Circuit affirmed the three-judge court's declaration that the Connecticut statute was unconstitutional.[54] Following its earlier decision in *Long Island Vietnam Moratorium Committee v. Cahn*,[55] the *Thoms* court stated that the statute was so broadly drafted as to infringe upon constitutionally protected symbolic speech, was overly vague, and was not divisible into flag misuse and flag defilement parts.[56]

In *Cahn*, the Second Circuit held that the state's interest in insuring respect for the national and state flags is not proper if the state

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49 473 F.2d at 485-86. The district court in *Thoms* could have stayed its hand until the state proceedings reached a final conclusion. If the state court struck down the statute, no action need be taken by the federal court. However, if the statute were upheld in state court, the district court could issue the declaratory judgment, thereby granting Thoms his relief and allowing the state court an opportunity to rule on the statute prior to any federal interference. Such an approach raises two considerations. The first is the question of comity, which is presumably protected by the three-judge district court arrangement. The second is the resultant delay and possible "chilling effect" on the federal plaintiff's first amendment rights. Hopefully, this would be paramount when the three-judge court considers whether or not to stay its hand pending the state court determination. The *Thoms* panel rejected this approach in light of the primacy of first amendment rights. *Id.*

50 *Id.*

51 Harman v. Forssenius, 380 U.S. 528, 534-35 (1965). *See* Baggett v. Bullitt, 377 U.S. 360 (1964).

52 Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zwickler v. Koota, 389 U.S. 241 (1967).

53 *See* 473 F.2d at 486 n.4.

54 *Id.* at 486.

55 437 F.2d 344 (2d Cir. 1970). The attack in *Cahn* was directed at a New York statute, section 136(a) of the General Business Law, which was substantially the same as the Connecticut statute. The panel consisted of Chief Judge Lumbard and Circuit Judges Waterman and Anderson.

56 473 F.2d at 486.

requires flag worship by the imposition of taboos regarding flag display.[57] Thus, the state has no interest which would justify interference with a means of symbolic protest.[58] In the absence of *Cahn*, the resolution of the constitutional question would have been a very difficult proposition. There are cases which support both the view that such statutes are constitutional[59] and the view that such statutes violate first amendment rights.[60] As previously noted, the Connecticut courts upheld the validity of that state's statute.[61] The *Thoms* court was not confronted with this difficult problem because of available circuit precedent.

The Supreme Court has held that federal courts must not interfere with pending state proceedings against a federal plaintiff absent extraordinary circumstances. The Second Circuit in *Thoms* refused to extend *Samuels* and *Younger* to situations where the state action is directed against another person who is asserting the same rights as a federal plaintiff. The court's ruling will permit greater federal intrusion into state proceedings and thus offend the principles of comity enunciated in *Younger* and its progeny. A federal declaration that a state enactment is unconstitutional, issued during the pendancy of state proceedings, interferes with those proceedings, no matter who commenced the federal action. Moreover, a *Thoms* plaintiff does not even have to establish that he will be irreparably harmed or that the state authorities are proceeding in bad faith. This liberality is inconsistent with the Supreme Court's efforts to reduce federal interference with state court proceedings.

In addition, the court's liberal interpretation of the "credible threat of enforcement" test and its finding that the appellee had standing to assert his constitutional claims may compound the problem. When coupled with the holding that *Samuels* and *Younger* are inapplicable a possibility arises that federal courts will be inundated by such suits.

As for the three-judge court labyrinth, the Second Circuit followed the lead of the Supreme Court by limiting the number of cases that

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[57] 437 F.2d at 349.

[58] *Id.* at 350. The plaintiffs in *Cahn* circulated buttons on which were printed a circular version of the American flag on which a peace symbol was superimposed. *Id.* at 346.

[59] *See, e.g.*, Joyce v. United States, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972); Sutherland v. DeWulf, 323 F. Supp. 740 (S.D. Ill. 1971); People v. Radich, 26 N.Y.2d 114, 257 N.E.2d 30, 308 N.Y.S.2d 846 (1970), *aff'd by an equally divided Court*, 401 U.S. 531 (1971).

[60] *See, e.g.*, Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970); Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971); Crosson v. Silver, 319 F. Supp. 1004 (D. Ariz. 1970).

[61] *See* note 38 *supra*.

can be reviewed directly by the Court. While this approach is not in accord with the original congressional desire to have federal decisions invalidating state statutes reviewed expeditiously by the Court, a restrictive interpretation seems justified in order to keep the Supreme Court's docket within manageable proportions. The long-term solution lies in revision of the statutory provisions governing three-judge courts.

NATURE OF SUBSTANTIAL QUESTION REQUIRED FOR THREE-JUDGE DISTRICT COURT

Nieves v. Oswald

A suit brought in a federal court to enjoin the enforcement of a state statute, administrative order, or regulation which is of state-wide application, must be decided by a district court of three judges.[1] The single district judge who receives such a complaint and motion for a three-judge court must determine whether a substantial federal question exists thereby warranting the convocation of a three-judge district court.[2] The statutory scheme authorizing the three-judge district court, and the accompanying provisions governing appellate review,[3] have been the source of endless jurisdictional headaches for both judges and litigants.[4]

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1 28 U.S.C. § 2281 (1970). Three-judge court legislation stems from a concern expressed in the early part of this century that single-judge district courts had abused their power to issue injunctions against state statutes, especially statutes regulating transportation and industry. Goldstein v. Cox, 396 U.S. 471, 476 (1970); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Note, *Federal Jurisdiction — Three-Judge Courts — The Recent Evolution in Jurisdiction and Appellate Review*, 61 MICH. L. REV. 1528, 1529 (1963); Note, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 556 (1960). There was a feeling that federal judges had "run wild" in their issuance of injunctions against state legislation. Note, *The Three-Judge Court and Appellate Review*, 49 U. VA. L. REV. 538, 539 (1963).

> The purpose of § 2281 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order". . . .

Moody v. Flowers, 387 U.S. 97 (1967), *quoting* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1962).

In providing for three-judge courts, Congress acted to protect and benefit the interests of the states. Indeed, it was thought that parties attacking state enactments were overly protected. Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 77 (1964) [hereinafter cited as Currie]; Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299, 300 (1963). *See* Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970).

2 Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426, 428 (2d Cir. 1961); Bistrick v. Univ. of S. C., 319 F. Supp. 193, 194 (D.S.C. 1970); Glancy v. Parole Bd. of the Mich. Dep't of Corrections, 287 F. Supp. 34, 37 (W.D. Mich. 1968); Powell v. Workmen's Compensation Bd. of N.Y., 214 F. Supp. 283, 286 (S.D.N.Y.), *aff'd*, 327 F.2d 131 (2d Cir. 1963).

3 Either party can appeal directly to the Supreme Court from an order issued by a three-judge district court granting or denying injunctive relief. 28 U.S.C. § 1253 (1970).

4 One distinguished authority has said that: