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Comment

APPLICABILITY OF LIMITATIONS ON THE USE OF THE INJUNCTION IN CONSTITUTIONAL LITIGATION TO THE FEDERAL DECLARATORY JUDGMENT

INTRODUCTION

In the past the injunction suit has been the major method of testing the validity of legislative and administrative action.¹ The enactment in 1934 of the Federal Declaratory Judgments Act² made available in the federal courts a remedy that seems well adapted to replace the injunction in this field.

In many respects the declaratory judgment is superior to the injunction as an instrument in the field of constitutional litigation.

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¹ Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 236 *et seq.*; SEN. DOC. NO. 42, 75th Cong. 1st Sess. (1937) 1 *et seq.*

² 48 STAT. (1934) 955 as amended by 49 STAT. (1935) 1027, JUD. CODE § 274d, 28 U.S.C. (1940) § 400.

Declaratory judgments are not subject to the procedural and substantive technicalities that characterize injunctive relief. Though equitable in origin,³ they are neither legal nor equitable, but *sui generis*.⁴ Thus, the existence of an adequate legal remedy does not preclude a declaratory judgment.⁵ Nor is irreparable injury a prerequisite to declaratory relief if in other respects the controversy is real and substantial.⁶

The declaratory judgment involves no preliminary restraint on law enforcement before the court has had an opportunity to pass on the merits of the controversy. On the other hand, where an injunction is sought the court may grant preliminary relief to preserve the *status quo* before it has fully examined the merits of the controversy. This is one of the most objectionable features of the injunction in constitutional cases. Only after a full hearing on the merits will the court grant a declaratory judgment. The absence of preliminary restraint obviates the necessity of the posting of a bond. Like the injunction, the declaratory judgment effects a speedy determination of the case. Declaratory relief may be obtained summarily. The Federal Rules of Civil Procedure permit either a claimant or a defending party to move for summary judgment, and declaratory judgments are specifically included.⁷ Rule 57 provides: "The court may order a speedy hearing

³ English Chancery Procedure Act of 1852.

⁴ See *United States Fidelity & Guaranty Co. v. Koch* (C. C. A. 3d, 1939) 102 F. (2d) 288, 290; *Great Northern Life Ins. Co. v. Vince* (C. C. A. 6th, 1941) 118 F. (2d) 232, 233, *cert. den.*, (1941) 314 U. S. 637; *Sanders v. Louisville & N. R. Co.* (C. C. A. 6th, 1944) 144 F. (2d) 485, 486; *Bakelite Corporation v. Lubri-Zol Development Corp.* (D. Del. 1940) 34 Fed. Supp. 142, 144, (1940) 36 Fed. Supp. 105; Report of the Senate Committee, (Feb. 1, 1930) CONG. REC. 3009-3011; Borchard, *The Federal Declaratory Judgments Act* (1934) 21 VA. L. REV. 35, 38. Cf. *Great Lakes Co. v. Huffman* (1943) 319 U. S. 293, 300.

⁵ FED. RULES CIV. PROC. Rule 57: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." See *Bakelite Corporation v. Lubri-Zol Development Corp.*, *supra* note 4, at 143; 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3202; BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) 239.

⁶ See *Nashville, C. & St. L. Ry. v. Wallace* (1933) 288 U. S. 249, 264; *Aetna Life Ins. Co. v. Haworth* (1937) 300 U. S. 227, 241; *Black v. Little* (E. D. Mich. 1934) 8 Fed. Supp. 867, 870; *Bakelite Corporation v. Lubri-Zol Development Corp.*, *supra* note 4, at 143; 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3219, n. 67.

This advantage is more apparent than real because the United States Supreme Court has on several occasions stretched the concept of irreparable injury to a drastic extent. *Pierce v. Society of Sisters* (1925) 268 U. S. 510; *Euclid v. Ambler Co.* (1926) 272 U. S. 365; *Carter v. Carter Coal Co.* (1936) 298 U. S. 238; *Ashwander v. Valley Authority* (1936) 297 U. S. 288, *rel'g den.*, (1936) 297 U. S. 728; 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3219. See also Note (1936) 46 YALE L. J. 255, 267, where the writer maintains that the United States Supreme Court has liberally construed the requirements of irreparable injury in constitutional cases, finding it in direct pecuniary loss or in indirect injury resulting from harassment by government officials. He further states that in some cases the threat of penalty for noncompliance with an unconstitutional statute may itself be irreparable injury, regardless of whether compliance with the act would result in irreparable injury.

⁷ FED. RULES CIV. PROC. Rule 56(a), (b).

of an action for a declaratory judgment and may advance it on the calendar."

A declaration does not involve coercion, which is unnecessary in any event. It finally determines the question of constitutionality. Injunction suits were often a mere procedural vehicle. What the parties really wanted was a declaration.

