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I. INTRODUCTION

The Federal Declaratory Judgment Act[1] has now been law for more than 36 years. The debates over whether a purely declaratory judgment can be the product of a justiciable "controversy" in the constitutional sense have long since passed away, set to rest by the language of the Act itself and by the Supreme Court's decision that the Act was authorized by the judiciary article of the Constitution.[2] The last edition of Professor Borchard's great work, *Declaratory Judgments*,[3] was published in 1941, and the most recent article analyzing the constitutional significance of the Act was published shortly before Chief Justice Warren took his place on the Court in October 1953.[4] The present, therefore, is an appropriate time to review the developments in declaratory litigation since the beginning of the Warren Court.

Shortly before the momentous October 1953 term, the Supreme Court gave assurance that the Act was "procedural only" and did not enlarge jurisdiction otherwise granted.[5] Experience under the statute has demonstrated the error of this statement. The reform was never "only procedural." In constitutional litigation it combined with other developments to create causes of action where none had existed before, and thus changed both the substantive rights of parties and the jurisdiction of courts.[6] Partly as a result, what constitutes a justiciable

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1. "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201 (1964).

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." *Id.* § 2202.

2. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

3. E. BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941) [hereinafter cited as BORCHARD].

4. Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems*, 6 VAND. L. REV. 79 (1952).

5. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950).

6. In ordinary private litigation, not involving constitutional issues, the Act has usually served merely to accelerate the granting of relief in cases otherwise ripe for decision. A number of

"controversy" under Article III of the Constitution, over which federal courts can or should assert jurisdiction, has never been more unsettled than it is at the present time. This effect was entirely unforeseen by Professor Borchard, the author of the Act. In 1941, Borchard inveighed against "the narrowness of view which grew up around the words 'cases' and 'controversies,' originating in a desire to avoid the decision of constitutional cases," and urged a comprehensive reexamination of the "whole question of justiciability."[7] He has had his wish, and it may fairly be said that the problem now is the opposite of the one he described. Instead of "narrowness" in the definition of "controversy," there is an unprecedented breadth. Instead of "a desire to avoid the decision of constitutional cases," the Supreme Court majority in recent years has often displayed an unabashed enthusiasm. It seems appropriate, therefore, to make a further "reexamination" of the subject in the light of the recent momentous years.

II. THE ELEMENTS OF A "CONTROVERSY"

The courts and writers are generally agreed on the abstract elements of a constitutional "controversy." Borchard's definition is representative:

> Were the controversy not genuine or ripe for judicial decision, with a plaintiff and defendant having actually or potentially opposing interests, with a *res* or other legal interest definitely affected by the judgment rendered and the judgment a final determination of the issue, it would fail to present a justiciable dispute—not because it seeks a declaratory judgment, but because it lacks the elements essential to invoke any judgment from judicial courts.[8]

For present purposes, therefore, the elements of a justiciable "controversy" may be enumerated as (1) an issue or issues "legal" in nature, (2) ripe for judicial decision, (3) on which adverse positions are represented by interested parties, and (4) susceptible of a judgment finally disposing of the issues. These abstract elements must be clothed in flesh by discussion of specific cases before any conclusions can be drawn about the present condition of the law in constitutional declaratory judgment cases. A few preliminary observations, however, remain to be stated.

The first is that no analysis is possible unless the Supreme Court's decision of a controversy is distinguished from the opinion justifying or

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Supreme Court cases during the period 1953-70 fall into this category. These cases, plus others that are cumulative or of limited interest to the questions at hand, are collected, for reference purposes, in an appendix following this article.

7. BORCHARD x.

8. BORCHARD 41-42.

explaining that decision. Repetition here of the old law school dichotomy between "decision" and "dictum" would not be justified except for the fact that it recently has been widely misunderstood. An opinion should determine the rights of the parties, relate that determination to previous cases, and serve as a precedent for similar cases. Only the determination of the rights of the parties represents the decision, and only that portion can be examined to decide whether the court had a true "controversy" before it. If no rights are determined, the opinion is necessarily "advisory."[9] It has been plausibly argued that the Supreme Court should be given the power by constitutional amendment to render advisory opinions,[10] but until recently no one had argued that the Court already possessed the power to strike down a statute without regard to its impact in a particular case. This argument has now been made. The alleged existence of this power is defended on the ground that it is a "principled response" to the "failure of other methods of adjudication to protect first amendment rights adequately."[11] It is further argued that to deny the power would be "anomalous" because the Court can grant a declaratory judgment on a "contemplated course of conduct."[12]

So confused a conception of what courts do, and are authorized to do, would hardly have seen the light of day at the beginning of the period here under review. Certainly it finds no support among the original advocates of the Declaratory Judgment Act. Borchard, the father of the Act, was clear on this point. "Generally speaking, the ultimate goal of civil procedure is the judgment, to which all other procedural devices are preliminary and ancillary."[13] In Borchard's view, therefore, the final test of the existence of a controversy is whether the proceeding ends with a judgment. But what is a "judgment"? Judgments dealing with substantive law "perform one of two functions—(a) they either establish the existence of a pre-existing fact or legal relation, or (b) they declare a new one."[14] Obviously, a "judgment" under this definition must arise out of a particular factual situation, involving legal relationships between ascertainable persons or institutions, and must either confirm or alter those relationships. If "judgment" now means something else, then the Declaratory Judgment Act has indeed worked a profound change in the "controversy" concept and has greatly expanded federal

9. BORCHARD 35.
10. Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643 (1935).
11. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 846 (1970).
12. Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 816 (1969).
13. BORCHARD 22.
14. *Id.*

jurisdiction. It has been argued that the Act has had exactly this effect.[15] The argument is rested on *Thornhill v. Alabama,*[16] which declared an antipicketing statute unconstitutional "on its face." The argument, however, is misplaced; the actual judgment in *Thornhill* reversed the defendant's conviction for the specific picketing in controversy.[17] The fact that in its opinion the Supreme Court chose to rest the reversal on the invalidity of the statute on its face does not alter the conclusion that the Court would have lacked jurisdiction to review the decision below without the specific controversy to be resolved.

The essential elements of a judgment are the same, whether it be coercive or declaratory. The absence of coercive words indicates "not the disappearance, but the perfection of the rule of force."[18] The necessary implication of these words is that the power to coerce must be standing in the wings, ready to come on stage if needed. The Act itself gives the power to grant "[f]urther necessary or proper relief based on a declaratory judgment or decree."[19] The authorization to grant a declaration of rights "whether or not further relief is or could be sought"[20] cannot and does not mean that a court may grant a declaration when the parties are free to disobey it with impunity. The power to declare rests ultimately on the power to do more than declare, otherwise no "controversy" exists.[21]

The enforceability requirement reflects the close affinity between declaratory judgments and injunctions. This affinity was recognized in the first Supreme Court case to hold that a state court's declaratory judgment presented a justiciable federal controversy.[22] The opinion pointed out that an action for injunction would have lain, and that the only difference was the absence of allegations of irreparable injury and a prayer for coercive relief.[23] Prior to the adoption of the Act, the traditional requirement of a showing of irreparable injury before granting an injunction was often "lightly regarded" in order to permit

15. Note, *Federal Question Jurisdiction and the Declaratory Judgment Act,* 55 KY. L.J. 150 (1966); *cf.* Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment,* 50 MICH. L. REV. 261 (1951).

16. 310 U.S. 88 (1940), *discussed in* Bernard, *supra* note 15, at 273.

17. *See* Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533, 539-40 (1951).

18. Sunderland, *A Modern Evolution in Remedial Rights, The Declaratory Judgment,* 16 MICH. L. REV. 69, 70 (1917).

19. 28 U.S.C. § 2202 (1964).

20. *Id.*§ 2201.

21. *See Developments in the Law—Declaratory Judgments,* 1941-1949, 62 HARV. L. REV. 787, 788 (1949).

22. Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).

23. *Id.* at 262-63.

the courts to declare the legal effect of specific facts or conduct.[24] After the Act, one might have expected that declaratory actions would have replaced injunctive actions in such cases. To some extent this change has occurred, but it is still difficult to see any clear pattern of distinction in the facts or the law presented by the cases, whether the prayer be for declaration alone,[25] injunction alone,[26] or both declaration and injunction.[27] The observation of Professor Kenneth Davis that irreparable injury and justiciable controversy are "theoretically distinct" but "in the context of review of administrative action . . . tend to become equivalents"[28] is equally applicable to the decision of constitutional cases. Plaintiffs may be expected to continue seeking both declaratory and injunctive remedies in the same action, especially since it was recently determined that the right to a three-judge court and direct appeal to the Supreme Court from district court decisions is available in injunction cases, but not in cases where declaratory judgment alone is sought,[29] although, as Justice Douglas protested, the effect of the remedies may be "precisely the same."[30] The following discussion of declaratory judgments, therefore, must take into account the more important cases in which the prayer is for injunction alone, but the remedy sought would have the effect of a declaratory judgment.

In the light of the foregoing considerations, Supreme Court declaratory judgment cases and related injunction cases during the period 1953 to 1970 will be examined under each of the four elements of justiciable "controversy" mentioned above.

A. The Legal Nature of the Issues

"To be adjudicated by a federal constitutional court, a dispute must be of a 'legal' nature."[31] The author of that statement, made in 1952,

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24. BORCHARD 8. *See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L.J. 445, 462 (1943).

25. *See* Schneider v. Smith, 390 U.S. 17 (1968); Rabinowitz v. Kennedy, 376 U.S. 605 (1964).

26. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963); Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225 (1956).

27. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Reisman v. Caplin, 375 U.S. 440 (1964); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

28. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.05, at 310 (1958).

29. Mitchell v. Donovan, 398 U.S. 427 (1970) (direct appeal to the Supreme Court from district court declaratory judgment is not available under 28 U.S.C. § 1253 (1964)). *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

30. 398 U.S. at 432 (Douglas, J., dissenting).

31. Pugh, *supra* note 4, at 85.

could also say that although the formulation of an abstract definition of "legal" is an arduous task, the characterization of a particular dispute "is not normally difficult."[32] As an example of a controversy entirely "political in nature," the author cited *Colegrove v. Green*,[33] the 1946 case in which the Court held that it had no jurisdiction over congressional redistricting. So fast has the constitutional world turned that this illustration can today provoke only a sigh for a simpler bygone age.

