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DECLARATORY JUDGMENTS IN FEDERAL COURTS

THE *Harvard Law Review* in a comment published in its April issue, under the title "Declaratory Relief in the Supreme Court,"¹ has undertaken to formulate a series of arguments designed to indicate that the declaratory judgment, however well it may function in state courts, is, for certain reasons allegedly inherent in the peculiar functions of the Supreme Court—the lower federal courts seem to be overlooked—not well adapted to federal practice. The writer of the comment seeks to justify on extraneous grounds the dicta of the Supreme Court in the *Grannis* and *Willing* cases,² where it was intimated that an action for a declaratory judgment does not present a "case" or "controversy," a view which has elicited severe criticism from practically every commentator upon those cases. The *Harvard Law Review*, while apparently conceding the inadmissibility of the grounds for those dicta advanced in the opinions, seeks to justify them nevertheless

¹ 45 HARV. L. REV. 1089.

² *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 47 Sup. Ct. 282 (1927); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 48 Sup. Ct. 507 (1928).

by suggesting that the Court may have "sensed the existence of some strong reason which urged the undesirability of declaratory judgments in federal practice." If the considerations which the *Review* advances were really in the mind of the Court, it is unfortunate that they were not expressed in the opinions, for, as Mr. Justice Brandeis has very recently said, the judicial authority of the Court must "depend altogether on the force of the reasoning by which it is supported."³

The inarticulate major premises supplying the occult explanation for the *Grannis* and *Willing* dicta are suggested as the following: (1) that an issue presented in the federal courts for declaratory judgment possibly lacks, for some reason not clearly stated, the essential requisites of a "case" or "controversy;" (2) that inasmuch as the Supreme Court deals largely with constitutional cases and cases of statutory construction, it would be unfortunate to present these issues in the form of an action for a declaratory judgment, because, forsooth, actions for declaratory judgment involving statutes are assumed to be presented without an adequate record of the facts or "experience of the actual operation" of the statutes in question; and (3) that the declaratory judgment requires "the determination in advance of the legal consequences of every act," and that it would be inadvisable to require the federal courts to perform such a function: "Thus, if the declaratory judgment works perfectly, there will be nothing to prevent the presentation of all legislation to the Court immediately upon its passage. Needless to say, this will not only deprive the Court of an insight into the practical application of the statute to the injury in question, but may also deprive it of the experience to be gained from observing the results of conformity to the statute."

We are reminded of the now overruled opinion of the Michigan Supreme Court in the *Anway* case,⁴ in which the court remarked that "it at once becomes apparent that by the Act the courts of this State are made the legal advisers of all seeking such advice," and ended on a slightly hysterical note to the effect that "under our government the State does not till our farms, manufacture our autos, conduct our great department stores or do our law business for us. The unfortunate people of one country are at present trying such experiment in government."⁵

³ *Burnet v. Coronado Oil & Gas Co.*, 52 Sup. Ct. 443, 450 (1932).

⁴ *Anway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N. W. 350 (1920).

⁵ The universal criticism which the *Anway* case evoked, in purporting to entertain the assumption that the Act required or even permitted the court to render advisory opinions or decide moot cases, caused a revulsion against it, and other states in passing on the constitutionality of the declaratory judgment—an issue which never should have been raised had it been understood what a declaratory judgment was—declined to follow the *Anway* case. Finally the Michigan Supreme Court in *Washington-Detroit Theater*

The arguments advanced in the *Harvard Law Review* as a rationalization of the *Grannis* and *Willing* cases have the disadvantage of proceeding on assumptions as to declaratory judgments which have but little relation to the facts. We are after all not in the field of speculation, for there is now an experience of about 700 cases in the United States, and possibly 4000-5000 cases in England, Scotland, Australia, Canada, New Zealand, India, Germany, Austria and other countries. This experience cannot be swept aside by imaginative fears; and when it is considered that the states of the United States, Australia, Canada, and other English-speaking jurisdictions, not to speak of other countries, use declaratory actions constantly for the purpose of placing in issue the constitutionality or validity of statutes and ordinances, and that statutory construction is one of the major functions of the declaratory judgment, it seems strange that such categorical conclusions should have been essayed without even an attempt to examine this vast experience. The fears which have induced so much whistling in the dark might then have been dissipated.

In the first place it may be said that by no means the majority of the cases before the lower federal courts present questions involving the constitutionality or construction of statutes. Many of them are of the equity and common law type which regularly appear in the state courts. There is therefore no reason why litigants in the federal courts should be deprived of those remedies and forms of relief to avoid peril and insecurity which have served the community so well in the state courts and in foreign countries. In the second place, by possibly preventing, on grounds which have not commanded high respect, the passage of an Act giving the federal courts power to render declaratory judgments, the Supreme Court would seem to have stepped not only beyond its usual function of passing on the constitutionality of statutes after enactment, but it has in effect limited state jurisdiction by serving notice that actions for a declaratory judgment in the state courts cannot be appealed to the Supreme Court, though involving federal questions. In the third place, it is romancing to assume that the Supreme Court now delays a decision on statutes until cumulative experience of their operation has aided its

Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930), overruled the *Anway* case, until now eighteen states stand unanimous on the issue of constitutionality, eight of them subsequent to the federal *dicta*. *Morton v. Pacific Constr. Co.*, 36 Ariz. 97, 283 Pac. 281 (1929); *Sheldon v. Powell*, 99 Fla. 782, 128 So. 260 (1930); *Zoercher v. Agler*, 172 N. E. 186 (Ind. 1930); *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S. W. (2d) 481 (1930); *Washington-Detroit Theater Co. v. Moore*, *supra*; *Faulkner v. City of Keene*, 155 Atl. 195 (N. H. 1931); *City of Milwaukee v. Chicago N. W. Ry.*, 201 Wis. 512, 230 N. W. 626 (1930); *Holly Sugar Corp. v. Fritzler*, 42 Wyo. 446, 296 Pac. 206 (1931).