Occasionally some courts have stated that declaratory relief is proper only when an injunction may issue, and have shown a tendency to import some of the principles of equity into actions for declaratory judgments. In *Colegrove v. Green*,⁸ the United States Supreme Court dismissed a bill for a declaratory judgment presented by a qualified voter protesting the validity of the apportionment of Illinois into Congressional districts. The decision was based on the well-established constitutional doctrine that a court will not pass on controversies of a political nature. In the course of his opinion of the Court, however, Mr. Justice Frankfurter, with whom Mr. Justices Reed and Burton concurred, stated that a declaratory judgment is to be granted only in conformity with "established equitable principles", and that "the test for determining whether a federal court has authority to make a declaration such as is here asked is whether that controversy 'would be justiciable in this Court if presented in a suit for an injunction.'"⁹

When an injunction is proper, *a fortiori* the milder declaratory judgment lies. But as Mr. Justice Rutledge has stated in a separate opinion in *Cook v. Fortson*,¹⁰ declaratory relief is also appropriate in many instances in which aid by way of injunction cannot be afforded. He continues, "It was to avoid the limitations resulting from the fact that injunctive or other immediately effective equitable relief could not be given that relief by way of declaratory judgment was authorized by Congress. This Court has not yet determined that declaratory relief cannot be given beyond the bounds fixed by the pre-existing jurisdiction in equity . . . , although three members of the

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⁸ (1946) 328 U. S. 549. *reh'g den.*, (1946) .... U. S. .... 91 L. ed. Adv. Ops. 81, 67 S. Ct. 118. Justice Jackson did not participate. Justice Rutledge concurred in a separate opinion. Justice Black, joined by Justices Douglas and Murphy, dissented.

⁹ *Ibid.* at 551. *Accord*: *State of Wyoming v. Franke* (D. Wyo. 1945) 58 Fed. Supp. 890, 897.

¹⁰ (1946) .... U. S. ...., 91 L. ed. Adv. Ops. 65, 67 S. Ct. 21, 22. Other courts have also stated that declaratory relief is available in many cases where an injunction is not. See *Gully v. Interstate Natural Gas Co.* (C. C. A. 5th, 1936) 82 F. (2d) 145, 149, *cert. den.*, (1936) 298 U. S. 688; *Black v. Little*, *supra* note 6, at 870; *cf. Whisler v. City of West Plains, Mo.* (C. C. A. 8th, 1943) 137 F. (2d) 938, 939. In *Borchard, The Next Step Beyond Equity—The Declaratory Action* (1946) 13 U. OF CHI. L. REV. 145, the author says, "Equity requires a defendant to take a position actually adverse to the plaintiff; the declaratory action requires only the vindication of the actor's claim of right against a *potentially* adverse party."

Court announced their views apparently to that effect in *Colegrove v. Green*.¹¹

The possibility of widespread use of the declaratory judgment in constitutional litigation has aroused apprehension in some quarters because of the consequent speed of judicial review of the constitutionality of legislation.¹² But the requirement of notice to the United States in constitutional cases¹³ should, in most instances, prevent invalidation of statutes without proper consideration of the issues. Others have objected that the granting of declaratory relief will impair the efficacy of police power regulations. Certainly, the businessman who seeks to run his business economically and to comply in good faith with the requirements of law should be able to obtain a declaration of constitutionality when his interests are affected. To allow him this relief will, indeed, promote an understanding obedience to police power regulations.

NATURE OF THE PARTIES AND THE CONTROVERSY

It is familiar law that persons whose substantial interests will be or have been adversely affected by the enforcement of a law or the recognition of the validity of a privilege or right or by administrative action may raise the question of constitutionality.¹⁴ They must have sustained or be immediately in danger of sustaining some direct¹⁵ personal¹⁵ injury to a present and existing, rather than a prospective or contingent, interest.¹⁶

¹¹ FRANKFURTER, LAW AND POLITICS (1939) 23-33; Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002; Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1931* (1932) 46 HARV. L. REV. 226, 259; Note (1936) 46 YALE L. J. 255, 270; cf. Legis. (1937) 51 HARV. L. REV. 148; Notes (1931) 40 YALE L. J. 1101; (1941) 50 YALE L. J. 1278.

¹² 50 STAT. (1937) 751, 28 U.S.C. (1940) § 401.

¹³ 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) § 13.

¹⁴ Thus, an action to obtain a declaratory judgment that a municipal ordinance did not prohibit the use of paper milk containers, or if it did, that the ordinance was invalid, could not be maintained by a manufacturer and seller of paper milk bottles who did not engage in the distribution of milk. The ordinance was to regulate the distribution of milk, and any effect on the manufacturer and seller of the paper containers was only remote and incidental. *Ex-Cell-O Corporation v. City of Chicago* (C. C. A. 7th, 1940) 115 F. (2d) 627. Cf. *Fieldcrest Dairies v. City of Chicago* (N. D. Ill. 1940) 35 Fed. Supp. 451, *rev'd on other grounds and remanded for mod. of opinion*, (C. C. A. 7th, 1941) 122 F. (2d) 132 (Milk distributor has sufficient interest to obtain a declaration).

¹⁵ In *Tileston v. Ullman* (1943) 318 U.S. 44, the United States Supreme Court held that a physician is without standing to challenge, as a deprivation of life without due process of law in violation of the Fourteenth Amendment, a state statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance or counsel in their use. The lives alleged to be endangered were those of the patients who were not parties to the suit, and there was no allegation of infringement of the complainant physician's liberty or property rights. The Court reserved judgment as to whether a justiciable controversy might be presented with regard to those rights.

In *Frahn v. Tennessee Valley Authority* (N. D. Ala. 1941) 41 Fed. Supp. 83, peti-

¹⁶ See page 256.