If the *nature* of a legal question can no longer be defined with confidence, the *consequences* of a decision that a question is legal or nonlegal can perhaps still be stated. "When a court finds that an issue presented to it is political, it is in fact declaring that someone other than itself must make the ultimate determination of that issue."[34] Conversely, when a court finds that an issue is legal, it is declaring that it will make the ultimate determination. Legislative or executive activities may be self-initiated; the judiciary acts only on the petition of parties who have standing to invoke its aid. The legislative and executive branches may exercise their discretion on the basis of a great variety of facts and influences, political and otherwise, many of which are not or cannot be articulated; the judiciary, on the other hand, must base its action on the record provided by the parties and must justify to the parties the conclusions it draws from that record. Legislative and executive action is often not final, but is subject to revision in the light of new experience; the judgment of a court in a constitutional case is theoretically immutable. These fundamentally different consequences are reflected in the judicial requirements of standing, ripeness, and finality and the corresponding lack of similar requirements in the legislative and executive fields.

The judicial necessity that the rights of specified parties be finally determined from an exclusive record imperatively requires reduction and simplification of the issues. It would be utterly impractical for a court to consider the multitude of policies, facts, and contentions that a legislative committee or administrative agency would take into account as a matter of course. It is submitted that the Court's recognition of these limitations has been the major factor in its traditional reluctance to reach constitutional questions. During the period under review, the Court has continued to profess this same reluctance. For example, in a declaratory action seeking to invalidate on its face a state statute

32. *Id.* at 86.
33. 328 U.S. 549 (1946).
34. 6A J. MOORE, FEDERAL PRACTICE ¶ 57.14, at 3079 (2d ed. 1966).

subjecting the plaintiff's business to detailed restrictions, Justice Douglas, speaking for the court, asserted that "the day is gone when the Court uses Due Process to strike down state business regulations because they may be unwise, improvident, or out of harmony with a particular school of thought."[35] Similarly, in another case the Court declared that the imposition of its social and economic philosophy, as exemplified by a series of cases decided in the first quarter of this century,[36] "has long since been discarded."[37]

Some of the issues in a case may be legal, even if the others are "nonlegal." If the legal issues are separable, the Court has the power to determine them and will often do so.[38] On the other hand, the court still assumes on occasion its traditional arbitrary power to render an entire case nonlegal by invoking the sovereign immunity doctrine.[39] Moreover, the absolute power to deny certiorari has been repeatedly used in cases contesting the legality of the Vietnam war to avoid deciding even the question of justiciability.[40]

During the period under review, the Court has faced three major problems formerly within the "political" area, and it has often utilized the declaratory judgment in an attempt to impose judicial control. The problems are those arising from protection of minority voting rights, legislative redistricting, and desegregation of public schools. Some lessons may be drawn from these experiences about the practical limits on converting legislative and executive issues into legal ones.

1. *Legal Issues in Voting Rights Cases.*—In protecting the franchise of black citizens, the Court started this period with the basic decisions already on the record and the remaining problems primarily those of implementation. A unanimous Court invalidated without difficulty the discriminatory gerrymandering of a Southern city,[41] but it was another story when the Virginia poll tax was successfully attacked on the ground that the legislature lacked the power to impose *any*

35. Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

36. Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

37. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). In a recent dissenting opinion Justice Black used this quotation in a case in which the majority upheld a claim of the constitutional right to wear black armbands to school as a protest against United States involvement in Vietnam. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 519 (1969).

38. Mrvica v. Esperdy, 376 U.S. 560 (1964); Greene v. McElroy, 360 U.S. 473 (1959); Rogers v. Quan, 357 U.S. 193 (1958); Wilson v. Girard, 354 U.S. 524 (1957).

39. Rabinowitz v. Kennedy, 376 U.S. 605 (1964); Hawaii v. Gordon, 373 U.S. 57 (1963); City of Fresno v. California, 372 U.S. 627 (1963).

40. Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied,* 389 U.S. 934 (1967).

41. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

property tax qualification on the right to vote, whether or not the tax was discriminatory in the racial sense.[42] The majority's disregard for legislative discretion provoked violent dissent that questioned both the wisdom and the constitutionality of the Court's invasion into the field of political questions.[43]

The decisive developments in this field, however, were produced by Congress rather than the Court. The Voting Rights Act of 1870 was amended to allow the Attorney General to bring suit in the name of the United States against a state.[44] The Voting Rights Act of 1965[45] set up elaborate machinery to prevent the discriminatory use of any registration or voting "test or device." In 1966, a request for a declaration of its unconstitutionality was denied.[46] The Act provides that once a state or political subdivision is administratively brought within its coverage, the use of voting tests is suspended until the political unit proves them non-discriminatory in federal district court. The manageable judicial task of making a finding on this issue was performed in *Gaston County v. United States,*[47] in which the Court declared that the appellant had failed to meet the statutory burden of proof. Thus, under "political" control, a substantial measure of success was achieved with a comparatively small amount of litigation.

2. *Legal Issues and Legislative Redistricting.*—The reapportionment cases exhibit a different line of development. In 1953, the redistricting of malapportioned legislatures appeared to present no justiciable "legal" issue. The Supreme Court of the United States had earlier flatly declared, through Justice Frankfurter, that the judicial branch "ought not to enter this political thicket."[48] The Supreme Court of Tennessee explained its refusal to grant even a declaratory judgment on legislative redistricting by asserting that to do so would put the court on the horns of a dilemma: either to stand idly by while the legislature ignored the decision, or to declare the legislature illegally constituted and

42. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

43. *Id.* at 680 (Harlan, J., dissenting). "It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society, *Lochner v. New York,* 198 U.S. 45, 75-76. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism." *Id.* at 686.

44. This amendment was upheld in United States v. Mississippi, 380 U.S. 128 (1965).

45. 42 U.S.C. §§ 1973-73p (Supp. V, 1970).

46. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

47. Gaston County v. United States, 395 U.S. 285 (1969).

48. Colegrove v. Green, 328 U.S. 549, 556 (1946).

thus incapable of enacting any law.[49] Since there was no initiative or referendum in Tennessee, the impasse appeared to be complete. However, the controversy was renewed in *Baker v. Carr*,[50] and, on appeal, the Supreme Court held that the district court had the power to issue a judgment declaring the Tennessee districting a denial of equal protection, but at the same time permitting the legislature thus unconstitutionally chosen to adopt a valid system of reapportionment.[51] The subsequent history of this problem, during which the Supreme Court departed from the judicial task of applying the Constitution to invalidate existing districts, and assumed the political task of legislating new districts, will be examined later.[52] It will suffice to say at this point that the declaration of rights in *Baker v. Carr* can reasonably be characterized as both inevitable and successful, but that the subsequent mandatory orders establishing districts from the congressional to the local government level have raised and will continue to raise enormous difficulties. The essence of these difficulties is the judicialization of a previously legislative issue through the use of the "one man, one vote" formula.

3. *Legal Issues and Segregation.*—The third major advance into formerly political fields occurred in education. The "separate-but-equal" doctrine had for 60 years reserved to the federal courts only the issue of whether in fact "equal" facilities were provided, leaving the determination of whether such facilities should be "separate" as a political question.[53] Although this boundary between the legal and political issues had suffered serious erosion, it was not finally overthrown until *Brown v. Board of Education* in 1954.[54] The question left unanswered was where the new boundary would be established. The Court considered accepting the disposition made in the Delaware case, one of the four companion cases in the *Brown I* opinion. There, the state trial court, upon finding Negro facilities unequal, had simply ordered the superior white schools to admit the Negro plaintiffs and others similarly situated.[55] The Court's judgment, however, rendered a year later in *Brown II*,[56] chose the alternative of recognizing "varied local school

49. Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956).

50. 179 F. Supp. 824 (M.D. Tenn. 1959).

51. 369 U.S. 186 (1962).

52. *See* text accompanying notes 142-80 *infra*.

53. Plessy v. Ferguson, 163 U.S. 537 (1896).

54. 347 U.S. 483 (1954).

55. Belton v. Gebhart, 32 Del. Ch. 343, 87 A.2d 862 (Ch.), *aff'd*, 33 Del. Ch. 144, 91 A.2d 137 (Sup. Ct. 1952), *aff'd and remanded*, 349 U.S. 294 (1955).

56. 349 U.S. 294 (1955).

problems" by directing the trial courts to retain jurisdiction over desegregation and supervise the local school boards. This fateful judgment advanced the Court much further into the political field than it had gone in the voting and redistricting cases. Innumerable questions originating in the operation of school districts, which had formerly been considered matters of administrative discretion, were now judicialized. The subsequent problems, which are yet unresolved, may justly be said to have arisen from the affirmative assumption of the task of educational administration rather than from the Court's negative act of prohibiting separate facilities.

In a situation as fluid as the one now prevailing, dogmatic statements concerning legal and nonlegal issues would be foolhardy. Time is needed for consequences to be realized and for perspective to be gained. It is submitted, however, that the other traditional jurisdictional safeguards in constitutional controversies—awaiting the "ripeness" of fact situations before adjudication, accepting controversies only from persons having "standing," and reaching decisions meeting the traditional requirements of finality—are by no means obsolete, especially when the federal courts judicialize controversies over which they formerly declined jurisdiction. These traditional safeguards will be considered in the sections that follow.

B. The Ripeness of the Dispute

In order to be a "controversy" within the meaning of Article III of the Constitution, a dispute must be "ripe," but not overripe or "moot." The dispute, in other words, must be actual and present, not hypothetical or dead. The policy values inherent in this requirement go to the very essence of the place of the federal courts in the constitutional scheme of things. To accept a constitutional case before the actual rights of the parties need to be determined is to pose an unnecessary challenge to a coordinate branch of the federal government or to the government of a state, thereby endangering acceptance of the judicial role.[57] But it is more than that. It is an abandonment of the fundamental wisdom of English jurisprudence, which counsels that correct conclusions are most likely to

57. "Marshall, Cooley, Thayer, Hughes and Frankfurter, among others, have reminded the Court that the crucial power of review and its exercise admit of the utmost delicacy . . . . Another persuasive factor is that the Court may be less competent than the legislature to decide the important questions of public policy which are embedded in many constitutional controversies . . . . History suggests that if the Court exercises its power of review too readily and too independently it will be met with rebuke and disdain, with a consequent diminution of influence on the national scene." Bernard, *supra* note 15, at 262-63 (footnotes omitted).

be reached when the judicial mind is focused on the application of legal principles to specific facts.