judgment, and it would indeed be unfortunate if litigants and the public were to be left in the dark as to the validity or interpretation of statutes for the long period which such a supposed requirement might entail. But finally and more pertinently, the assumption that actions for a declaratory judgment involving the constitutionality or construction or interpretation of state statutes are brought or decided without an adequate presentation of the facts or prematurely is an assumption contrary to fact, which the most casual examination of the cases in which such issues have been presented for judicial determination would readily have disclosed. While we shall discuss here only cases which have arisen in the United States, the American experience is confirmed by the decisions of Australia and Canada, where issues involving the constitutionality and construction of statutes regularly occupy the federal courts. We shall not stop to refute the unwarranted *Anway* and *Grannis* assumption, that a declaratory judgment can be rendered in the absence of a "case" or "controversy," or consider the elements of justiciability, for these matters have been sufficiently dealt with in recent articles.⁶

The *Harvard Law Review* suggests that the cautious grant of injunctions by the federal courts is an indication of the Court's feeling "that the experience of actual operation is necessary to a satisfactory ruling."⁷ The cases appear to have been misread. Without undertaking to suggest that courts do or should pass upon issues without an adequate presentation of facts warranting and justifying a decision on the law, the cases cited merely indicate that federal courts will not grant injunctions unless irreparable injury is threatened and unless there is no adequate remedy at law. Recourse to legal relief in state courts, in the absence of irreparable injury, is generally, for citizens of the state, a condition of judicial relief in the federal courts on federal grounds.⁸ The supposed insufficiency of the facts was not in issue in these cases. But the fact that injunctions were not issued in these cases, for reasons quite different from that of an assumed lack of factual

⁶ Borchard, *The Constitutionality of Declaratory Judgments* (1931) 31 COL. L. REV. 561; *Ibid.*, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 793.

⁷ See *Hurley v. Kincaid*, 52 Sup. Ct. 267, 269 (1932); *cf. Irwin v. Dixon*, 9 How. 10 (U. S. 1850); *Dalton Adding Machine Co. v. State Corp. Comm.*, 236 U. S. 699, 35 Sup. Ct. 480 (1915); *Cavanaugh v. Looney*, 248 U. S. 453, 39 Sup. Ct. 142 (1919); *Cline v. Frink Dairy Co.*, 274 U. S. 445, 47 Sup. Ct. 681 (1927); *Lawrence v. St. Louis-San Francisco R. R.*, 274 U. S. 588, 47 Sup. Ct. 720 (1927); *Mathews v. Rogers*, 284 U. S. 521, 52 Sup. Ct. 217 (1932); *Stratton v. St. Louis S. W. R. R.*, 284 U. S. 530, 52 Sup. Ct. 222 (1932).

⁸ "The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney*, *supra* note 7, at 456, 39 Sup. Ct. at 142.

experience, directs attention to the fact that the cumbersome and expensive effort of litigants to invoke federal protection by injunction often serves to demonstrate the urgent need for declaratory relief. While the prayer for relief must be framed in equity and while proof of the jurisdictional requisites of injunction is demanded, requisites which often fail, what the plaintiff really wants is a judicial declaration that the state law or the administrative action, state or federal, is invalid.⁹ A decision on this question he should be enabled to obtain as quickly as feasible, without, however, permitting additional interference by federal courts with state jurisdiction. But the extraordinary efforts in *Hurley v. Kincaid* to obtain by injunction a ruling on the question whether the administrative officers were privileged without compensation to endanger the plaintiff's land by overflow, requiring five separate and inconclusive court arguments before the Supreme Court—without passing on the substantive issue—decided that he was not entitled to an injunction, illustrates the exceptional inadequacy of federal procedure in the determination of legal rights placed in issue between the individual and the administration.¹⁰ It is hardly conceivable that in England or in any other jurisdiction enjoying declaratory judgment procedure, such an exhibition of judicial circuitry would have been possible.¹¹

⁹ *Mathews v. Rogers*, *Straton v. St. Louis S. W. R. R.*, *Hurley v. Kincaid*, all *supra* note 7.

¹⁰ Plaintiff landowner sought to enjoin the execution of any work on the Boeuf floodway under the Mississippi River Flood Control Act, May 15, 1928, c. 569, 45 Stat. 534, and specifically the receiving of bids, etc., for the construction of guide levees. The plan adopted by this statute so changed the natural drainage that a greatly increased flow of water could be expected in flood times through this floodway. Plaintiff's land was not in the line of construction proposed by the plan but was within the proposed channel of the floodway. The War Department advertised for bids for the guide levees for the Boeuf floodway, the completion of which project would require 10 years. Plaintiff contended that the scheme would impose additional danger on his land and additional servitudes, and that this amounted to a taking of his land. On a motion to dismiss, the District Court held that the United States was not a necessary party and that the statute required the Government to condemn. 35 F. (2d) 235 (1929). Thereupon answer was filed, alleging that the administrative officers did not consider it necessary to condemn plaintiff's land and that it in reality received additional protection. The District Court held that the plan proposed a taking and that, although physical occupancy would not occur until the land had been overflowed in flood time, the taking began with the construction of the first works under the plan and granted the injunction which plaintiff sought. 37 F. (2d) 602 (1929). This was affirmed by the Circuit Court of Appeals, 49 F. (2d) 768 (1931), but reversed by the Supreme Court, *supra* note 9, who suggest that he might sue in the Court of Claims to establish whether there has been a "taking."

¹¹ Jennings, *Declaratory Judgments against Public Authorities in England* (1932) 41 YALE L. J. 407-424. Particular attention may be called to a recent English case, *Ruislip-Northwood U. D. C. v. Lee*, 145 L. T. R. 208 (K. B. 1931). In that case, administrative officers were authorized by stat-

In the very next comment in the April issue of the *Harvard Law Review*,^{11a} on the "Statutory Extension of Injunctive Law Enforcement," we find an exemplification of the social need for the determination of issues arising between the individual and the administration, involving the relative scope of individual liberty and public restraint, a social need which has been met by abusing the injunction in order to enable the courts to declare and mark the line between permissive and prohibited private conduct and public interference. The *Harvard Law Review* correctly calls attention to this departure from the historic function of equity, but fails to observe that what has happened is an abuse of injunction in order to obtain a declaration of rights, which society and the individual find indispensable. The protest which that abuse is arousing has already served to produce statutes limiting the jurisdiction of courts of equity, whereas both the evil and the remedy would have been unnecessary had it been realized that judicial *determination*, not coercive *injunction*, was the social need to be served. The narrow conceptions arising out of an inadequate analysis of the theory and function of procedure were responsible for a failure to note that the principal goal sought was the declaration of rights, rather than the ancillary writ of injunction. The prayer for injunction was merely an instrument for obtaining a declaration of rights. Apart from the fact that the United States Supreme Court, whose jurisdiction is more restricted than that of the lower federal courts, has on innumerable occasions rendered declaratory judgments,¹² thus refuting the protestations of lack of power, it has in recent years on several occasions permitted the injunction to be used, or abused, for the purpose of rendering a much needed declaratory judgment, under circumstances where an immediate or irreparable injury was not perceptible.¹³