It has long been very questionable whether public officers, as well as private citizens, have the necessary interest to challenge the constitutionality or construction of a statute under which they are required to act. Considerations of public policy are opposed to refusal by a public officer to carry out his duties of law enforcement and to his passing on the constitutionality of every law he is directed to enforce. On the other hand, a public official charged with the enforcement of a law that he deems unconstitutional is faced with a dilemma. If he refuses to enforce the statute or regulation, and it later proves to be valid, he is subject to all the penalties prescribed for failure to perform the duties of his office. If he decides to enforce the statute and it is subsequently held to be unconstitutional, he is "stripped" of his official capacity, and may be liable for damages in tort to all persons injured by his illegal actions.¹⁷ While a public official in this position may not be in imminent danger of irreparable injury, the prerequisite to injunctive relief, some authorities feel that his interest is sufficient to obtain a declaratory judgment.¹⁸

In suits for declarations as to the constitutionality of enactments, a public official is more often the defendant. He must be responsible for the enforcement of or for some duty in connection with the act or regulation the validity of which is challenged.¹⁹ Thus, it has generally

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tioners in a taxpayers action for a declaratory judgment that the Tennessee Valley Authority and its directors were not complying with the provisions of the Tennessee Valley Authority Act providing that the corporation should maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama, failed to allege violation of a *personal* contract or an injury affecting their *personal* financial rights. The court found that there was no justiciable controversy upon which a declaratory judgment could be entered, notwithstanding that if the principal office was moved to the vicinity of Muscle Shoals, large sums of money would be spent in that area, and the petitioners, as citizens of the community, would thereby benefit.

¹⁶ Perkins v. Lukens Steel Co. (1940) 310 U. S. 113, *rev'g* (App. D. C. 1939) 107 F. (2d) 627 (Manufacturers could not enjoin Secretary of Labor and other government officials from continuing in effect a minimum wage determination which was included in all government contracts as a standard to be met by all sellers to the government. Their interest as *prospective* vendors was not sufficient to present a justiciable controversy). *Cf.* Publix Cleaners v. Florida Dry Cleaning and L. Board (S. D. Fla. 1940) 32 Fed. Supp. 31 (Dry cleaner could obtain declaratory judgment as to validity of minimum price schedule prescribed by State Dry Cleaning and Laundry Board).

¹⁷ *Ex parte* Young (1908) 209 U. S. 123; Borchard, *Challenging "Penal" Statutes by Declaratory Action* (1943) 52 YALE L. J. 445, 467.

¹⁸ BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941) 976 *et seq.*; 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3220, n. 73; Ellingwood, *Declaratory Judgments in Public Law* (1934) 29 ILL. L. REV. 1. See Quinones v. Landron (C. C. A. 1st, 1938) 99 F. (2d) 618, 620.

¹⁹ Smith v. Blackwell (C. C. A. 4th, 1940) 115 F. (2d) 186 (Qualified electors of South Carolina could not maintain a suit against the secretary of state and the commissioners of federal elections for a declaratory judgment that the South Carolina election law as administered did not adequately preserve the secrecy of the ballot, because the defendants had no duties with respect to the furnishing of ballots or the manner of conducting elections).

been recognized that a suit for a declaratory judgment cannot be maintained against a subordinate official in the absence of his administrative superior who is charged with the duty of enforcing the act.²⁰ If the subordinate official is not authorized to enforce the law the constitutionality of which is challenged, his interest is not adverse, and no justiciable controversy exists.²¹ If the subordinate official is authorized by his superior to institute proceedings for enforcement, some courts still deny the existence of a justiciable controversy because the officials primarily charged with enforcement are not bound.²² Other courts refuse to take jurisdiction on the ground that even if a justiciable controversy exists, the superior official with the primary authority of enforcement is an indispensable party.²³

Where the defendant is a public official or a public agency or the federal or state government or a political subdivision of a state, the problem of sovereign immunity is often present. It has been emphatically held that the Federal Declaratory Judgments Act does not extend the consent of the United States to be sued beyond the terms of the Tucker Act²⁴ and other statutory authority expressly and specifically

²⁰ Webster v. Fall (1925) 266 U.S. 507; John P. Agnew & Co. v. Hoage (App. D. C. 1938) 99 F. (2d) 349; James v. Lake Wales Citrus Growers Ass'n (C. C. A. 5th, 1940) 110 F. (2d) 653; Smith v. American Asiatic Underwriters, Federal (C. C. A. 9th, 1942) 127 F. (2d) 754, *aff'd on reh'g*, (C. C. A. 9th, 1943) 134 F. (2d) 233; Helco Products Co. v. McNutt (App. D. C. 1943) 137 F. (2d) 681; Bethlehem Shipbuilding Corporation v. Nylander (S. D. Calif. 1936) 14 Fed. Supp. 201; Beranek v. Wallace (N. D. Ind. 1939) 25 Fed. Supp. 841; F. W. Maurer & Sons v. Andrews (E. D. Pa. 1939) 30 Fed. Supp. 637; Redlands Foothill Groves v. Jacobs (S. D. Calif. 1940) 30 Fed. Supp. 995; Connecticut Importing Co. v. Perkins (D. Conn. 1940) 35 Fed. Supp. 414; Mushroom Cooperative Canning Co. v. Jacobs (E. D. Pa. 1940) 35 Fed. Supp. 624; Kentucky Cottage Industries v. Hagan (W. D. Ky. 1941) 41 Fed. Supp. 451; Baltimore Transit Co. v. Flynn (D. Md. 1943) 50 Fed. Supp. 382; Blue Star Auto Stores v. Fleming (D. C. 1941) 50 Fed. Supp. 928; People's Bank v. Federal Reserve Bank of San Francisco (N. D. Calif. 1944) 58 Fed. Supp. 25, *app. dismissed*, (C. C. A. 9th, 1945) 149 F. (2d) 850. But see Chester C. Fosgate Co. v. Kirkland (S. D. Fla. 1937) 19 Fed. Supp. 152, 159; Roloff v. Perdue (N. D. Iowa 1939) 31 Fed. Supp. 739, (1940) 33 Fed. Supp. 513; Sunshine Mining Co. v. Carver (D. Idaho 1940) 34 Fed. Supp. 274, (1941) 41 Fed. Supp. 60. Cf. A. H. Belo Corporation v. Street (N. D. Tex. 1940) 35 Fed. Supp. 430, (1941) 36 Fed. Supp. 907 (Where local official authorized to sue as representative of a class of private individuals entitled to recover penalties against the petitioner for violation of Fair Labor Standards Act, petitioner could get a declaratory judgment as to applicability of the Act to himself in a suit against the local official); State of Wyoming v. Franke, *supra* note 9.