The declaratory judgment procedure, which is designed to afford parties judicial relief at an earlier stage of their dispute, often raises questions of ripeness in an acute form.[58] No one realized this better than Professor Borchard, who prefaced his discussion of ripeness by pointing out that "the danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events . . . and the prejudice to his position must be actual and genuine and not merely possible or remote."[59] On the other hand, he noted the importance of recognizing a true controversy:

> Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the *status quo*. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial.[60]

Obviously, the two statements are in tension, and in fact are not wholly reconcilable. In the first place, there is a marked difference between a threat to the plaintiff based on present facts and a threat based on future facts that the plaintiff has the option to bring into being. The former is justiciable if the facts are presented in the record; the latter is arguably within Borchard's definition of a "contingent" danger. In the second place, the ripeness of a dispute based on future facts over which the plaintiff has control will frequently depend on whether his further step will irretrievably shatter the *status quo*. If the plaintiff has gone as far as he can without irreparable injury, the fact that the next step is his to make should not prevent a declaration of what his rights would be if he takes the fatal step. The court should recognize, however, that such a declaration is hypothetical and anomalous, and it should confine such declarations to situations in which the plaintiff has evinced a positive intention to take the final step, the relevant facts concerning that step are developed, the threat to the plaintiff if he takes the step is clear, and the resulting injury cannot be readily repaired. Only by imposing such limitations can a court avoid the hazards of rendering a declaration that is merely advisory. No litigant is constitutionally entitled to ask a court to rule on a series of hypothetical situations until he finally finds one for which the court's declaration is to his liking. It also should be

58. *Racial Integration and Academic Freedom, Part II*, 34 N.Y.U.L. REV. 899, 930 (1959).
59. BORCHARD 56.
60. *Id.* at 58.

reemphasized that if a ripe legal controversy exists, and if a federal court decides it, the fact that the reasoning in the court's opinion is based on the invalidity of the statute "on its face" does not provide grounds for an objection based on justiciability. When deciding whether the Court was faced with a true "controversy," the touchstone must be the nature of the Court's determination of the rights of parties, not the reasoning given for the decision.

Bearing in mind the foregoing observations, the issue of constitutional ripeness may be brought into focus. Under what, if any, circumstances should a plaintiff be allowed to obtain a declaration of the legal consequences of his own future conduct? The Court's position on this question can be most conveniently examined by dividing the pertinent cases into three classes: (1) cases in which the danger is to the plaintiff's status or his ability to continue conduct in which he is already engaged; (2) cases in which the danger is to new conduct immediately contemplated and of a specific character; (3) cases in which the danger is to any new conduct in which the plaintiff may choose to engage, and no particular contemplated conduct is specified in the record.[61]

1. *Status or Present Conduct.*—The first class of cases deals with a danger to the plaintiff's status, or his ability to continue conduct in which he is already engaged without subjecting himself to criminal penalties or other irreparable injury. In these cases, the facts on which the Court must pronounce judgment are fully developed by the past conduct. Nevertheless, at the beginning of the period here under review, the Court occasionally took a narrow view of its jurisdiction in these situations. In *International Longshoremen's Local 37 v. Boyd,*[62] for example, it refused to declare the effect of the immigration laws on the right of resident alien workmen to re-enter the United States when, pursuant to established practice, they sought to travel from Seattle to Alaska for seasonal work. The decision was reached over the objection of Justice Black, who asserted: "This looks to me like the very kind of 'case or controversy' courts should decide."[63] Similarly, the Court twice refused to define boundaries between state and federal administrative regulation of private enterprise.[64] As indicated below, however, the more usual attitude, both before and after 1953, was to assume jurisdiction

61. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 139 (1953).

62. 347 U.S. 222 (1954).

63. *Id.* at 224.

64. Public Util. Comm'n v. United Air Lines, Inc., 346 U.S. 402 (1953); Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

over declaratory actions seeking to protect existing status or conduct, at least when the facts were clear and irreparable injury would result from delay.

In administrative law cases, potential irreparable injury generally could be established by proof that the continuation of an existing status or present conduct was threatened and that the plaintiff's remedy before the agency was either entirely lacking or obviously inadequate. If these factors could be shown, the Court was justified in intervening before completion of the agency proceedings. This principle was established prior to 1953 in *Columbia Broadcasting System v. United States,*[65] in which the Court reviewed on the merits the validity of a Federal Communications Commission decision that broadcasting station licenses would not be renewed if the stations continued to observe existing contracts with the plaintiff network. Since the contracts in question were already in force, the facts were specific and concrete. The plaintiff was suffering irreparable injury because its subscribers were cancelling their contracts, and the plaintiff was without power to defend its contracts before the agency because only the individual stations were licensed. The Court held that this combination of specific facts, irreparable injury, and lack of administrative remedy produced a controversy sufficiently "ripe." After 1953, the Court continued to grant relief under similar circumstances.[66] Conversely, if the facts were not developed in the record or the plaintiff had an administrative remedy, the Court often exercised its discretion to deny a declaration, even though there was likelihood of serious injury to a business or livelihood.[67] Two companion cases decided in 1967 are particularly instructive with regard to the requirements of clear facts, absence of administrative remedy, and present injury. In one, the Court, applying the *Columbia* tests, declared unauthorized a self-executing administrative regulation that would have invalidated specific drug labels then in use, thereby causing a substantial and costly change in

65. 316 U.S. 407 (1942).

66. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (declaratory judgment invalidating state commissioner's attempt to censor specified books); California v. Taylor, 353 U.S. 553 (1957) (order compelling Adjustment Board to act on grievances of railroad employees). Declarations regarding the validity of congressional action depriving the plaintiffs of citizenship were granted in Afroyim v. Rusk, 387 U.S. 253 (1967), and Perez v. Brownell, 356 U.S. 44 (1958). Declarations on the merits, regarding the personal status of plaintiffs or their right to continue existing business practices without governmental interference, were frequently granted. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

67. *E.g.*, Reetz v. Bozanich, 397 U.S. 82 (1970); Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965); Nostrand v. Little, 362 U.S. 474 (1960).

existing business practices.[68] In the other, the Court refused to entertain on the merits an attack on a regulation requiring drug companies to admit federal inspectors to their premises on demand; no demand had been made and thus neither specific facts nor present injury were shown.[69]

A more troublesome situation is presented when the plaintiff's existing conduct or status is threatened by criminal prosecution or agency action, and the only irreparable injury arises from the hardship or expense of the proceedings themselves. When the threat is to constitutionally protected personal freedoms, and when it arises from repeated and harassing police action and prosecutions brought without reasonable hope of success, the federal court may appropriately intervene to forbid future harassment.[70] On the other hand, a declaration or injunction seems unwarranted when it prohibits action by a state court or federal administrative agency that is apparently proceeding in good faith and has power to grant relief to the plaintiff. Such injunctions, nevertheless, have been approved by the Supreme Court in recent years.[71]

In summary, when an existing status or course of action is disturbed, the Court usually has been willing to declare rights and grant protection upon proof of irreparable injury, even though its action prevents another court or agency from proceeding. The cases do not ordinarily present a constitutional problem, but they raise the question of whether under the facts it is sound judicial policy to restrain action by a tribunal with apparent jurisdiction to grant relief. In all of the cases of this character, ripeness in the constitutional sense seems clearly to have been present.

2. *Specific Future Conduct.*—In the second class of cases, the plaintiff typically has not previously engaged in the contemplated conduct, but desires to do so, and asks for a judicial declaration that he is entitled to freedom from governmental interferenee. Obviously, this situation is "doubly contingent." Will the plaintiff actually take the

68. Abbott Labs. v. Gardner, 387 U.S. 136 (1967); *accord,* Gardner v. Toilet Goods Ass'n, 387 U.S. 158 (1967).

69. Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

70. Dombrowski v. Pfister, 380 U.S. 479 (1965); Hague v. Committee for Indus. Organ., 307 U.S. 496 (1939). Injunctions in such cases are subject to the limitations of 28 U.S.C. §§ 2281-84 (1964).

71. King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); *cf.* Lewis v. Martin, 397 U.S. 552 (1970) (issue identical to the *King* case but at a later stage in the administrative process); Hannah v. Larche, 363 U.S. 420 (1960) (subpoenas attacked by declaratory action were subject to same defenses on petitions to enforce).

proposed action, and, if he does, will the defendant interfere with him? The traditional approach has been that no controversy is present unless the plaintiff proves both his intent to bring about the necessary occurrence and an official threat of resultant governmental action.[72] Borchard argued that an actual threat should be unnecessary as long as a statute or regulation apparently proscribes the contemplated action.[73] Recent cases seem to have accepted this view,[74] subject to the qualification that the federal court should abstain until any necessary clarification of an applicable state statute has been obtained from the state courts.[75]

3. *Nonspecific Future Conduct.*—In the third class of cases, a statute or regulation has been attacked on the ground that it is unconstitutional, not as applied to the plaintiff's specific present or future conduct, but as it *may* be applied to *any* future conduct of the plaintiff or others similarly situated. The contention is that the statute or regulation is invalid "on its face" with reference to all possible conduct conceivably subject to it. Such a contention raises not only the question of ripeness, but it also raises questions of the standing of the plaintiff to represent the rights of others[76] and the finality and scope of a judgment purporting to determine the legal effect of future activities of persons not before the court.[77]

Even as to the plaintiff himself, the situation in these cases is "trebly contingent." Will the plaintiff take any action? If he does, what specific action will he take? If he does act, will the defendant interfere with him? Obviously, a declaration under these circumstances presents in acute form the danger that the rights of parties before the court will be prejudiced by an ill-considered declaration, not dispositive of any particular set of facts. There also is the danger that the rights of nonparties will be prejudiced by "the real or supposed precedential effects of abstract determinations."[78]

Prior to the period under review, the Court's answer to plaintiffs seeking to invalidate statutes on the basis of unspecified future action

72. For a discussion of these requirements see *Developments in the Law, supra* note 21, at 849, 870. For a discussion of the necessity of official threat see BORCHARD 465-75.

73. Borchard, *Challenging "Penal" Statutes by Declaratory Action,* 52 YALE L.J. 445, 464-75 (1943).

74. *E.g.,* Zemel v. Rusk, 381 U.S. 1 (1965); Anderson v. Martin, 375 U.S. 399 (1964); Louisiana v. NAACP, 366 U.S. 293 (1961); Kent v. Dulles, 357 U.S. 116 (1958).