ute to tear down "temporary buildings." A dispute arose between the administrative officers and a landowner as to the nature of the buildings on his property, so, before proceeding to demolish the buildings, the officers sought a declaration as to the nature of the buildings. In upholding a judgment giving a declaration that they were "temporary buildings" within the meaning of the statute, Greer, L. J., said: "The present case is a case where the wrong had in fact been done, and was continuing in existence at the date the writ was issued, and if ever there was a case in which it is convenient and right that there should be on the part of a plaintiff a right to a declaration which will make it safe if he acts in accordance with his rights, that is the present case."

^{11a} (1932) 45 HARV. L. REV. 1096.

¹² See cases cited in (1931) 31 COL. L. REV. 561, at 586 and 596-7. See also *United States v. Smith*, 52 Sup. Ct. 475 (U. S. 1932).

¹³ *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510, 45 Sup. Ct. 571 (1925); *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926). And see *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 52 Sup. Ct. 260 (1932), where

The *Harvard* comment, in its assumption that the difference in the prayers between a declaratory judgment and an executory judgment implies some material difference in the operative facts which would be presented in the record, undertakes to set up a row of straw men which it proceeds ruthlessly to decapitate. It says (p. 1095): "Where the dispute involves passing upon legislation, the feasibility of which requires a nice balancing of benefit and detriment, a determination of its validity after a single injury includes a pronouncement, in part at least, as to the social value of acts prior to their occurrence. To the extent that it goes beyond the field of factual injury presented in the litigation, such a pronouncement is likely to be a mere speculation as to policy on the part of the Court. The tendency to limit judicial consideration to the subject matter in dispute indicates a consciousness of the importance of entering as little as possible into an advance determination of matters in which the beneficial enlightenment of experience has not been presented to the Court."

When a court declares legislation unconstitutional, it does so only in a particular case and in the light of particular facts. It is well known that the result of the issue of constitutionality depends largely on the facts of the first case presented for determination. Yet that is an unavoidable consequence of our judicial system. The effect given to that decision in other cases depends on extraneous factors. The court is not bound to apply the decision to other facts, and, inasmuch as the statute is not erased from the books, it may prove constitutional or unconstitutional under other circumstances or at a different time.¹⁴ The court cannot refuse to pass upon the issue when properly raised, because they regard the facts as presenting only one aspect of a situation they would prefer to see presented in broader aspects. They may limit their decision or its effects, expressly or by implication, or may, if they can, decline to pass on the issue of constitutionality by deciding the case on other grounds. As to what is "factual injury," that will depend on the circumstances of the case. In the three recent cases cited,¹⁵ the mere passage of statutes or ordinances deleteriously affecting the property values or personal rights of the plaintiff were regarded as sufficiently constituting a "factual injury" to warrant judicial relief. In the *Grannis* case, the Kentucky court regarded a statute which required the plaintiff under penalty to change his mode of doing

tax collection was enjoined thus limiting a statute in order to make a declaration on validity. Cf. Note (1932) 45 HARV. L. REV. 1221.

¹⁴ See Note, *The Permanence of Constitutionality* (1931) 41 YALE L. J. 1101-1105.

¹⁵ *Supra* note 13.

business as an injury sufficiently factual to create justiciability.¹⁶ In some cases a denial or challenge of the plaintiff's rights by a qualified person creates a legal interest in judicial relief. In other cases a more definite threat of injury to the plaintiff may be necessary, for example, if a cloud on title is not dissipated, it will reduce the value of plaintiff's land or impair other privileges, wherefor proof or allegation of the existence of the cloud creates justiciability.¹⁷ In other cases, a danger of a criminal penalty attaching to the performance of an act affords the plaintiff a legal interest in the determination of the legality of his status, position, or act.¹⁸ If Grove had been merely nominated for the office of city commissioner of Wichita, an office closed under penalty to a person in the employ of a railroad having a franchise from the City, he would not have had a justiciable

¹⁶ *Jewell Tobacco Warehouse Co. v. Kemper*, 206 Ky. 667, 267 S. W. 342 (1925). No threat to enforce a penal statute has usually been deemed necessary as a condition of justiciability, but in the *Grannis* case there was in fact a threat to enforce, for indictments had been requested, and the plaintiffs also had combined their request for a declaration with a demand for an injunction. Few dicta of the Supreme Court have been so vulnerable to attack as that in the *Grannis* case.

¹⁷ The cloud on title may arise as a result of competing claims under the same document. *Corn v. Roach*, 225 Ky. 725, 9 S. W. (2d) 1074 (1928) (interest taken under a will by the widow); *Jackson v. Ku Klux Klan*, 231 Ky. 370, 21 S. W. (2d) 477 (1929) (son's interest under a will asserted by his widow); *Long v. Uhle*, 8 D. & C. 671 (Pa. 1927) (widow's interest under will, her devisee being the plaintiff); *Mullens v. Mullens*, 5 Tenn. App. 235 (1927) (devisee's interest under will, plaintiff grantee being anxious to secure a loan).

It may arise as a result of building or contractual restrictions on the use of land. *Strong v. Hancock*, 201 Cal. 530, 258 Pac. 60 (1927) (purchaser at foreclosure claimed a declaration that restrictions, breach of which would work a forfeiture, were cleared by the forfeiture); *Hess v. Country Club Park*, 2 Pac. (2d) 782 (Cal. 1931); *Village of Grosse Point Shores v. Ayres*, 254 Mich. 58, 235 N. W. 829 (1931) (that conditions imposed by defendant in plaintiff's deed as to telegraph poles, water system, etc., were void); *Voegler v. Alwyn Improvement Corp.*, 247 N. Y. 131, 159 N. E. 886 (1928), *rev'g* 220 App. Div. 829, 222 N. Y. Supp. 918 (1928) (that restrictions in deed creating easement in defendant's favor were not enforceable); *One and Three South William Street Bldg. Corp. v. Gardens Corp.*, 133 Misc. 790, 233 N. Y. Supp. 473 (1929), 232 App. Div. 58, 248 N. Y. Supp. 743 (1931); *McCarter v. New Rochelle Homestead Co.*, 139 Misc. 672, 249 N. Y. Supp. 23 (1931) (that defendant vendor, who no longer held property in the neighborhood, had no interest in maintenance of restrictions); *Garvin & Co., Inc. v. Lancaster County*, 290 Pa. 448, 139 Atl. 154 (1927) (that plaintiff was entitled to build certain types of buildings without regard for defendant's easement of light and air); *Marmack v. Barwick*, 8 D. & C. 479 (Pa. 1926) (plaintiff seller relieved his fears and the doubts of a title guaranty company and avoided the refusal of the defendant purchaser to take title without a certain guaranty, by a declaration that a restrictive covenant placed in an 1814 deed was personal).