²¹ John P. Agnew & Co. v. Hoage; Smith v. American Asiatic Underwriters, Federal; Helco Products Co. v. McNutt; Beranek v. Wallace; F. W. Maurer & Son Co. v. Andrews; Connecticut Importing Co. v. Perkins; A. H. Belo Corp. v. Street; Mushroom Cooperative Canning Co. v. Jacobs; Blue Star Auto Stores v. Fleming; Baltimore Transit Co. v. Flynn, all *supra* note 20. This concept follows when the enforcement official personally, rather than the state, is regarded as the adverse party.

²² Smith v. American Asiatic Underwriters, Federal, *supra* note 20.

²³ See Redlands Foothill Groves v. Jacobs, *supra* note 20, at 1009; Barr v. Rhodes (W. D. Ky. 1940) 35 Fed. Supp. 223, 225; Kentucky Cottage Industries v. Hagan, *supra* note 20, at 452.

²⁴ 24 STAT. (1887) 505, 28 U.S.C. (1940) §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761-765.

accepting liability and subjection to suit.²⁵ But in suits thus specifically and expressly authorized, the declaratory judgment would doubtless be available along with other forms of relief.

Since *Ex parte Young*,²⁶ the courts have assumed that the state was immune from suit even where the constitutionality of its enactment was challenged. *Ex parte Young* was able to avoid the doctrine by the fiction that a public official who attempts to enforce an unconstitutional statute or administrative order is "stripped" of his official capacity and acts as a private individual. When the only method of challenging constitutionality before the institution of enforcement proceedings was the injunction, a showing of imminent irreparable injury was required in order to get relief. This was often interpreted to require some positive action by the enforcing official.²⁷ A showing of imminent irreparable injury is not prerequisite to declaratory relief; hence, it may be available without action on the part of enforcement officials. If a justiciable controversy arises from mere enactment of the statute, it is difficult to find a dispute between the petitioner and the enforcement officer as an *individual*. It becomes, in reality, a bare suit against the state. If the court admits this, it will be unable to avoid the doctrine of sovereign immunity by use of the "stripping" fiction. It will thus be forced to re-examine the wisdom of the extension of sovereign immunity into the field of constitutional litigation.²⁸

While the Federal Declaratory Judgments Act does not extend the jurisdiction of the federal courts to controversies which are not justiciable, it does enable them to give relief in actual controversies which may not have developed to the point where equitable relief or damages could be given.²⁹ There must still be a substantial controversy between parties having adverse legal interests of sufficient immediacy

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²⁵ *Lynn v. United States* (C. C. A. 5th, 1940) 110 F. (2d) 586; *Yeskel v. United States* (D. N. J. 1940) 31 Fed. Supp. 956; *Innes v. Hiatt* (M. D. Pa. 1944) 57 Fed. Supp. 17; *Twin Cities Properties v. U. S.* (1935) 81 Ct. Cl. 655.

²⁶ *Supra* note 17.

²⁷ *Liberty Warehouse Co. v. Grannis* (1927) 273 U.S. 70; *Southern Pac. Co. v. Conway* (C. C. A. 9th, 1940) 115 F. (2d) 746, (1941) 26 WASH. U. L. Q. 428.

²⁸ It is questionable whether the doctrine of sovereign immunity should ever have been extended into the constitutional field. Chief Justice Marshall regarded the Eleventh Amendment as applicable to suits to extract money from a state or to coerce a state to perform an obligation, but did not mention suits challenging the validity of legislative or administrative action. See *Cohens v. Virginia* (1821) 19 U.S. (6 Wheat.) 264, 405; *Osborn v. United States Bank* (1824) 22 U.S. (9 Wheat.) 737, 844.

²⁹ See *Putnam v. Ickes* (App. D. C. 1935) 78 F. (2d) 223, 226, *cert. den.*, (1935) 296 U.S. 612; *Gully v. Interstate Natural Gas Co.*, *supra* note 10, at 149; *Hary v. United Electric Coal Co.* (E. D. Ill. 1934) 8 Fed. Supp. 655, 656. In the *Gully* case at page 149, the court says: "When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction . . . of the controversy to grant the relief of declaration either before or after the stage of relief by coercion has been reached."

and reality to warrant the issuance of a declaratory judgment.³⁰ The challenged statute must operate as a "present restraint" and be applied to a concrete set of facts before the court will pass on its constitutionality.³¹

STATUTORY LIMITATIONS

Congress has enacted several statutes placing limitations on the use of the injunction to test the constitutionality of legislative and administrative action. In other statutes it has limited methods of judicial review in special classes of cases. The remainder of this article will examine the effect of these statutory qualifications on the declaratory judgment.