75. England v. Louisiana State Bd. of Medical Examiners, 373 U.S. 411 (1964); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

76. *See* text accompanying notes 104-41 *infra.*

77. *See* text accompanying notes 142-79 *infra.*

78. *Racial Integration and Academic Freedom, supra* note 58.

was usually decisively negative. Thus, in *Alabama State Federation of Labor v. McAdory,*[79] Chief Justice Stone emphasized that the requirements for a justiciable case or controversy "are no less strict in a declaratory judgment proceeding than in any other type of suit,"[80] and that "all contingencies of attempted enforcement cannot be envisioned in advance."[81] In 1952, the Court departed from this salutary rule, and the consequences of its departure are instructive. In *Adler v. Board of Education,*[82] the Court sustained, prior to its specific application to the plaintiffs, a New York statute requiring public school teachers to execute a non-Communist oath. The decision was overruled only fifteen years later[83] because experience with the implications of the decision exposed its inadequacies. In the earlier case of *Thornhill v. Alabama,*[84] on the other hand, the *decision* protected specific conduct for which the defendant had been criminally convicted, although the *opinion* took a far wider range and invalidated the antipicketing statute on its face. Because the dispute was sufficiently "ripe," the holding of the case is still valid in spite of the fact that the Court has limited severely its "broad pronouncements."[85]

The period here under review opened conventionally with a 1954 "property rights" controversy in which the Court affirmed the refusal of a state court to invalidate on its face a city excise tax alleged to be unconstitutionally discriminatory. The Court observed that the anticipatory character of the suit precluded consideration of the actual application of the tax or the regulations adopted to implement it.[86] Quite a different approach, however, was soon taken in "personal rights" cases.[87] In 1959, the Court considered and sustained on its face a state literacy test for voters, although the plaintiff had not exhausted her administrative remedies and had not shown that the test resulted in her own disqualification.[88] The plaintiff thus obtained a judgment that did not dispose of her case, since it expressly left open the validity of the test in actual application.[89] This departure from the traditional criteria of an

79. 325 U.S. 450 (1945).
80. *Id.* at 461.
81. *Id.* at 462.
82. 342 U.S. 485 (1952).
83. Keyishian v. Board of Regents, 385 U.S. 589 (1967).
84. 310 U.S. 88 (1940).
85. Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957).
86. Walters v. City of St. Louis, 347 U.S. 231 (1954).
87. *See* Note, *supra* note 11; Note, *supra* note 12. *See also* Bernard, *supra* note 15 (anticipating and recommending this approach in first amendment cases).
88. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
89. *Id.* at 50. The opinion is thus merely advisory, and even its authority as advice is doubtful in view of the decision in Katzenbach v. Morgan, 384 U.S. 641 (1966).

"actual controversy" has since been extended. During the subsequent years the Court has decided on the merits declaratory and injunctive actions attacking, in advance of enforcement and without proof of specific facts, a wide variety of statutes allegedly violative of personal freedom.[90]

Repeated declarations of the Court have shown that its failure to require proof of specific facts to establish a "controversy" has not been inadvertent. In a film censorship case, the Court sustained an ordinance without consideration of its standards and without knowing the contents of the film that the plaintiff sought to protect.[91] In a case involving NAACP solicitation and funding of private civil rights litigation, the Court stated that a statute proscribing such tactics may be invalid "whether or not the record discloses that the petitioner has engaged in privileged conduct."[92] Recently, the Court expressly conceded that whether facts are necessary to establish a justiciable controversy may depend on which constitutional right is being asserted. In *Dandridge v. Williams*,[93] the Court sustained the Maryland welfare law imposing a maximum limit on assistance to a family because only the fourteenth amendment was invoked; whereas, it said, if the first amendment were involved, the regulation might be invalid for "overreaching."

The "chilling effect" doctrine, which has frequently been used in recent years to "ripen" controversies, deserves examination. The practice of determining the validity of a statute "on its face" was of course not unknown prior to 1953, but it typically represented a method of opinion writing in a case in which the legal effect of specific facts also had been determined.[94] Only during recent years has the Court undertaken to make a controversy appear ripe, when it is in fact either underripe or moot, by the development of the "chilling effect" doctrine

90. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (statute limiting total welfare payments to a single family); Kramer v. Union Free School Dist. No. 15, 395 U.S. 623 (1969) (statute limiting franchise in school board elections to parents of school children and property owners); Gray v. Sanders, 372 U.S. 368 (1963) (statute establishing a county unit voting system); NAACP v. Button, 371 U.S. 415 (1963) (legal malpractice statute construed by state court to prohibit the NAACP's solicitation, funding, and direction of private civil rights litigation). The one recent decision that did refuse to pass on the merits of a statute penalizing a first amendment right, on the ground that no threat of prosecution existed, failed to produce a majority decision of the Court. Poe v. Ullman, 367 U.S. 497 (1961). That case was later ignored when the Court invalidated an unenforced Arkansas statute penalizing the teaching of evolution in public schools. Epperson v. Arkansas, 393 U.S. 97 (1968).

91. Times Film Corp. v. City of Chicago, 365 U.S. 43, 44-46 (1961).

92. NAACP v. Button, 371 U.S. 415, 432 (1963). *See also* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).

93. 397 U.S. 471 (1970).

94. *E.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

in first amendment cases.[95] The doctrine requires that the limitations of the first amendment be fully read into the fourteenth amendment. It has been used to hold that the inhibiting effect that a "vague" or "overbroad" statute may exert on possible future conduct is itself a present irreparable injury to freedom of speech or association. Once the mere existence of the statute is held to constitute a present injury to constitutional rights, and all such injuries are hypothesized to be irreparable, it is no longer the duty of the plaintiff to overcome a presumption of constitutionality.[96] In this event, the government or its representative has the burden of "justifying" the hypothesized irreparable injuries to the favored right.[97] Since the record in these cases ordinarily presents no specific facts regarding the application of the statute, both the plaintiff's asserted right and the state's justification[98] are based on arguments outside the record and determined by the Court in accordance with its own social concepts. With the state thus handicapped, it is not surprising that its hypothetical justifications for legislation are often found by the Court to be insufficiently weighty to overcome the hypothetical dangers to the postulated "preferred right."

The "chilling effect" doctrine, as applied in those cases in which no present or future specific conduct is threatened, is clearly reactionary. It turns the clock back to the early years of the century, before the days of the "Brandeis brief,"[99] when the Court regularly consulted its own views of social policy and set aside legislation on the basis of "abstract logic" without regard to "the logic of facts."[100] It is difficult if not impossible

95. The cases are analyzed in Comment, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) and Comment, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

96. Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945).

97. NAACP v. Button, 371 U.S. 415 (1963). The Court said that "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." *Id.* at 438. *Accord*, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969).

98. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963). The Court said that the state statute might be found invalid "whether or not the record discloses that the petitioner has engaged in privileged conduct." *Id.* at 432. The Court also found insufficient the state's justifications that it had already confirmed "petitioner's right to continue its advocacy of civil-rights litigation," and that its right to regulate the practice of law included the right to prohibit the solicitation and control of other persons' litigation. *Id.* at 437-38.

99. The first "Brandeis brief" was filed in Muller v. Oregon, 208 U.S. 412 (1908), and its "very copious collection" of statutory and sociological material convinced the Court that the 10-hour day for women was justified by their weaknesses and competitive disadvantages. *Id.* at 419. Current enlightenment has presumably now demonstrated the fallacies into which Mr. Brandeis and the Court fell, but should not invalidate their approach to the constitutionality of legislation.

100. For the background of *Muller v. Oregon* see A. MASON, BRANDEIS: A FREE MAN'S LIFE 248 (1946). The stubborn persistence of the archaic approach is illustrated by Jay Burns Baking Co.

to square acceptance of such unripe cases with the "controversy" requirement of the Constitution.

The existence of the Declaratory Judgment Act has undoubtedly facilitated this retrogressive process. Although the Act was never intended to permit declarations regarding the validity of statutes unless the Court also decided the specific rights of particular parties,[101] declarations are in fact issued under it without considering whether they are, or will ever become, enforceable.[102] Furthermore, as old criteria of ripeness are dissolved, the process of determining whether an acceptable controversy exists may become exhaustingly prolonged. In two recent "chilling effect" cases, the plaintiffs obtained decisions from the Supreme Court that their cases were within federal court jurisdiction, only to have the actions dismissed on a second appeal because they were not ripe for decision on the merits.[103]

It is submitted that the Supreme Court can best reassert control over the decision-making process by a return to traditional standards of ripeness. The Court should reestablish the principle that district courts may accept for declaratory judgment only cases presenting a substantial danger to existing status or conduct, or cases in which the plaintiff has evinced a positive intention to proceed immediately on a clearly defined new course of conduct, and the defendant threatens to cause him irreparable injury if that course of conduct is pursued. No reversal of substantive law on constitutional rights is necessary in order to pursue this course. By thus returning to the historic jurisdiction of the federal courts, the Supreme Court will better serve the rights of parties, avoid unnecessary confrontations with the states and coordinate branches of government, and better perform its constitutional and statutory duty to decide only "actual controversies."

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v. Bryan, 264 U.S. 504 (1924) (Brandeis & Holmes, JJ., dissenting), which invalidated the Nebraska statute establishing maximum and minimum weights for loaves of bread as "contrary to common experience and unreasonable."

101. BORCHARD 41-42, 56-58.

102. *E.g.*, Powell v. McCormack, 395 U.S. 486 (1969).

103. Zwickler v. Koota, 261 F. Supp. 985 (E.D.N.Y. 1966), *rev'd and remanded*, 389 U.S. 241 (1967), *declaratory judgment entered*, 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd and remanded sub nom. with directions to dismiss as moot*, Golden v. Zwickler, 394 U.S. 1103 (1969); Cameron v. Johnson, 244 F. Supp. 846 (S.D. Miss. 1964), *dismissal vacated and case remanded*, 381 U.S. 741 (1965), *dismissed on the merits*, 262 F. Supp. 873 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611 (1968). Unfortunately, the American Law Institute has embraced the "chilling effect" doctrine of these and other cases, and even has extended it by eliminating any specific requirement that prior harassment or future irreparable injury be proved. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1372(7), at 52, 308-12 (1969).

C. *Standing of Plaintiff to Sue*

Since "adverse litigants" are essential to the existence of a "case" or "controversy,"[104] the plaintiff's standing to sue is an issue of constitutional significance. In recent years, however, the importance of the standing requirement as a barrier to litigation had been greatly diminished. Some of the reasons for this development already have been examined. The expanding definition of "legal dispute" obviously entails a corresponding extension of the interests protected and the classes of persons entitled to protect them. The great surge of judicial protection for the rights of minorities, whether racial or electoral, has contributed to the development of the declaratory judgment as a class of representative action in which the parties' interests do not differ materially from the interests of a large class of nonparties. In addition, there is an apparent trend to recognize the judicial controversy as a device for the protection of the public at large—a development that may cause the desuetude of present limitations on the class action. As Borchard prophetically stated 30 years ago: "The idea of 'legal interest' is an expanding conception and rules of practice should not be used as a bar to its development."[105]

Constitutional "standing" is, in the absence of statute, for judicial determination, and injury to a "legal right" was the traditional judicial test.[106] In recent years, however, any jeopardy to the plaintiff's financial interest usually has been sufficient to give him standing, whether that interest be employment,[107] sale of allegedly pornographic books,[108] freedom from unlawful competition,[109] protection of state funds,[110] or protection from bondage to the "company store."[111] Nonfinancial

104. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); Muskrat v. United States, 219 U.S. 346 (1911). On appeal from a state court, plaintiff's standing to sue is a federal question which the Supreme Court must determine for itself. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959).