¹⁸ *State v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921); *Ruislip-Northwood U. D. C. v. Lee*, 145 L. T. R. 208 (K. B. 1931).

issue, because he might not have been elected. He had an insufficient *legal interest* in a judicial decision. But after his election to the office, it was perfectly legitimate for him or for the Attorney General to raise the issue of his eligibility, instead of requiring him first to enter upon the office, incur the criminal penalty, and defend himself against a criminal prosecution. Slight examination will make it clear that in these cases there is no mere speculation as to the effect of a statute, but that the validity or construction of the statute is presented to the court in a factual setting which enables the issue to be determined, not before the issue is ripe for determination by reason of the non-accrual of the necessary facts, but before the plaintiff has *incurred* a criminal penalty or before *violence* has been committed. It seems strange that this distinction appears to be so difficult to make. The determination is not made in "advance" of experience of facts but in "advance," if one will, of criminal act or violence irretrievably impairing a *status quo* which should be preserved and yet clarified by settling disputed issues.^{18a}

In passing upon statutes, the Supreme Court, like other courts, may construe or interpret the statute or constitution from internal evidence of its meaning (in some factual setting) or may *apply* the statute or constitution to a varied combination of external facts.¹⁹ This second function, perhaps the more frequently exercised, involves the application to complex facts of such concepts or standards as due process, equal protection, interstate commerce, reasonable, *etc.*, and necessarily presupposes a full presentation of the facts, the adequate appreciation of which is the main element in the case. "In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law."²⁰ It is these cases which apparently have impressed the writer of the *Harvard* comment as inappropriate to decision by declaration, on the assumption that their decision might be required on inadequate facts. To this assumption, two answers may be made: (1) that by experience, declaratory actions have proved most congenial to rulings of law on more or less undisputed facts and not to the application of standards to complicated or disputed facts; and (2) that the complete discretion of the court over declaratory relief would enable it to decline to pass upon complicated or disputed facts by declara-

^{18a} Cf. Note, *Judicial Determination of the Validity of a Federal Tax before Payment* (1932) 45 HARV. L. REV. 1221.

¹⁹ *Burnet v. Coronado Oil & Gas Co.*, 52 Sup. Ct. 443, 448 (1932), in dissenting opinion of Brandeis, J. See also FRANKFURTER AND LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927) 307 *et seq.*

²⁰ 52 Sup. Ct. 443, 448.

tion. That appears to be the British practice.²¹ How many facts are necessary in a particular case depends upon the nature of the issue involved. In the *Euclid v. Ambler Realty Co.*, *Pierce v. Society of Sisters*, and *Terrace v. Thompson* cases,^{21a} it was only necessary to show a statute or ordinance which injuriously affected the plaintiff, having a concrete interest at stake. But in no case can it be shown that a declaration was issued on facts less adequate than would have been required for any other relief, except for the dispensation from proof of committed violence or breach. In all cases the procedural and substantive conditions and prerequisites to invoke judicial protection must be present.²² It is interesting to note that in *Weigand v. Wichita*,²³ involving the constitutionality of a zoning ordinance as applied to the plaintiff, the court in an action for a declaration demanded not only ownership of the property by the plaintiff, but evidence that he had applied for a permit to build; whereas this second requirement was waived by the Supreme Court in *Euclid v. Ambler Realty Co.*, though brought for an injunction.

An examination of the state cases in which statutes and ordinances have been reviewed for constitutionality, construction, or interpretation discloses that almost without exception they involved issues of law, without any dispute as to the facts. Not infrequently the case was dismissed for lack of a justiciable controversy, either because of want of the necessary legal interest in the issue on the part of the plaintiff or defendant²⁴ or because the parties were not adverse in interest²⁵ or because the facts were not sufficiently ripe for judicial decision, in which event the judgment would merely have been an advisory opinion²⁶ or because in the court's discretionary view, there was

²¹ "It is obvious that facts are in dispute, and that evidence would have to be heard involving an investigation which, I think, puts the matter outside the category of applications to be brought before the court under Order LIVa." *F. Pratt Co. Ltd. v. Minister of Munitions*, 127 L. T. 814 (Ch. 1922).

^{21a} *Supra* note 13.

²² See (1932) 45 HARV. L. REV. 793, 801.

²³ 118 Kan. 265, 267, 234 Pac. 978, 979 (1925).

²⁴ *Williams v. Flood*, 124 Kan. 728, 262 Pac. 563 (1928); *Purity Oats v. State*, 125 Kan. 558, 264 Pac. 740 (1928); *Garden City News v. Hurst*, 129 Kan. 365, 282 Pac. 720 (1929); *In re Annexation of part of Lancaster Township to City of Lancaster*, 6 D. & C. 36 (Pa. 1925); *Bell Telephone Co. v. Lansdown Bros.*, 18 Dela. Cy. 307 (Pa. 1927) (plaintiff challenges zoning ordinance, because he *might* want to buy in restricted area); *Perry v. City of Elizabethtown*, 160 Tenn. 102, 22 S. W. (2d) 359 (1929).

²⁵ *Crawford v. Favour*, 34 Ariz. 13, 267 Pac. 412 (1928); *Reese v. Adamson*, 297 Pa. 13, 146 Atl. 262 (1929); *Wagner v. County of Somerset*, 96 Pa. Sup. Ct. 434 (1929); *Public Defense Ass'n v. Allegheny County*, 6 D. & C. 182 (Pa. 1925); *Cummings v. Shipp*, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928).