Exclusive Statutory Review.

Where a federal statute expressly provides a method of judicial review of an administrative order, federal courts may not issue a declaratory judgment.³² That follows logically from the power of Congress to prescribe the jurisdiction of the inferior federal courts.³³

The recently enacted Administrative Procedure Act³⁴ indicates that any method of statutory review specifically prescribed for review of the action of administrative agencies will be deemed exclusive, whether the statute expressly makes it exclusive or not, unless it is inadequate. Section 10 of the Act states: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— . . . The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or, *in the absence or inadequacy thereof*, any applicable form of legal action (including action for declaratory judgments or writs of prohibitory or mandatory

³⁰ *Md. Casualty Co. v. Pacific Co.* (1941) 312 U.S. 270, *rev'd* (C. C. A. 6th, 1940) 111 F. (2d) 214. Good discussions of the usual requirements of a justiciable controversy in the field of declaratory judgments may be found in *Legis.* (1936) 49 HARV. L. REV. 1351; *Note* (1941) 50 YALE L. J. 1278.

³¹ *Federation of Labor v. McAdory* (1945) 325 U.S. 450.

³² *Arkansas Power & Light Co. v. Federal Power Com.* (D. C. 1945) 60 Fed. Supp. 907. "Obviously the declaratory action is not designed to replace special statutory proceedings like income tax appeals, zoning appeals, labor relations cases, naturalization proceedings and other exclusive administrative and judicial remedies established for special types of cases." Borchard, *Declaratory Judgments* (1939) 9 BROOKLYN L. REV. 1, 8. *Note* (1944) 149 A. L. R. 1103, 1104 *et seq.*, collects English cases and state cases which have held jurisdiction to render a declaratory judgment impliedly denied where a state statute confers *exclusive* jurisdiction on a certain court or courts, *e.g.*, court of summary jurisdiction, probate court, workmen's compensation board, public service commission, etc.

³³ *Sheldon et al. v. Sill* (1850) 49 U.S. (8 How.) 441; *Lockerty v. Phillips* (1943) 319 U.S. 182; *Yakus v. United States* (1944) 321 U.S. 414; *Mason v. Hitchcock* (C. C. A. 1st, 1939) 108 F. (2d) 134, 135; *Seligman's Inc. v. United States* (W. D. La. 1939) 30 Fed. Supp. 895.

³⁴ PUB. L. NO. 404, 79th Cong., 2d Sess. (June 11, 1946), 5 U.S.C.A. § 1001 *et seq.*

injunction or habeas corpus) in any court of competent jurisdiction." (Italics added.)

When a special statutory review proceeding exists, the declaratory judgment is no more efficacious than the injunction to obtain a ruling on the constitutionality of administrative action. The limitation goes to the jurisdiction of the court, whatever the procedure employed.

The Three Judge Acts.

Section 266 of the Judicial Code³⁵ provides that no *interlocutory* injunction restraining the action of any officer of a state in the enforcement of a statute of a state, or of an order made by an administrative board or commission pursuant to a state statute, shall be granted by any justice of the Supreme Court of the United States, or by any district court, or by any judge thereof, or by any circuit judge acting as a district judge, upon the ground of unconstitutionality of the statute, unless the application for the injunction shall be heard and determined by three judges. Direct appeal lies to the United States Supreme Court from the order of the three judge court granting or denying the injunction.

In *Colegrove v. Green*, Mr. Justice Frankfurter, with whom Mr. Justices Reed and Burton concurred, stated:³⁶ "This case is appropriately here under § 266 of the Judicial Code . . . on direct review of the judgment of the District Court of the Northern District of Illinois, composed of three judges, dismissing the complaint of the appellants."

In view of the course of earlier decisions on the Three Judge Act, it is apparent that it was aimed not at *all* decisions on the constitutionality of state laws by a single federal judge, but only at a particular kind of procedure before a single federal judge. The Act, itself, uses the word "interlocutory". Until the *Colegrove* case, the courts had confined its application to interlocutory relief. It had been construed to apply to hearings on an application for an interlocutory injunction, and to hearings on an application for a permanent injunction *only when interlocutory relief was demanded*. Where only a permanent injunction was sought, it was held that a single judge had jurisdiction, and there was no direct appeal to the United States Supreme Court.³⁷ *A fortiori*, section 266 should not apply where the milder

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³⁵ 36 STAT. (1910) 557 as amended 36 STAT. (1911) 1162, 37 STAT. (1913) 1013, and 43 STAT. (1925) 938, 28 U. S. C. (1940) § 380.

³⁶ *Supra* note 8, at 550. None of the other members of the Court questioned this conclusion.