105. BORCHARD 203.

106. In Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), the Court created a "legally protected right" to be "free from defamatory statements" through publication of the Committee's name on the Attorney General's Communist List. It then held that plaintiffs had standing to protect this "right" although no "direct demands" were made on them. *Id.* at 141. Justice Frankfurter concurred on the ground that the "hardship" to the Committee was sufficient to give it standing. *Id.* at 149.

107. Ramspeck v. Federal Trial Examiners Conf., 345 U.S. 128 (1953).

108. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

109. Association of Data Processing Serv. Organs., Inc. v. Camp, 395 U.S. 976 (1970). First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966).

110. Lassen v. Arizona *ex rel.* Ariz. Highway Dep't, 385 U.S. 458 (1967).

111. Barlow v. Collins, 396 U.S. 925 (1970).

constitutional interests have received even greater protection. It is no longer a valid objection to the assertion of first amendment rights that the plaintiff is in the same position as thousands of others, or that he fails to show that the statute presently injures him.[112] In fact, the whole concept of "legal right" is dissolving in this field. The Court recently declared that deprivation of the opportunity to be a juror gives standing, even though the plaintiffs did not prove that the deprivation was directed at them personally; the Court found it unnecessary to decide whether jury service is "a right, a privilege or a duty."[113]

As the foregoing cases clearly indicate, the battle for the principle that a plaintiff who has suffered "injury in fact" has standing is a battle of the day before yesterday; nevertheless, Professor Kenneth Davis is fighting it still.[114] The need now is to remove the debris of that battle, find where we stand, and prepare for the battles to come. "Injury in fact" is a most elusive phrase, which seems precise but actually settles nothing. Ambiguity inheres in each part of it. In the first place, to determine the meaning of "injury," it must be decided what interests should receive protection, what persons are entitled to protect them, and how much of an adverse effect on those persons should constitute actionable harm. If the interests that deserve protection are characterized as "legal" interests, which is to say, interests that the legislature or the courts say shall be protected, the result is mere tautology. In the second place, what is an injury "in fact?" If by this phrase is meant an existing injury, the test is erroneous, since threatened injury has been sufficient at least since the enactment of the Declaratory Judgment Act. And once it is recognized that a threatened injury is sufficient, the issue becomes one of ripeness, not standing. As Professor Davis himself correctly says: "The courts should avoid hypothetical or remote questions . . . through the law of ripeness, not through the law of standing."[115]

Examples of genuine interests that were at one time believed legally unprotected were the so-called "privileges," which arose when the government had discretion to contract or not to contract, to license or

112. In both Katzenbach v. Morgan, 384 U.S. 641 (1966), and Watson v. City of Memphis, 373 U.S. 526 (1963), plaintiffs were permitted to assert first amendment rights even though their position was not distinguishable from that of many others. Similarly, in Carter v. Jury Comm'n, 396 U.S. 320 (1970), and Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), the plaintiffs' failure to show present injury did not bar the assertion of their constitutional rights.

113. Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970).

114. *Compare* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970), *with* 3 K. DAVIS, *supra* note 28, § 22.02.

115. Davis, *supra* note 114, at 469.

not to license, or to pay or withhold benefits. The legislature or its delegate claimed the discretionary right to deny or withdraw the license or benefit, without granting a hearing or giving reasons, on the ground that the recipient lacked standing to challenge its action. Prior to 1953, the Supreme Court accepted such claims of absolute discretion.[116] Shortly thereafter, however, a new trend became apparent. The Court held in 1954 that even an alien under order of deportation was entitled to a hearing before an unbiased tribunal on whether the deportation should be suspended.[117] By 1958, it was clear that the right to withhold a benefit no longer included the right to do so unfairly or arbitrarily. In that year the Court declared that an applicant for a state tax exemption was denied procedural due process by a requirement that he execute a non-Communist affidavit, even though it admitted that the limitation of the benefit to non-Communists was substantively valid.[118] More recently, the Court has declared that a state's interest in purging its welfare rolls is outweighed by the recipient's possible need, and that the plaintiff-recipient thus has standing to challenge the lack of a "due process hearing" before the delisting.[119]

The new Court has not been content with recognizing the standing of the applicant for, or holder of, a privilege to obtain procedural due process. In recent years it also has reviewed the substantive terms on which many privileges have been granted or withheld. The practice of law, for example, traditionally has been considered a privilege, but state regulation of this occupation was severely circumscribed when the Court granted a declaratory judgment preventing state interference with the NAACP's control over the civil rights litigation of its members.[120] Similarly, the Court majority recently granted welfare beneficiaries standing to challenge, on their faces, statutes requiring one-year residency for receipt of benefits,[121] regulations allowing greater aid to children in one county than in another,[122] statutes and regulations reducing benefits when there is a "man in the house,"[123] and a statute establishing a maximum limit for payments to any one family.[124] While

116. Adler v. Board of Educ., 342 U.S. 485 (1952); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

117. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

118. Speiser v. Randall, 357 U.S. 513 (1958).

119. Goldberg v. Kelly, 397 U.S. 254 (1970).

120. NAACP v. Button, 371 U.S. 415 (1963).

121. Shapiro v. Thompson, 394 U.S. 618 (1969).

122. Rosado v. Wyman, 397 U.S. 397 (1970).

123. Lewis v. Martin, 397 U.S. 552 (1970).

124. Dandridge v. Williams, 397 U.S. 471 (1970).

some of these constitutional objections were not sustained on the merits, the Court made its position on standing clear by expressly disapproving the argument that welfare benefits are a "privilege" and not a "right," and by putting the burden on state officers to show "compelling necessity" for withdrawal.[125]

Encouraged by the broad definition of standing in the Administrative Procedure Act,[126] the Court also has granted statutory standing where it had been withheld, prior to that Act, under identical congressional language.[127] Furthermore, the Court does not now question the standing of a public official who is given the statutory right to sue on behalf of a group of citizens,[128] even though the official has no interest in the suit beyond enforcement of the law. The rationale of these cases would appear to be that when a statute creates an interest, and expressly or impliedly authorizes a citizen or a public official to bring suit to protect that interest, standing in the constitutional sense exists.[129] Given the present state of the law, therefore, it seems improbable that Congress or the states could make any personal "privilege" subject to final administrative discretion, no matter how clear a bounty or gratuity they might declare it to be.

If a statute establishes an important public interest, but creates no recognizable protected class narrower than the public at large, and if it also fails to nominate a public official entitled to sue, will any citizen or group of citizens have "standing," even though affected no more than the public generally? A standard treatise on federal jurisdiction still says that the plaintiff "must assert an adequate interest in *himself,* which the law recognizes, against a defendant having a substantial *adverse interest.*"[130] Until 1953, the Court customarily spoke of the need of a

125. Shapiro v. Thompson, 394 U.S. 618, 627 (1969). The *Shapiro* case relied on Sherbert v. Verner, 374 U.S. 398 (1963), but the *Sherbert* case involved denial of unemployment benefits to a Seventh Day Adventist for refusal to work on Saturday, and plaintiff therefore had standing under the free exercise clause. Justice Harlan protested in vain that this presumption against legislative action and in favor of judicial control "reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this nation out of its present troubles is contained only by the limits of judicial ingenuity." 394 U.S. at 676.

126. 5 U.S.C. § 702 (1964) provides: "A person suffering legal wrong because of ageney action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

127. Brownell v. We Shung, 352 U.S. 180 (1956); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

128. Sullivan v. United States, 395 U.S. 169 (1969); Wirtz v. Hotel Employees Local 6, 391 U.S. 492 (1968); United States v. Mississippi, 380 U.S. 128 (1965).

129. *But cf.* Muskrat v. United States, 219 U.S. 346 (1911) (plaintiffs were given statutory standing to sue, but the case was held nonjusticiable for the reason, among others, that defendant United States "has no interest adverse to the claimants").

130. 6A J. MOORE, *supra* note 34, ¶57.15, at 3085 (emphasis added).

"protected class," narrower than the public at large, and showing "special injury,"[131] but even in those days the Court would review an ordinary taxpayer's suit arising in a state court.[132]

As governmental power has grown, the Court has simultaneously become more alert to the need for protection of the individual, and the concept of a citizens' champion has moved increasingly to the fore. The Court recognized his standing as early as 1958, when it reviewed a class suit to declare bus segregation invalid.[133] Significantly, the nonresident Negro plaintiff was not a member of the class of bus-riders who would traditionally be qualified to sue. A further step was taken in 1962 when the Court entertained, without discussion of standing, a parents' suit to compel school authorities to discontinue use of a short voluntary prayer at the opening of school. The use of the establishment clause, rather than the free exercise clause, to strike down the prayer seemed to indicate that plaintiffs' standing did not differ from that of other members of the public.[134] In 1968, the Court utilized the establishment clause as a source of standing when a federal taxpayer sought to enjoin the expenditure of federal funds for religious schools, and thus significantly restricted previous authority in the area of taxpayers' standing.[135] The 1969 case of *Moore v. Ogilvie*[136] granted standing without discussion to candidates attacking Illinois elections laws, although the election was past and the interests asserted were those of nonparties. The rationale, as indicated in a subsequent case, was simply that *someone* should have standing, because the situation was one "capable of repetition, yet evading review."[137] At the same term, the Court granted standing for an attack on the Louisiana Labor-Management Commission of Inquiry to a plaintiff who was a union member but had not been personally summoned or investigated, apparently on the ground that the public

131. Doremus v. Board of Educ., 342 U.S. 429 (1952); Fairchild v. Hughes, 258 U.S. 126 (1922).

132. Crampton v. Zabriskie, 101 U.S. 601 (1880).

133. Evers v. Dwyer, 358 U.S. 202 (1958). For a criticism of *Evers* on the ground that plaintiff did not belong to the protected class see Note, *Federal Declaratory Judgment Act—Actual Controversy in Class Actions*, 30 Miss. L.J. 329 (1959).