²⁶ *Crawford v. Favour*, *supra* note 25; *Hayden Plan Co. v. Friedlander*,

an absence of certain parties deemed necessary to the suit²⁷ or because the court's judgment would not have finally settled the issue²⁸ or because the court was not in a position to make its judgment effective.²⁹ The procedural and substantive requisites of justiciability are evidently watched as closely in a suit for a declaratory judgment as in a suit for any other form of relief. It is, however, true that a citizen directly threatened with a criminal penalty under a statute or ordinance may challenge the validity of the legislation before he commits the forbidden act and incurs the penalty.³⁰ Whether such a suit is "premature" depends upon the nature of the plaintiff's interest in an immediate decision, and this criterion of "legal interest" of the plaintiff is one of the major tests of justiciability in the states and in foreign countries. To assume that justiciability is conditioned upon prior violence or that to test the constitutionality or construction of legislation it is necessary first to violate it, involves a misconception of the judicial process, not sustained by experience.³¹ In non-declaratory procedure, a plaintiff contesting the applicability or validity of restrictive regulations under the police power need do no more than show that they in some general way affect him deleteriously.³² Yet it has already been ob-

97 Cal. App. 12, 275 Pac. 253 (1929); *Lisbon Village District v. Town of Lisbon*, 155 Atl. 252 (N. H. 1931); cf. *Mason's Adm'r v. Mason's guardian*, 239 Ky. 208, 39 S. W. (2d) 211 (1931); *In re Freeholders of Hudson County*, 105 N. J. L. 57, 143 Atl. 536 (1928); *Lockwood v. Baird*, 59 N. D. 713, 231 N. W. 851 (1930); *Ladner v. Siegel*, 294 Pa. 368, 144 Atl. 274 (1928).

²⁷ *Denver Land Co. v. Moffat Tunnel Impr. Dist.*, 87 Colo. 1, 284 Pac. 339 (1930); *Coke v. Shanks*, 209 Ky. 723, 273 S. W. 552 (1925); *Additional Law Judge, 53rd Jud. Dist.*, 10 D. & C. 577 (Pa. 1928); *Cummings v. Shipp*, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928).

²⁸ *Additional Law Judge, 53rd Jud. Dist.*, 10 D. & C. 577 (Pa. 1928).

²⁹ *State v. Board of Commissioners of Wichita County*, 117 Kan. 162, 230 Pac. 531 (1924).

³⁰ *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927); *Pathé Exchange, Inc. v. Cobb*, 202 App. Div. 450, 195 N. Y. Supp. 661 (1922), *aff'd*, 236 N. Y. 539, 142 N. E. 274 (1923) (that plaintiff's "news reel" was not subject to censorship); *Erwin Billiard Parlor v. Buckner, Sheriff*, 156 Tenn. 278, 300 S. W. 565 (1927); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926) (privileged to conduct horse race without danger of prosecution).

³¹ "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights." *Terrace v. Thompson*, *supra* note 13, at 216, 44 Sup. Ct. at 18 (1923). See also *Pennsylvania v. West Virginia*, 262 U. S. 553, 591, 593, 43 Sup. Ct. 658 (1923). See discussion and cases in 45 HARV. L. REV. 793, 839.

³² (1) *Building regulations*: *Faulkner v. City of Keene*, 155 Atl. 195 (N. H. 1931) (privilege to establish a filling station in building zone); *Rosenberg v. Whitefish Bay*, 199 Wis. 214, 225 N. W. 838 (1929) (that statute prohibiting building does not apply to plaintiff). (2) *Other Regulations concerning land*: *Spring Hill Cemetery Co. v. Lindsey*, 162 Tenn.

served that at least the Kansas courts have demanded definite proof that a plaintiff seeking a mere declaration of the invalidity of a zoning ordinance must do more than show general disadvantage,³³ but must show that he has taken steps to put the property to the forbidden use.³⁴ Not an uncommon form of declaratory action against the Government is the claim of immunity from the requirement of a license or fee as a condition of doing business³⁵ or the claim of immunity from taxation or assessment, involving statutory construction,³⁶ a claim often difficult or hazardous to assert by injunction or by awaiting enforcement proceedings or a penalty, but readily susceptible of determination by the speedy method of declaratory judgment. It may often require an intelligent appreciation of the facts to determine whether the plaintiff's interest is sufficiently ripe or concrete to justify invoking a judicial determination on the constitutionality or construction of a statute, but to assume that courts are unable to draw the necessary distinctions is to challenge their intelligence and to disregard tested experience in this very form of procedure. While state cases are not always reported as fully as they might be, there is no evidence in the reports that courts deciding upon issues of statutory constitutionality, construction,

420, 37 S. W. (2d) 111 (1931) (that burdens imposed for beautification could not be imposed on plaintiff because statute unconstitutional). (3) *Business free from regulations: Jewell Tobacco Warehouse Co. v. Kemper*, 206 Ky. 667, 268 S. W. 342 (1925) (unsustained claim that statute regulating business of warehousemen was unconstitutional); *Dowdy v. City of Covington*, 237 Ky. 274, 35 S. W. (2d) 304 (1931) (administrative interpretation of ordinance requiring registration of moving van operators, held improper); *Erwin Billiard Parlor v. Buckner*, *supra* note 30 (not subject to pool-room regulations, because discriminatory). *Cf. Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105, 49 Sup. Ct. 57 (1928) (statute requiring ownership of drugstores by pharmacists held invalid on injunction), with *Pratter v. Lascoff*, 140 Misc. 211, 249 N. Y. Supp. 211 (1931) (declaratory judgment), and *Evans v. Baldridge*, 294 Pa. 142, 144 Atl. 97 (1928). But see *In re Haughes*, 140 Misc. 811, 252 N. Y. Supp. 81 (1931).

³³ *Euclid v. Ambler Realty Co.*, *supra* note 13; *cf. Taylor v. Haverford Township*, 299 Pa. 402, 149 Atl. 639 (1930).

³⁴ *Weigand v. Board of Commissioners of Wichita*, 118 Kan. 265, 234 Pac. 978 (1925); *Hoel v. Kansas City*, 131 Kan. 293, 291 Pac. 781 (1930).

³⁵ *American Trust Co. v. McCallister*, 299 Pac. 319 (Ore. 1931) (privileged to sell stock without public permit).