³⁷ *Moore v. Fidelity & Deposit Co.* (1926) 272 U.S. 317; *Smith v. Wilson* (1927) 273 U.S. 388, 390. See *Stratton v. St. Louis S. W. Ry.* (1930) 282 U.S. 10, 15; *Frankfurter and Landis, The Supreme Court under the Judiciary Act of 1925* (1928) 42 HARV. L. REV. 1, 25.

declaratory judgment is sought.³⁸ It is a final and not an interlocutory form of relief. Unlike an interlocutory injunction, it is rendered only after a full and complete hearing on the merits. There are also specific indications that it was the Congressional intent to exempt the declaratory judgment from the coverage of the Three Judge Act. In the hearings of the Senate Judiciary Committee on the proposed Federal Declaratory Judgments Act, Professor Borchard pointed out to a subcommittee that the federal declaratory judgment might evade section 266. The Committee felt that this was no objection.³⁹ Moreover, the courts have evinced a tendency to interpret the Three Judge Act narrowly in view of the trouble involved in assembling a three judge court.⁴⁰

In the face of the words of the Act, judicial decisions interpreting it, and the action of the Senate Judiciary Committee, the Supreme Court in the *Colegrove* case makes the assertion, without any discussion, that the case is properly before the Court under the Three Judge Act. It would seem that all precedent points to a contrary decision; that applications for declaratory judgments on the constitutionality of state laws or administrative action are not covered by the Three Judge Act.

The Judiciary Act of 1937 provides:

"No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as a district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. . . . An appeal may be taken directly to the Supreme Court of the United States."⁴¹

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³⁸ See *Mills v. Bd. of Education of Anne Arundel County* (D. Md. 1939) 30 Fed. Supp. 245, 246, n. 1.

³⁹ HEARINGS BEFORE JUDICIARY COMMITTEE, SENATE, ON H. R. 5623, Declaratory Judgments (1929) 38-39.

⁴⁰ *Ex parte Williams* (1928) 277 U. S. 267 (does not include matters of local interest even though constitutionality of a state statute is challenged); *Ex parte Collins* (1928) 277 U. S. 565 (does not include municipal ordinances); *Oklahoma Gas Co. v. Packing Co.* (1934) 292 U. S. 386, 391 (does not include suit with no real basis for relief against state officers); *Wilentz v. Sovereign Camp* (1939) 306 U. S. 573 (does not include action by local officers). But see 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3220 where the author states that the Three Judge Act probably cannot be avoided by recourse to a declaratory judgment. The basis for this argument is that Congress intended to limit not only interlocutory relief, but all adjudication in the federal courts of the constitutionality of state statutes before a determination in the courts of the state.

⁴¹ 50 STAT. (1937) 752, 28 U. S. C. (1940) § 380a.

This act is not by its terms limited to cases where interlocutory relief is sought. But it clearly states "no interlocutory or permanent *injunction*" shall be issued. The courts have shown the same tendency to interpret it narrowly as they have in construing section 266.⁴² This would indicate that the three judge provision of the Judiciary Act of 1937 may not cover declaratory judgments.⁴³ If suits for declaratory relief may be heard by a single judge, appeal is to the appropriate circuit court of appeals rather than directly to the Supreme Court.

The Johnson Acts.

The Johnson Act of 1934 denies district courts "jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative body or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."⁴⁴ This provision has been greatly limited by the United States Supreme Court's interpretation of what constitutes a "plain, speedy, and efficient remedy" in the state courts.⁴⁵ As a result, public utility companies were, in many instances, able to get relief by injunction in spite of the Johnson Act. They did not resort to the declaratory judgment, however, and there is no direct holding as to its availability.⁴⁶

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⁴² *Garment Workers v. Donnelly Co.* (1938) 304 U.S. 243; *Jameson & Co. v. Morgenthau* (1939) 307 U.S. 171 (includes only "Acts of Congress" as such, and does not include challenges to validity of administrative action and regulations under an act of Congress where no substantial question of the constitutional validity of the act itself is raised).

⁴³ Another section of the Judiciary Act of 1937 providing for direct appeal to the United States Supreme Court where the decision is against the validity of an act of Congress and where the United States is a party or has intervened is broad enough to include declaratory judgments. 50 STAT. (1937) 752, 28 U.S.C. (1940) § 349a. See Note (1939) 7 GEO. WASH. L. REV. 514.

⁴⁴ 48 STAT. (1934) 775, 28 U.S.C. (1940) § 41(1).

⁴⁵ See, e.g., *Corporation Comm'n v. Cary* (1935) 296 U.S. 452, 458; *Mountain States Co. v. Comm'n* (1936) 299 U.S. 167, 170; *Legis.* (1937) 50 HARV. L. REV. 813.

⁴⁶ In *Mississippi Power & Light Co. v. City of Jackson* (C.C.A. 5th, 1941) 116 F. (2d) 924, *cert. den.*, (1941) 312 U.S. 698, the court gave a declaratory judgment as to a power and light company's rights to obtain higher rates because of changed conditions, where it was operating under a subsisting contract with the city to furnish gas at a fixed rate. At page 926, the court makes some general statements about the limitation of the Johnson Act to restraint or suspension by injunction of the enforcement of orders affecting utility rates. But these statements must be read in the light of the fact that the rates

The Johnson Act of 1937, otherwise known as the Tax Injunction Act, denies district courts "jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."⁴⁷ It has not been limited in the same manner as the 1934 Act. Almost all cases find the state remedy "plain, speedy, and efficient".⁴⁸ Since this resulted in the denial of injunctive relief, the taxpayers seeking relief did resort to the declaratory judgment. The wording of the 1934 and 1937 Acts is so much alike that some of the same principles of construction may apply to both; therefore, some guidance for the construction of the 1934 Act may be obtained from tax cases.