134. "The Establishment Clause, unlike the Free Exercise Clause, . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." Engel v. Vitale, 370 U.S. 421, 430 (1962).

135. Flast v. Cohen, 392 U.S. 83 (1968).

136. 394 U.S. 814 (1969).

137. *Moore* was distinguished on this ground in Hall v. Beals, 396 U.S. 45 (1969), where a class action to compel registration of voters without satisfying residence requirements was dismissed as moot after plaintiffs became eligible to register under the statute.

interest required that the statute be invalidated at the suit of anybody who was even potentially subject to its operation.[138]

In light of the foregoing cases, there is every indication that the courts will continue to encourage public interest litigation by private citizens. It is submitted that in an era of expanding government and mounting public problems, this development is to be welcomed. Federal, state, and local governments—overwhelmed by numerous and complex tasks, often inadequately staffed, and usually subject to conflicting pressures—often cannot or will not prosecute the necessary suits. The concerned citizen with no special interest to protect is, perhaps, the one best fitted to serve as plaintiff in such cases. Constitutional requirements, as well as judicial interest in adequate presentation of the issues, can be safeguarded by stricter application of the other requirements of a justiciable "controversy."

The new day has, in fact, already dawned. The Supreme Court recently expressed its approval of lower federal court cases requiring administrative agencies to grant standing to representatives of the public interest in the broadcasting and environmental fields.[139] The issue undoubtedly will be squarely presented to the Court for decision in the not too distant future. Recent circuit court cases raise the question,[140] and state statutes expressly granting standing to such "private attorneys general" have recently been enacted.[141]

D. Finality of the Court's Judgment

In a very real sense, the requirements of a "justiciable controversy" previously discussed are only preparatory to the ultimate and supreme requirement that the issues presented to the court be capable of final disposition by the judicial process. If the controversy is not "legal" in

138. Jenkins v. McKeithen, 395 U.S. 411 (1969).

139. Association of Data Processing Serv. Organs. v. Camp, 397 U.S. 150 (1970), *citing with approval,* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("responsible representatives of the listening public" held to have standing before Commission and court under Communications Act), *and* Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966) (organizations representing public interest held "parties aggrieved" entitled to review under Federal Power Act).

140. *E.g.,* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970) (club with demonstrated interest in environment does not have standing to obtain declaration invalidating commercial development in national forest); Environmental Defense Fund, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970) (individual members of public have standing to obtain review of order refusing to ban DDT).

141. *See* Sax, *Environment in the Courtroom,* SAT. REV., Oct. 3, 1970, at 55-57 (discussing Michigan law authorizing "any person" to maintain action for "declaratory and equitable relief" to prevent "air, water and other natural resources" from pollution, in addition to existing administrative and regulatory procedures).

nature, either because the issues are not susceptible of judicial resolution or because their resolution has been committed to other authority, the court's judgment is merely advisory to those having the true power. If the controversy is not "ripe," because not founded on facts sufficiently developed or on issues sufficiently formulated, the judgment is subject to later modification or reversal when the facts and issues are presented concretely. If the plaintiff has no "standing" to present the controversy to the court, its judgment is not binding when the issues are later presented by a plaintiff who does have standing.

The previous discussion, therefore, indicates the dangers to the court's judgment that result if the elements of a constitutional "controversy" are not required. Nevertheless, the importance of "finality" justifies some further discussion directed to this specific point. The absence of finality is clear enough when the court is asked to render a money judgment that is subject to revision by a coordinate branch of the government.[142] The problem becomes more difficult when declaratory judgments are involved. Unlike the Uniform Declaratory Judgments Act, the federal Act does not contain language authorizing refusal of a judgment that "would not terminate the uncertainty or controversy giving rise to the proceeding."[143] Nevertheless, whether the declaratory judgment would settle the controversy is "a highly important factor in federal litigation,"[144] and the judgment must be "a final one, forever binding on the parties on the issues presented."[145] If the judgment is to be "binding," it follows that coercive relief should be granted if either party disregards it. Otherwise, the court has rendered mere "advice." When there is no possibility of present or future coercive relief, the declaration should be refused.[146]

The power of the federal courts to determine a controversy by declaring state or federal action to be unconstitutional was described in a 1923 case as "little more than the *negative power* to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."[147] The 1946 plurality opinion in *Colegrove v. Green,*[148] in which the Court refused to entertain an action

142. *See* Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865).

143. UNIFORM DECLARATORY JUDGMENTS ACT § 6.

144. BORCHARD 299; 6A J. MOORE, *supra* note 34, § 57.08[4].

145. BORCHARD 85.

146. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); *cf.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (relief should not be limited to declaration where injunction is also available and appropriate).

147. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (emphasis added).

148. 328 U.S. 549 (1946).

to declare Illinois congressional districts invalid, expressed the same thought: "Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid."[149] Justice Black, dissenting, accepted this premise, but thought the Court should exercise its negative power to invalidate the existing districts, leaving congressmen to be elected at large unless the legislature saw fit to redistrict.[150]

Both the majority and dissenting opinions in *Colegrove* point to the line separating justiciable from nonjusticiable issues in constitutional cases. If a trial court exercises its "negative" power either by denying the plaintiff relief, or by granting him relief through a refusal to enforce the challenged statute as applied to the particular plaintiff in the specific situation shown by the record, it is well within the judicial function. On the other hand, when—as in the reapportionment and school desegregation cases—the court not only denies effect to an unconstitutional law, but also assumes the tasks of creating a valid law and supervising its subsequent application, issues of finality are raised in an acute form, and the court may well have intruded upon a domain beyond its practical and constitutional competence.

In the reapportionment cases the Supreme Court, once embarked on requiring district court supervision of redistricting, was driven by the inexorable limits of judicial competence to simplify the issue to "one man, one vote" in all situations, regardless of interference with a coordinate branch of the government,[151] the amount of litigation provoked,[152] competing considerations,[153] and the will of a majority of the people involved.[154] The Court has felt compelled to give orders to a state legislature regarding the bills it might pass[155] and to strike down variations of less than four percent because the legislative solution

149. *Id.* at 553.

150. *Id.* at 574.

151. Wesberry v. Sanders, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting).

152. For example, in an unusual series of cases, the Court invalidated 3 successive attempts to reapportion the Florida Legislature. Swann v. Adams, 378 U.S. 553 (1964); Swann v. Adams, 383 U.S. 210 (1966); Swann v. Adams, 385 U.S. 440 (1967). *See* Fortson v. Dorsey, 379 U.S. 433 (1965) (validating apportionment of Georgia Legislature "on its face" but expressly reserving questions of validity in actual operation). For data on the volume of reapportionment litigation see Gray v. Sanders, 372 U.S. 368, 382 (1963).

153. Reynolds v. Sims, 377 U.S. 533 (1964).

154. Jordan v. Silver, 381 U.S. 415 (1965); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 533 (1964). In each case a majority of the state's voters had approved the districting.

155. Burns v. Richardson, 384 U.S. 73 (1966); Parsons v. Buckley, 379 U.S. 359 (1965).

departed from "the mathematical ideal."[156] The Court, moreover, has pressed on to apply the "one man, one vote" rule to almost every type of minor political district in the country,[157] despite the protests of Justice Harlan that "these adventures of the Court in the realm of political science are beyond its constitutional powers."[158]

In the school desegregation cases, the results are even more troublesome because the Court has not adopted a simple legal rule comparable to "one man, one vote." The resulting unavoidable excursions into local politics have led to strong criticism of the Court by its brethren on the state supreme courts,[159] proposals in Congress reminiscent of the Roosevelt "court-packing plan,"[160] and expressions of despair by the lower federal courts charged with the implementation of the Court's policies. Judge Wisdom of the Court of Appeals for the Fifth Circuit, after recounting the twelve-year effort towards desegregation of schools, said: *"The courts acting alone have failed."*[161] The reasons for that failure were well summarized in another opinion from the same Circuit, in which the court spoke of "great anxiety . . . with the *Brown* approach," and concluded:

> [Judicial desegregation] inescapably puts the Federal Judge in the middle of school administrative problems for which he was not equipped and tended to dilute local responsibility for the highly local governmental function of running a community's schools under law and in keeping with the Constitution.[162]

In both cases the court relied on the standards adopted by the Department of Health, Education and Welfare, rather than on its own judgment, in attempting to solve these "administrative problems."

Unable to develop judicially a simple legal rule in the school cases, the Supreme Court has pushed the lower courts ever further into the details of school administration. No longer is a district court allowed to say: "The Constitution . . . does not require integration. It merely forbids discrimination."[163] During the 1967 and 1968 terms, for

156. Kirkpatrick v. Preisler, 394 U.S. 526 (1969); *accord,* Wells v. Rockefeller, 394 U.S. 542 (1969).

157. Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Educ., 387 U.S. 105 (1967). Justice Fortas, dissenting in *Avery,* referred to 81,253 local governments in the United States. 390 U.S. at 499.

158. 390 U.S. at 487.

159. Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions, submitted to the Conference of Chief Justices, Aug. 20, 1958.

160. S. 1392, 75th Cong., 1st Sess. (1937).

161. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966).

162. Price v. Denison Ind. School Dist. Bd. of Educ., 348 F.2d 1010, 1013-14 (5th Cir. 1965).

163. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955).

example, the Court affirmed a district court order fixing mathematical ratios of black and white teachers,[164] and instructed a school board that its duty was not merely to remove segregation but "to effectuate a transition to a racially nondiscriminatory school system."[165] The last cited case is particularly instructive concerning the Court's recent methodology. The Court struck down a "freedom-of-choice" plan because in its three years of operation not a single white child attended the former black school, and the former white school was still 85 percent white; these facts, said the Court, showed that "the school system remains a dual system."[166] That it remained a dual system *in policy* is of course a complete nonsequitur from the facts stated. In the absence of evidence, one can only speculate about the cause, but it is at least equally probable that the continued segregation was due to the actions of parents rather than to the policy of the school board. That it remained a dual system *in fact* is at least partially true, according to the record, but if the Court now intends to fix mathematical ratios for black and white teachers and pupils in every public school in the land, it may be entering a contest not only with school authorities but with the parents of school children as well. As long as American citizens have the freedom to decide where they shall live, and the desire to get for their children what they think is the best possible education, such a contest between the Court and the citizenry can have but one outcome.