³⁶ *Wilcox v. Madison*, 106 Conn. 223, 137 Atl. 742 (1927) (unsustained claim that assessment was out of proportion to real value of property and that classification was wrong). *Cert. den.*, 276 U. S. 606 (1927); *Cupp Grocery Co. v. Johnstown*, 288 Pa. 43, 135 Atl. 610 (1927) (plaintiff owner of 33 stores claims liability to only one license tax of \$100 as a corporation, not \$915 as assessed); *Peoples Tel. Corp. v. City of Butler*, 99 Pa. Sup. Ct. 256 (1930) (that lot and building necessary for plaintiff's business, hence tax exempt); *Frazier v. City of Chattanooga*, 156 Tenn. 346, 1 S. W. (2d) 786 (1928) (claim that law permitting assessment on property owners for improvements was repealed; denied). See also note 50.

or interpretation have done so without an adequate presentation or realization of the facts in a concrete setting.

Among the thirty-three state cases in which the constitutionality of statutes was placed in issue by declaratory action—six of which were dismissed for lack of justiciability—three involved a threat of criminal prosecution,³⁷ two, a denial of a license, operation without which would have entailed criminal responsibility,³⁸ five, statutes which, if valid, imposed on plaintiff a pecuniary loss,³⁹ six, taxpayers' actions challenging public acts or expenditures,⁴⁰ eight, actions by administrative officers to determine the scope or legality of official duties under statutes,⁴¹ three, actions challenging tax assessments.⁴² Among the cases in which the validity of ordinances was attacked, apart from those dismissed for want of justiciability, five were brought by taxpayers challenging the validity of municipal action,⁴³ four, by property

³⁷ *Pathé Exchange v. Cobb*; *Erwin Billiard Parlor v. Buckner*; *Utah State Fair Ass'n v. Green*, all *supra* note 30.

³⁸ *Pratter v. Lascoff*; *Evans v. Baldrige*, both *supra* note 32. *Cf.* *Alaska Mexican Gold Mining Co. v. Territory of Alaska*, 236 Fed. 64 (C. C. A. 9th, 1916), *cert. den.*, 242 U. S. 648, 37 Sup. Ct. 242 (1917), in which the court held that the plaintiff was in no position to complain until it had applied for and been denied a license.

³⁹ *Hessick, Att'y Gen., v. Moynihan*, 83 Colo. 43, 262 Pac. 907 (1927); *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 (1927); *Jewell Tobacco Warehouse Co. v. Kemper*, *supra* note 32 (unsustained claim that statute regulating business of warehousemen was unconstitutional); *Pettit v. White County*, 152 Tenn. 660, 280 S. W. 688 (1926); *Spring Hill Cemetery Co. v. Lindsey*, *supra* note 32 (that burdens imposed for beautification could not be imposed on plaintiff because statute unconstitutional).

⁴⁰ *MacDonald v. University of Kentucky*, 225 Ky. 205, 7 S. W. (2d) 1046 (1928) (leasing power); *Bloxtton v. State Highway*, 225 Ky. 324, 8 S. W. (2d) 392 (1928) (bond issue for the erection of bridges, payment by tolls); *Hesse v. Watertown*, 232 N. W. 53 (S. D. 1930) (bond issue); *Lindsey v. Drane*, 154 Tenn. 458, 285 S. W. 705 (1926) (election to approve statute on impounding straying animals); *Newton v. Hamilton County*, 161 Tenn. 634, 33 S. W. (2d) 419 (1930); *Simkin v. City of Rock Springs*, 33 Wyo. 166, 237 Pac. 245 (1925) (bond issue).

⁴¹ *Adams v. Slavin*, 225 Ky. 135, 7 S. W. (2d) 836 (1928) (duties and compensation of judges); *City of Owensboro v. Hazel*, 229 Ky. 752, 17 S. W. (2d) 1031 (1929); *Wingate v. Flynn*, 139 Misc. 770, 249 N. Y. Supp. 351 (1931); *Goetz v. Smith*, 152 Tenn. 451, 278 S. W. 417 (1925) (road statutes); *Peters v. O'Brien*, 152 Tenn. 466, 278 S. W. 690 (1925) (statute regulating the salaries of county trustees); *State Board of Examiners v. Standard Engineering Co.*, 157 Tenn. 157, 7 S. W. (2d) 47 (1928) (validity of statute and defendant's liability thereunder); *Shipp v. Cummings*, 158 Tenn. 526, 14 S. W. (2d) 747 (1929) (statute varying dates of tax collection); *State ex rel. Bareham v. Graham*, 161 Tenn. 557, 30 S. W. (2d) 274 (1930) (salary to office, several persons claiming).

⁴² *Wilcox v. Madison*, *supra* note 36; *Moore v. Lewis*, 10 D. & C. 466 (Pa. 1928); *North Tintic Mining Co. v. Crockett*, 284 Pac. 328 (Utah, 1929).

⁴³ *Cannon v. Tempe*, 36 Ariz. 12, 281 Pac. 947 (1929) (ordinance already in existence on appointment of officer who had forfeited office); *Davis v.*

owners or business men claiming to be adversely affected,⁴⁴ two, by cities claiming the invalidity of their own ordinances against adverse parties,⁴⁵ and one by an officer claiming the invalidity of a resolution passed without his consent, as required by law.⁴⁶ The numerous cases involving the construction or interpretation of statutes embrace in the main actions by taxpayers or parties more directly in interest challenging the validity of bond issues, usually after the enactment of the authorizing legislation but prior to the issue of the bonds,⁴⁷ actions challenging the right of administrative officers to refuse licenses or claiming immunity

City of Newport, 239 Ky. 610, 40 S. W. (2d) 281 (1931) (ordinance on funding of floating debt); *Bareham v. City of Rochester*, 221 App. Div. 36, 222 N. Y. Supp. 141 (1927) (taxpayer's action—statute provided for city-manager form of government); *Macrum v. Board of Supervisors of Suffolk County*, 141 Misc. 358, 252 N. Y. Supp. 546 (1931); *Lewis v. Nashville, Gas & Heating Co.*, 162 Tenn. 268, 40 S. W. (2d) 409 (1931) (several conflicting statutes on franchise brought in issue by administrative ruling on rate base).