The argument for the exclusion of declaratory judgments from the ban of the Tax Injunction Act is as follows: (1) The words, "enjoin, suspend, or restrain", contemplate injunctive relief only; the declaratory judgment has no such coercive effect. (2) The Federal Declaratory Judgments Act had already been passed at the time Congress framed the Tax Injunction Act. Congress was aware of the existence of declaratory relief and of the fact that it had been used in state tax cases.⁴⁹ Thus, its failure to mention the declaratory judgment indicated its intention to exclude it. (3) Congress was aware of the interpretation and history of the Act of 1867, *infra*, denying jurisdiction of suits to "restrain" the assessment or collection of federal taxes. A special amendment to the Federal Declaratory Judgments Act⁵⁰ had been required to ban declaratory judgments on federal taxes. That amendment covered only federal taxes. In spite of this, Congress used language similar to that of the Act of 1867 in the 1937 Act, and did not mention declaratory judgments.

The argument for the inclusion of declaratory judgments within the ban of the 1937 Tax Injunction Act may be summarized as follows: (1) The 1937 Act is aimed at *adjudication* of state tax questions in the first instance in the federal courts. It is not only intended to preclude injunctive relief. It is an extension of the general principle of avoiding needless obstruction to the fiscal or domestic policy of a state. A declaratory judgment would accomplish the same result as an injunction, and so is comprehended by the 1937 Act. (2) The purpose of the 1937 Act was to decrease the burden on the federal courts, and it should be construed in that light. (3) State courts are more

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as such were not in question, and that the declaration demanded was only as to the petitioner's rights under a contract which had to be settled before either party could further proceed.

⁴⁷ 50 STAT. (1937) 738, 28 U. S. C. (1940) § 41(1).

⁴⁸ Note (1941) 50 YALE L. J. 927 and cases there cited.

⁴⁹ *E.g.*, Gully v. Interstate Natural Gas Co., *supra* note 10.

⁵⁰ 49 STAT. (1935) 1027, 28 U. S. C. (1940) § 400, Judicial Code § 274d.

familiar with local problems, and should be allowed to construe their own statutes in the first instance. (4) It is more expensive for the parties to litigate in the federal courts. (5) Failure to include state taxes in the 1935 amendment to the Declaratory Judgments Act may be explained by the fact that the 1935 amendment was enacted at the insistence of the United States Treasurer, who was interested only in federal taxes, by the absence of any *legislative* policy to limit even injunctive relief in the federal courts in state tax cases until 1937, and by the absence of any case prior to 1935 in which a federal court granted a declaration when state taxes were in issue.⁵¹

Professor Borchard, the greatest advocate of the declaratory judgment, admits that both the Acts of 1934 and 1937 were probably designed to prevent federal adjudication and not merely injunctive relief.⁵² When the question was presented to the United States Supreme Court in *Great Lakes Co. v. Huffman*,⁵³ it did not find it necessary to pass directly on whether the words, "enjoin, suspend, or restrain," in the 1937 Act also preclude declaratory judgments on the validity of state taxes. The Court declared:⁵⁴ "The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles. . . . The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court."

In *Township of Hillsborough v. Cromwell*,⁵⁵ the Supreme Court reaffirmed this view, but held that the equitable principle was subject to the same exception as that expressly provided in the Act of 1937. Where it is not clear that the state will afford a remedy to the taxpayer, the state remedy becomes inadequate because of uncertainty, and declaratory relief is available in the federal courts. The Court

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⁵¹ Cases holding the declaratory judgment within the ban of the 1937 Act; *West Pub. Co. v. McColgan* (C. C. A. 9th, 1943) 138 F. (2d) 320; *Collier Advertising Service v. City of New York* (S. D. N. Y. 1940) 32 Fed. Supp. 870. *Contra*: *Morrison-Knudsen Co. v. State Board of Equalization* (D. Wyo. 1940) 35 Fed. Supp. 553. For general discussion of the principles involved, see 3 MOORE'S FEDERAL PRACTICE (Moore and Friedman's ed. 1938) 3216; Note (1941) 50 YALE L. J. 927; (1941) 8 U. OF CHI. L. REV. 572; (1941) 25 MINN. L. REV. 643.

⁵² Borchard, *Challenging "Penal" Statutes by Declaratory Action* (1943) 52 YALE L. J. 445, 463, n. 69.

⁵³ (1943) 319 U.S. 923.

⁵⁴ *Ibid.* at 299. *Accord*: *Miller v. City of Greenville, Miss.* (C. C. A. 8th, 1943) 138 F. (2d) 712.

⁵⁵ (1946) 326 U.S. 620.

distinguished *Spector Motor Co. v. McLaughlin*⁵⁶ where availability of declaratory relief had been denied on the ground that the taxpayer had an adequate remedy to challenge the assessment in the state courts. There the only uncertainty was as to the subject matter of the tax, and that was a question for the state court to decide in the first instance.

The Federal Tax Injunction Act and the 1935 Amendment to the Federal Declaratory Judgments Act.