To say that the Court will lose a political contest in which it is arrayed against both the local governments and the citizens is not to say that its objectives are unworthy or that other branches of the government cannot achieve those objectives by other means. The Civil Rights Act of 1964 authorizes technical and financial assistance in the desegregation of local schools and the training of teachers and other personnel,[167] and delegates to the Commissioner of Education the administrative power to deny financial aid to school systems that fail to comply with regulations requiring desegregation.[168] This legislation was described by the Court of Appeals for the Fifth Circuit as not only appropriate and constitutional, but also necessary to rescue school desegregation from the bog in which it had been trapped for the previous ten years while the federal courts

164. United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

165. Green v. County School Bd., 391 U.S. 430, 435 (1968). It is not clear whether a "racially non-discriminatory school system" is the same as a "unitary school system within which no person is to be effectively excluded from any school because of race or color," as prescribed by the decree in the later case of Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

166. 391 U.S. at 441.

167. 42 U.S.C. §§ 2000c-2 to -4 (1964).

168. *Id.* §§ 2000d, -1, -5.

sought unaided to enforce compliance.[169] The 1964 Act authorizes the courts to grant or deny enforcement of administrative orders, including orders denying financial aid.[170] Thus, the way is open for the courts to return to the statutory and constitutional controversies with which they are equipped to deal, if the Supreme Court will permit them to do so.[171]

As this is written, the Supreme Court has before it cases that will allow it to permit lower courts to withdraw to more tenable positions in the field of school desegregation.[172] It is hoped that the Court will embrace these opportunities. The alternative is to continue on the present course until the detailed administrative decrees that the trial courts must enter become wholly unenforceable, through sheer inability of the court machinery to cope with the problems involved. In that direction lies increasing disrespect for the courts and grave danger for the rule of law.

Unfortunately, some recent decisions of the Court in other fields evidence a determination to enter judgments, whether or not they are enforceable, by claiming the power to declare in the absence of any present or future power to coerce.[173] The most significant of these cases is *Powell v. McCormack,*[174] in which the Court, speaking through the former Chief Justice on the eve of his retirement, held that Congressman Powell's prayer for a declaration establishing his right to a seat in Congress presented a justiciable controversy, while specifically refusing to decide whether the declaration could ever be enforced by a coercive judgment. The Court directed that defendant members of the House be dismissed, and declared Powell's right to his seat only against the House's clerk, sergeant-at-arms, and doorkeeper. The finding of justiciability was not supported by the earlier cases cited in the opinion, in which both declaratory and injunctive relief could have been granted.[175] Furthermore, while the case was pending, the term for which

169. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 856 (5th Cir. 1966).

170. 42 U.S.C. § 2000d-2 (1964).

171. *E.g.,* Griffin v. County School Bd., 377 U.S. 218 (1964) (the Court not only ordered the county to cease supporting private schools, but also ordered it to reopen the public schools; the second part of the order could now be left to administrative enforcement).

172. *E.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291 (W.D.N.C.), 306 F. Supp. 1299 (W.D.N.C. 1969) (supplementary opinion and order), 311 F. Supp. 265 (W.D.N.C.) (setting deadlines for complete integration), *joined and cert. granted,* 397 U.S. 978 (1970).

173. Mitchell v. Donovan, 397 U.S. 982 (1970); Powell v. McCormack, 395 U.S. 486, 499 (1969); Zwickler v. Koota, 389 U.S. 241, 254 (1967).

174. 395 U.S. 486 (1970), *rev'g as to jurisdictional issues* 395 F.2d 577 (D.C. Cir. 1968), *aff'g* 266 F. Supp. 354 (D.D.C. 1967) (complaint dismissed for lack of jurisdiction over the subject matter).

175. United States v. California, 332 U.S. 19 (1947) (declaration settling conflicting claims of the parties to oil and gas underlying submerged coastal lands; no injunction prayed); United Pub.

Powell was excluded expired, and he was re-elected and seated, thus rendering even the declaration moot;[176] however, a motion to dismiss on this ground was denied. If the Court had been faced with the prospect of enforcing its declaration, it would have been unable to do so because the remaining defendants were merely subordinate employees of a coordinate branch of the government carrying out a positive order of their employer, and subject to its contempt powers. A Court order would have compelled them to choose between obeying the House majority and obeying the Court. The Court majority chose to avoid this danger by rendering an advisory opinion in a case that had ceased to be a controversy against defendants who had no real interest in the case and no power to act.

A declaration that will never be enforced is an exercise in judicial irresponsibility and a perversion of the Declaratory Judgment Act and other sections of the Judicial Code.[177] It is especially mischievous in constitutional cases such as *Powell* and should be vigorously disapproved.[178] Hope for this result is nurtured by the strong dissent of the new Chief Justice in a case in which the majority imposed constitutional limitations on termination of welfare benefits at the very time that the government was in the process of developing administrative safeguards that would render the judgment unnecessary. His trenchant criticism of "the now familiar constitutionalizing syndrome" and the Court's search for "instant solutions" presages a greater awareness of the impact of Court decisions in the real world.[179]

Workers of America v. Mitchell, 330 U.S. 75 (1947) (Hatch Act found valid and Court therefore did not decide whether allegations of injury would have supported an injunction against its enforcement); *cf.* Bond v. Floyd, 385 U.S. 116 (1966) (Court granted declaratory judgment and injunction to restore a state senator to his position; it appears that the exclusion from office continued up to date of judgment).

176. In Alejandrino v. Quezon, 271 U.S. 528 (1926), when a Philippine senator prayed mandamus and injunction to restore his seat for a term which had expired prior to judgment, the case was dismissed as moot, although the question of his salary for the expired term remained open. In the *Powell* case, plaintiff's claim for salary was within the jurisdiction of the Court of Claims (*see* 28 U.S.C. § 1491 (1964)) and not within the jurisdiction of the district court where the suit was filed (*see id.* § 1346).

177. *Contra,* Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation,* 83 HARV. L. REV. 1870, 1878-79 (1970) (federal court may issue declaration under 28 U.S.C. § 2202 (1964), and then issue an injunction to enforce the declaration under *id.* §1651, without complying with the Three Judge Court Act, *id.* § 2282).

178. "Declaratory relief in this case is particularly inappropriate since it could not finally terminate the controversy, indeed, it might well tend to resurrect the very conflict our holding of inappropriateness seeks to avoid." Powell v. McCormack, 395 F.2d 577, 597 (D.C. Cir. 1968).

179. Wheeler v. Montgomery, 397 U.S. 280, 282 (1970) (Burger, C.J., dissenting).

III. CONCLUSION

The preceding analysis is not designed to criticize the objectives pursued by the Supreme Court since 1953. Many of these objectives were clearly sound, and time might even vindicate the Court's doctrinaire solution in the redistricting cases. The analysis has sought only to demonstrate that even the achievement of legitimate objectives may be jeopardized by careless craftsmanship and unconstitutional uses of declaratory remedies. More specifically, it has endeavored to make clear that in recent years the Court has too often used declarations of rights to avoid the arduous task of comprehending the complexity of the problems before it and the long-term consequences of attempting to enforce the decisions that it directed the lower courts to enter.

This jeopardy to the federal courts and their functions appears to have arisen from lack of attention to at least three inherent limitations on the United States courts.

The first limitation is imposed by the restriction of the federal judicial power to "cases" and "controversies" under Article III of the Constitution. The significance of this limitation has never been better expounded than by Chief Justice Marshall in *Marbury v. Madison:* "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."[180] If "individuals" be broadened to "litigants," Marshall's statement of the courts' province remains as valid as when it was uttered. The great Chief Justice saw that every advance by the federal courts into an area previously considered nonjusticiable necessarily raises new enemies and imperils the support of the executive, the Congress, and the people, which he knew is necessary to the performance of the Supreme Court's function. Each such advance, therefore, should be made with caution, in the clear exercise of the Court's duty to decide the rights of litigants, and with the realization that an unenforceable legal declaration is both unconstitutional and far more dangerous to our people and our institutions than no declaration at all.

The second limitation is inherent in the restricted means by which federal courts can gather information. This limitation flows from the first because the restriction of the federal judicial power to "cases" and "controversies" means that a court is dependent on the record made by parties having standing to invoke its aid in any particular case. Unlike Congress and the administrative agencies, the federal courts have little

180. 5 U.S. (1 Cranch) 137, 170 (1803).

power to summon expert assistance, or to employ staffs to investigate both the background of the cases brought before them and the consequences of possible judgments. Even if federal judges had the power, they lack the time and the training to use such material effectively. It is of great importance, therefore, that the courts' duties be limited to "legal" materials, and that the evidentiary basis of a decision be sufficiently developed and presented in the record so that, in constitutional cases, the court can reach a sound conclusion on the facts and foresee the legal significance of its judgment in terms of both res judicata and precedent. Aids to the court from outside the record by means of amici curiae and the "Brandeis brief" are excellent cautionary devices to encourage humility, but are wholly inadequate as props to the assertion of affirmative judicial control over new and unfamiliar social forces.

The third limitation arises from the ultimate powerlessness of the courts to effectuate their judgments. American history has seen cases in which the United States Supreme Court has been openly and flagrantly defied, and other cases in which knowledge that it might be defied caused the Court to proceed with circumspection. Legislative proposals have been made to limit the power of the Court, and in some cases the proposals have been adopted. Fortunately, the limits on the congressional power to deprive the Court of jurisdiction under Article III of the Constitution have not been tested. In order to maintain its authority in the face of such challenges, the Court must be able to convincingly assert that it is doing only its duty to decide the rights of litigants. If it attempts to do more over any extended period of time, it risks grave misunderstandings and can correct itself only by open or covert confession of error. Unlike the courts, Congress and the administrative agencies can assemble large amounts of information, openly change their minds on the basis of new information, and frankly shape their actions in accordance with "public convenience and necessity." The fact that the Court may for a time exceed the limitations of its power, by drawing on the reservoir of respect and good will built up by its predecessors, does not mean that the reservoir is inexhaustible. The Court's legal authority ultimately rests on its moral authority, which, once dissipated, cannot be easily restored.

In short, lasting constitutional adjudication, like politics, is always "the art of the possible." Constant awareness of the laws of that art, and their application through jurisdictional limitations, is the best security for individual justice and permanent judicial accomplishment.

Appendix

Following is a listing, by year of decision, of nonconstitutional declaratory cases, and constitutional declaratory cases that are cumulative to those discussed or of limited interest. *See* note 6 *supra* and accompanying text.

1954: Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (declaratory judgment that apportioned *ad valorem* tax on plaintiff's aircraft was valid); Castle v. Hayes Freight Lines, 348 U.S. 61 (state may not suspend interstate carrier's right to use state highways as sanction for violation of state weight law).