⁴⁴ *Hoel v. Kansas City*, *supra* note 34 (for defendant; plaintiff had shown no injury); *Dowdy v. City of Covington*, *supra* note 32. *Taylor v. Haverford*, 299 Pa. 402, 149 Atl. 639 (1930) (zoning ordinance—actual sufferer, as plaintiff had had offers only for forbidden use); *Commonwealth Title & Trust Co. v. Yeadon Boro.*, 19 Dela. Cy. 232 (Pa. 1928) (ordinance required building to have light and air on three sides before building license would be granted—plaintiff showed issuance of licenses violating this rule since its passage).

⁴⁵ *City of Wichita v. Wichita Gas Co.*, 126 Kan. 769, 271 Pac. 272 (1928) (validity of 1921 ordinance under which defendant had invested two million dollars); *City of Manhattan v. United Power & Light Corp.*, 129 Kan. 392, 283 Pac. 919 (1930) (ordinance under which defendant was operating).

⁴⁶ *Craig, City Comptroller v. Commissioners of Sinking Fund*, 208 App. Div. 412, 203 N. Y. Supp. 236 (1924). Said the court: "It would be difficult to find a more appropriate case for the application of the [declaratory judgments] law."

⁴⁷ *Pollard v. City of Norwalk*, 108 Conn. 145, 142 Atl. 807 (1928) (plaintiff also sought injunction—case turns on compliance with statute on notice of election); *State ex rel. Enright v. Kansas City*, 110 Kan. 603, 204 Pac. 690 (1922) (right of city to issue bonds without certain repayment clause—turns on whether 1921 statute was additional or amendatory); *State ex rel. Baird v. Board of Commissioners of Wichita County*, 117 Kan. 162, 230 Pac. 531 (1924) (bonds had been executed and registered but not delivered—had been the subject of prior actions in both state and federal courts); *Kirkpatrick v. City Bd. of Education of Russelville*, 234 Ky. 836, 29 S. W. (2d) 565 (1930); *Bridges v. Scott County Bd. of Education*, 235 Ky. 141, 29 S. W. (2d) 593 (1930); *City of Sturges v. Christenson Bros.*, 235 Ky. 346, 31 S. W. (2d) 386 (1930) (defendant—contractor with whom plaintiff had made contract for water system; uncertainty arose because of 1930 legislation); *Holman v. Glasgow Graded Common Sch. Dist.*, 237 Ky. 7, 34 S. W. (2d) 733 (1931); *Godsey v. Board of Ed. of Ludlow*, 238 Ky. 17, 36 S. W. (2d) 656 (1931); *Douthitt v. Board of Trustees of Newcastle*, 239 Ky. 751, 40 S. W. (2d) 335 (1931) (taxpayer sought declaratory judgment re ordinance authorizing loan for debt payment for which taxes could not be levied—turns on notice of authorizing election); *Pace v. City of Paducah*, 44 S. W. (2d) 574 (Ky. 1931) (taxpayer's action).

from license under the circumstances or contesting the scope or meaning of the license,⁴⁸ actions demanding a clarification of rights on the part of citizens or administrative officers thrown into uncertainty in their legal relations with defendants by reason of conflicting statutes,⁴⁹ actions placing in issue liability to or exemption from taxation or the interpretation of tax statutes in their application to the plaintiff,⁵⁰ actions involving the right to

⁴⁸ *Barlow v. Jones*, 294 Pac. 1106 (Ariz. 1930) (scope of license—plaintiff contended it covered right to take fish and small game, and defendant administrative officer only fish); *American Trust Co. v. McCallister, Corp. Com'r*, *supra* note 35, *Lackawanna County Undertakers' Ass'n v. State Bd. of Undertakers*, 11 D. & C. 503 (1928) (issue: "continuous" as including exclusive—statute required 2 years' continuous employment—plaintiff contended this meant exclusive and defendant administrative officers and applicants held contra); *In re Templar Motor Car Co.*, 27 Dau. 276 (Pa. 1924) (license had been held necessary and had been refused—held, could appeal from administrative decision or use declaratory judgment); *State Bd. of Examiners v. Standard Engineering Co.*, 157 Tenn. 157, 7 S. W. (2d) 47 (1928) (plaintiff board claims defendant subject to its administrative control); *Tennessee Eastern Elec. Co. v. Hannah*, 157 Tenn. 582, 12 S. W. (2d) 372 (1928).

⁴⁹ *State ex rel. Enright v. Kansas City*, 110 Kan. 603, 204 Pac. 690 (1922) (effect of 1921 statute on powers of city to issue bonds without repayment clauses—city proposed bond issue); *School Dist. No. 19 of Sheridan County v. Sheridan Community High School of Sheridan County*, 130 Kan. 421, 286 Pac. 230 (1930) (plaintiff claimed discharge from guaranty as result of new statute on community high school); *Bartlett v. Lily Dale Assembly*, 139 Misc. 338, 249 N. Y. Supp. 482 (1931) (stockholder's action to settle questions as to defendant's corporate existence and their duties—in view of statutes on voting passed after incorporation); *Frazier v. City of Chattanooga*, *supra* note 36; *Lagoon Jockey Club v. Davis County*, 72 Utah 405, 270 Pac. 543 (1928) (plaintiff sought to determine whether old statute against betting on horse races had been revived by repeal of statute providing for racing commission—threat of prosecution under old statute). *Between administrative officers*: *Lewis v. Coleman*, 233 Ky. 266, 25 S. W. (2d) 390 (1930) (plaintiff administrative officer sought declaratory judgment against administrative officer—charged with financial duties—who contended that certain legislation repealed the statute governing her salary and reduced the salary); *Campbell County Election Com. v. Weber*, 42 S. W. (2d) 511 (Ky. 1931) (action between election officers to ascertain which of two statutes on same subject passed at same session governed their duties); *Easton Councilmen's Salaries*, 8 D. & C. 752 (Pa. 1926) (action between administrative officers to settle which of two ordinances governed the salary to be paid plaintiff—each alleged different statute as guiding).