As it stands today, the Act of 1867 provides that, with certain exceptions not pertinent here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."⁵⁷ This section was construed to apply to federal taxes only.⁵⁸ At first, it was broadly interpreted, and was not limited only to suits for injunctive relief.⁵⁹ But later cases narrowed its scope, and declaratory judgments were specifically excluded from its ban in *Penn v. Glenn*.⁶⁰ Congress then hastily amended the Federal Declaratory Judgments Act to except federal taxes.⁶¹ The language which excepts suits involving federal taxes from the Declaratory Judgments Act has been regarded by the courts as coextensive with that which precludes the maintenance of a suit to restrain the assessment or collection of a tax. It does not apply in any case where the latter does not.⁶² The amendment to the Declaratory Judgments Act has been interpreted to bar federal courts from rendering decrees declaratory of the constitutionality of federal tax statutes,⁶³ or as to the liability of a taxpayer for federal taxes⁶⁴ in the absence of a showing of extraordinary and entirely exceptional circumstances which would make the statu-

⁵⁶ (1944) 323 U.S. 101, (1944) 20 NOTRE DAME LAW. 170.

⁵⁷ 14 STAT. (1867) 475 as amended, I.R.C. § 3653(a), U.S. REV. STATS. (1898) § 3224.

⁵⁸ State Railroad Tax Cases (1875) 92 U.S. 575, 613; Snyder v. Marks (1883) 109 U.S. 189, 193.

⁵⁹ "Restraining" is used in a broad popular sense of hindering or impeding as well as to prohibiting or staying, rather than in a narrow technical sense as applicable only to suits for restraining orders and injunctions. See Gouge v. Hart (D.Va. 1917) 250 Fed. 802, 805, *app. dism'd*, (1920) 251 U.S. 542.

⁶⁰ (W.D.Ky. 1935) 10 Fed. Supp. 483, *app. dism'd*, (C.C.A. 6th, 1936) 84 F. (2d) 1001. *Accord*: F. G. Vogt & Sons v. Rothensies (E.D. Pa. 1935) 11 Fed. Supp. 225.

⁶¹ *Supra* note 49.

⁶² See Tomlinson v. Smith (C.C.A. 7th, 1942) 128 F. (2d) 808, 811; Filipowicz v. Rothensies (E.D. Pa. 1940) 31 Fed. Supp. 716, 722.

⁶³ Beeland Wholesale Co. v. Davis (C.C.A. 5th, 1937) 88 F. (2d) 447, *cert. den.*, (1937) 300 U.S. 680; Alpha Portland Cement Co. v. Davis (C.C.A. 5th, 1937) 88 F. (2d) 449, *cert. den.*, (1937) 300 U.S. 681; William B. Scaife & Sons Co. v. Driscoll (C.C.A. 3rd, 1937) 94 F. (2d) 664, *cert. den.*, (1938) 305 U.S. 603; Aponaug Manufacturing Co. v. Fly (S.D. Miss. 1937) 17 Fed. Supp. 944; Note (1938) 114 A.L.R. 1361, 1363.

⁶⁴ Murphy v. Graves (C.C.A. 6th, 1941) 120 F. (2d) 243, *cert. den.*, (1941) 314 U.S. 661; Wilson v. Wilson (C.C.A. 4th, 1944) 141 F. (2d) 599; United States v. Stiles (W.D. Ark. 1944) 56 Fed. Supp. 881.

tory prohibition inapplicable. When third persons (non-taxpayers) sue for a declaration to establish rights in or a prior lien to a fund also claimed by a tax collector in settlement of taxes, it has been held that neither the amendment to the Declaratory Judgments Act nor the prohibition against restraining the assessment or collection of federal taxes applies.⁶⁵ But in such actions, the court may not enter a declaratory judgment as to the validity of the tax. That is precluded by the amendment to the Declaratory Judgments Act; furthermore, the tax is not imposed on the plaintiff, and it is doubtful whether he has sufficient interest to maintain an action relative thereto.⁶⁶

CONCLUSION

Colegrove v. Green imposes rather stringent limitations on the availability of declaratory relief in constitutional litigation. These seem unwarranted in view of the nature and history of the declaratory judgment. Widespread use of the declaratory judgment in constitutional litigation will facilitate decisions on the constitutionality of public action. Elimination of the technicalities associated with the injunction, the lesser degree of ripeness of the controversy necessary to obtain a judicial decree in settlement of the dispute, and the inapplicability of certain statutory restraints to the declaratory judgment combine to increase the number of cases and types of controversy in which a judicial declaration of constitutionality is available. The lack of preliminary restraint on law enforcement before a full hearing on the merits, which characterizes the interlocutory injunction, makes the declaration peculiarly appropriate to constitutional litigation.

So long as the use of the declaratory judgment is confined to cases in which the challenge to constitutionality is based on specific and concrete factual applications of legislation or administrative action, there is no radical departure from traditional concepts. It is merely a liberalization of procedure. But the declaratory judgment should not become an instrument for obtaining abstract determinations of constitutionality. When it is carried that far, it goes beyond the judicial sphere in violation of the basic constitutional theory of separation of powers.

Recent decisions in declaratory suits, particularly those involving the constitutionality of state action, have relied more and more upon equitable principles. While the declaratory judgment is a discretionary remedy, it should be remembered that it is *sui generis* and not equitable in nature. The rules of equity should not be applied in any narrow

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⁶⁵ *Tomlinson v. Smith*; *Filipowicz v. Rothensies*, both *supra* note 61; *New York Casualty Co. v. Zwerner* (N. D. Ill. 1944) 58 Fed. Supp. 473.

⁶⁶ See *Tomlinson v. Smith*, *supra* note 61, at 811.