1955: Maneja v. Waialua Agricultural Co., 349 U.S. 254 (declaratory judgment that plaintiff's employees were subject to Fair Labor Standards Act); Peters v. Hobby, 349 U.S. 331 (declaratory judgment that plaintiff's removal from federal employment was unlawful, but reinstatement denied because his term had expired).

1956: International Harvester Credit Corp. v. Goodrich, 350 U.S. 537 (declaratory judgment on priority of liens); Frozen Food Express v. United States, 351 U.S. 40 (ICC order held subject to judicial review); United States v. Storer Broadcasting Co., 351 U.S. 192 (broadcasting Company has standing to challenge FCC order amending licensing rule); Offutt Housing Co. v. County of Sarpy, 351 U.S. 253 (state tax on real property leased from United States declared valid); Cole v. Young, 351 U.S. 536 (declaratory judgment that plaintiff's removal from federal employment was unlawful, and reinstatement ordered); DeSylva v. Ballentine, 351 U.S. 570 (illegitimate child of deceased copyright owner declared entitled to share in renewal of copyright); Brownell v. We Shung, 352 U.S. 180 (alien declared entitled to judicial review of exclusion order).

1957: Ceballos v. Shaughnessy, 352 U.S. 599 (alien's voluntary act in seeking relief from military service declared to make him ineligible for citizenship); Rabang v. Boyd, 353 U.S. 427 (Filipino's petition for habeas corpus and declaratory judgment to halt deportation denied); Service v. Dulles, 354 U.S. 363 (declaratory judgment that plaintiff's removal from federal employment was unlawful, and reinstatement ordered); Wilson v. Girard 354 U.S. 524 (waiver by United States of jurisdiction over crime committed by serviceman in Japan declared unconstitutional); Conley v. Gibson, 355 U.S. 41 (district court erroneously dismissed declaratory judgment action that union did not fairly represent plaintiff Negro employees).

1958: Public Util. Comm'n v. United States, 355 U.S. 534 (state statute prohibiting carrier from transporting government property at unapproved rates declared unconstitutional); Harmon v. Brucker, 355 U.S. 579 (nonhonorable discharge from army for pre-induction acts declared invalid); Northern Pac. Ry. v. United States, 356 U.S. 1 (preferential routing contracts with railroad's grantees declared violation of antitrust laws); Trop v. Dulles, 356 U.S. 86 (statute authorizing expatriation as sanction for wartime desertion declared unconstitutional); Nishikawa v. Dulles, 356 U.S. 129 (government failed to carry burden of proving grounds for expatriation); Rogers v. Quan, 357 U.S. 193 (declaration that on facts proved Attorney General had authority to deport alien); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (contracts between irrigation districts declared valid); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (prior decision upholding city's right to condemn state property for power project declared res judicata and city's bonds valid under federal law); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 577 (city ordinance declared inconsistent with Interstate Commerce Act).

1959: Federal Housing Admin. v. The Darlington, Inc., 358 U.S. 84 (declaration that renting practices not in accordance with National Housing Act); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (district court's declaration that Mississippi tax was invalid vacated and case remanded for stay); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (state statute requiring a specified type of mudguard for trucks passing through the state declared unconstitutional); Vitarelli v. Seaton, 359 U.S. 535 (declaratory judgment that plaintiff's removal from federal employment was unlawful for lack of fair hearing required by regulations); Martin v. Creasy, 360 U.S. 219 (district court had no jurisdiction to hear challenge to state statute); Taylor v. McElroy, 360 U.S. 709 (federal employee's declaratory judgment suit dismissed as moot).

1960: Mackey v. Mendoza-Martinez, 362 U.S. 384 (petition for declaration of citizenship rights remanded); De Veau v. Braisted, 363 U.S. 144 (plaintiff's suspension from waterfront union because of conviction of felony, as required by New York law, declared valid); Shelton v. Tucker, 364 U.S. 479 (state statute requiring teachers to report membership in organizations declared invalid).

1961: Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (requirements contract declared valid under antitrust laws); Burton v. Wilmington Parking Auth., 365 U.S. 715 (refusal of defendant's restaurant to serve plaintiff declared illegal); Montana v. Kennedy, 366 U.S. 308 (declaration that plaintiff was not a United States citizen); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (teacher's loyalty oath declared unconstitutionally vague); Campbell v. Hussey, 368 U.S. 297 (federal act regulating classification of tobacco pre-empts state regulation).

1962: Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (action for declaration on copyright remanded); Rusk v. Cort, 369 U.S. 367 (nonresident may maintain a declaratory action challenging denial of citizenship); Beard v. Stahr, 370 U.S. 41 (suit to enjoin appellant's discharge from Army dismissed as premature); Idlewild Liquor Corp. v. Epstein, 370 U.S. 713 (petitioner entitled to 3 judge court in declaratory action attacking state statute).

1963: McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (declaration regarding coverage of NLRA); Simler v. Conner, 372 U.S. 221 (jury trial required in declaratory judgment action at law); Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (union's declaratory judgment action to invalidate work rule changes dismissed); Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (declaration that notes were void for usury); Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (agency shop agreement declared invalid under Florida law); Rosenberg v. Fleuti, 374 U.S. 449 (alien declared to have lawfully reentered the United States); Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (state courts had jurisdiction to declare agency shop invalid).

1964: Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (Florida milk regulations and orders declared invalid); Tilton v. Missouri Pac. R. Co., 376 U.S. 169 (declaration of rights under Military Training and Service Act); Brooks v. Missouri Pac. R. Co., 376 U.S. 182 (declaration of rights under Military Training and Service Act); Schneider v. Rusk, 377 U.S. 163 (petition for declaration of citizenship rights); Baggett v. Bullitt, 377 U.S. 360 (loyalty oath declared unconstitutionally vague); Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (drug manufacturer could lawfully demand that dealer comply with Ohio Fair Trade Law); American Fed'n of Musicians v. Wittstein, 379 U.S. 171 (increase of union dues declared lawful); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (declaration of unconstitutionality of Civil

Rights Act of 1964 denied); Katzenbach v. McClung, 379 U.S. 294 (petition to enjoin enforcement of Civil Rights Act of 1964 denied).

1965: Texas v. New Jersey, 379 U.S. 674 (original suit in Supreme Court; escheat of funds to state of unclaiming creditor's last known address declared valid); Harman v. Forssenius, 380 U.S. 528 (voting registration requirement declared to violate twenty-fourth amendment); Simons v. Miami Beach First Nat'l Bank, 381 U.S. 81 (right to dower declared extinguished by divorce); United States v. California, 381 U.S. 139 (title to inland waters declared); Lamont v. Postmaster Gen., 381 U.S. 301 (regulation requiring repeated requests to receive Communist mail declared unauthorized and unconstitutional).

1966: Brotherhood of Locomotive Eng'rs v. Chicago, R.I. & P.R.R., 382 U.S. 423 (petition for declaration of unconstitutionality of state statute regulating train crew size denied); Elfbrandt v. Russell, 384 U.S. 11 (loyalty oath declared unconstitutional); Wallis v. Pan Am. Petrol. Corp., 384 U.S. 63 (declaration of interests in land leased by United States granted).

1967: Lassen v. Arizona, 385 U.S. 458 (suit to enjoin enforcement of rules governing acquisition of rights of way in lands held in trust by state); Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (Missouri law declared to require stockholder vote on corporate consolidation plan); Railroad Transfer Serv., Inc. v. City of Chicago, 386 U.S. 351 (declaration that city licensing ordinance imposed undue burdens on interstate commerce); Whitehill v. Elkins, 389 U.S. 54 (loyalty oath declared unconstitutionally vague); W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309 (suit to invalidate provisions requiring registrationof communist-front organizations dismissed as premature).

1968: Wirtz v. Local 153, Glass Bottle Blowers, 389 U.S. 463 (in suit by Secretary of Labor, union election declared void and new election ordered); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (automobile owner declared not an indispensable party to action to declare policy coverage); Lee v. Washington, 390 U.S. 333 (Alabama statute providing for prison segregation declared invalid); Puyallup Tribe v. Department of Game, 391 U.S. 392 (Department held entitled to declaration of tribe's fishing rights); Uniformed Sanitation Men Ass'n Inc. v. Commissioner of Sanitation, 392 U.S. 280 (declaration that petitioners may not be compelled to choose between surrendering jobs or fifth amendment rights); First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (state sales and use taxes declared invalid as applied to national banks); Williams v. Rhodes, 393 U.S. 23 (declaration and injunction granted requiring party to be placed on Ohio election ballot); WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (denial of tax exemption on sole ground of foreign incorporation declared invalid); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (Arkansas full-crew law declared valid).

1969: Glover v. St. Louis-S.F. Ry., 393 U.S. 324 (failure to exhaust administrative remedies excused when Negro plaintiffs charged conspiracy between union and employer to discriminate against them); Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (tax on traveling photographers declared valid); Allen v. State Bd. of Elections, 393 U.S. 544 (change in state election laws declared subject to requirements of Voting Rights Act of 1965); United States v. Louisiana, 394 U.S. 11 (rights of parties in submerged coastal lands declared); Bokulich v. Jury Comm'n, 394 U.S. 97 (declaration and injunction to prevent grand jury from acting held properly

denied); Black Unity League v. Miller, 394 U.S. 100 (declaratory judgment and injunction suit to prevent investigation by state government committee held properly dismissed as premature); Cipriano v. City of Houma, 395 U.S. 701 (limitation of right to vote in municipal bond elections to "property taxpayers" declared invalid); First Nat'l Bank v. Dickinson, 396 U.S. 122 (declaration of rights with regard to banking practices); Zuber v. Allen, 396 U.S. 168 (federal milk market regulation declared invalid); Dowell v. Board of Educ., 396 U.S. 269 (District Court's temporary approval of desegregation plan affirmed).

1970: Turner v. Fouche, 396 U.S. 346 (Georgia grand jury selection law declared invalid on its face and as applied); Arkansas v. Tennessee, 396 U.S. 873 (state boundaries declared); Northcross v. Board of Educ., 396 U.S. 1054 (school desegregation order affirmed); Rowan v. United States Post Office Dep't, 397 U.S. 728 (statute permitting notice to Post Master not to deliver pandering advertisements declared valid); City of Phoenix v. Kolodziejski, 399 U.S. 204 (Arizona statutes limiting vote on approval of revenue bonds to real property owners declared invalid, but decision will apply only prospectively); Gunn v. University Comm. to End the War in Viet Nam, 399 U.S. 383 (declaratory judgment in District Court cannot be appealed directly to Supreme Court).