⁵⁰ *Washington County H. S. District v. Board of Com'rs of Washington County*, 85 Colo. 72, 273 Pac. 879 (1928) (right to make a levy in aid of teachers' salaries); *School Dist. No. 6, Rooks County v. Board of Com'rs of Rooks County*, 115 Kan. 631, 223 Pac. 818 (1924) (time at which statute became effective—levy of taxes pending); *City of Louisville v. Cromwell*, 233 Ky. 828, 27 S. W. (2d) 377 (1930) (exemption from gasoline tax on gasoline furnished city under contract); *Haggerty v. Potter*, 252 Mich. 460, 233 N. W. 380 (1930) ("wort"—and basis of tax in privilege tax on malt extract or malt syrup or wort); *Board of Education of City of Rochester v. Van Zandt*, 234 N. Y. 644, 138 N. E. 481 (1923) (tax status

or the term of office⁵¹ or to allowances and fees,⁵² statutory powers⁵³ or private privileges or immunities under statute.⁵⁴ In none of these cases in which judgments were given can it be said that insufficient facts were before the court or that, although the issue was narrowed to the point actually in litigation, the decision was made before justiciability was fully established.

It goes without saying that a court can and should always refrain from deciding a particular issue before there is any necessity therefor⁵⁵ and that it is the court's function to establish in the case before it not only the existence of the procedural and substantive prerequisites of justiciability,⁵⁶ but also the existence in the record of sufficient facts to pass upon the issue and make the decision *res judicata* in the case. If there are insufficient facts, the judgment may be withheld as in effect an advisory

of certain funds raised by city); *Frank v. Lindsay*, 156 Tenn. 456, 2 S. W. (2d) 412 (1928) (liability to tax as auto tire merchant); *Parmer v. Lindsey*, 157 Tenn. 29, 3 S. W. (2d) 657 (1928) (liability to privilege tax as contractor); *Box Elder County v. Conley*, 284 Pac. 105 (Utah, 1930) (liability to tax of auto assembled in California and shipped to Utah in March, 1927); *Nash Sales Co. v. City of Milwaukee*, 198 Wis. 281, 224 N. W. 126 (1929) (liability to tax).

⁵¹ *State v. Grove*, 109 Kan. 619, 201 Pac. 82 (1921) ("franchise"—statute forbade employees of corporation holding municipal franchise to hold office—defendant had been elected but had not taken office); *McGinnis v. Cossar*, 230 Ky. 213, 18 S. W. (2d) 988 (1929) ("term"—whether election to sheriff's office was possible after serving out an unexpired term in view of statutory prohibition of re-election to such office); *Wingate v. Flynn*, 139 Misc. 770 (1931) (length of term—6 or 14 years); *Fox Dist. Att'y v. Ross*, 7 D. & C. 263 (Pa. 1926) (term—time at which office was to be filled by election after an appointment to fill an unexpired term); *Criswell v. Martin*, 8 D. & C. 425 (Pa. 1926) (forfeiture of judge's pension if judge returned to practice).

⁵² *Waits v. Kelley*, 118 Kan. 751, 234 Pac. 827 (1925) (allowance for transporting children to school); *Nichols v. Board of Ed. of Danville*, 232 Ky. 428, 23 S. W. (2d) 607 (1930) (compensation for clerk of county court for making out defendant's tax bills); *Hawkins v. Fiscal Court of Caldwell County*, 233 Ky. 211, 25 S. W. (2d) 1015 (1930) ("paid"—officer's right to fee when convicted person worked out the fine).

⁵³ In the *Matter of the Application of the School District of Steelton*, 31 Dau. 75 (Pa. 1927) (statutory limits of deposit); *City of Bristol v. Bank of Bristol*, 159 Tenn. 647, 21 S. W. (2d) 620 (1929) (power to issue \$10,000 or \$6,000 in bonds, statute ambiguous).

⁵⁴ *Rice v. Franklin Loan & Finance Co.*, 82 Colo. 163, 258 Pac. 223 (1927); *Marine Lighterage Corp. v. Luckenbach S. S. Co.*, 139 Misc. 612, 248 N. Y. Supp. 71 (1931); *Warren v. Commerce Union Bank*, 152 Tenn. 67, 274 S. W. 539 (1925) (right to have branch banks in face of state statute against them—arose in connection with contract to buy bank).

⁵⁵ *People v. Smith*, 206 N. Y. 231, 99 N. E. 568 (1912); *McCabe v. Voorhis*, 243 N. Y. 401, 153 N. E. 849 (1926).

⁵⁶ These do not include the motives for bringing the suit, which may be the desire for protection, relief, freedom, security, or revenge, and may be induced by doubts and fears, emanating from the plaintiff or others. See 45 HARV. L. REV. 793, 802. With these the court has nothing to do.

opinion or involving a moot case, and on actions for declaratory judgments courts have as a rule been alert and astute not to render advisory opinions, or decide abstract or hypothetical questions or moot cases.⁵⁷ The elements of justiciability are no different in federal than in state courts and there is no peculiar charm in the word "case" or "controversy" which implies any difference.⁵⁸

In addition to justiciability, however, which is as fundamental to actions for declarations as it is to those seeking any other form of judicial relief, courts having power to render declaratory judgments have a wide discretion in declining the declaration where it will not finally settle the issue, where it will not serve a useful purpose, or where for any other reason the court thinks it ought to be withheld. Actions seeking declarations often associate a prayer for some ancillary form of relief, such as injunction or specific performance; and where the court grants only one prayer, it is usually the declaration alone, not the ancillary relief, which is given. That generally settles the issue conclusively. The court's discretion is broad enough to enable it to say, in the rare case in which more experience of the operation of a statute might be required than is afforded by the case *sub judice*, that it prefers not to render a declaratory judgment under the circumstances. But it is not conceivable that in such a case it would grant any other form of relief, so that it could probably be said, were the pending federal declaratory judgment Act passed, that the types of cases which the court has heretofore refused to decide are the types in which declaratory judgments will be refused. The assumption that actions for declaratory judgments will come before the court on a different kind of record than would any other action seems destitute of substantial foundation. The types of cases referred to by Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*,⁵⁹ which have apparently induced the apprehensions of the *Harvard Law Review*, are not well adapted to submission

⁵⁷ *Crawford v. Favour*, *supra* note 25; *Hayden Plan Co. v. Wood*, 97 Cal. App. 1, 275 Pac. 248 (1929); *City of Mankato v. Jewell County Comm.*, 125 Kan. 674, 266 Pac. 96 (1928); *Garden City News v. Hurst*, *supra* note 24; *Axton v. Goodman*, 205 Ky. 382, 265 S. W. 806 (1924); *Shearer v. Backer*, 207 Ky. 450, 269 S. W. 543 (1925); *Revis v. Dougherty*, 215 Ky. 823, 287 S. W. 28 (1926); *In re City of Pittsburgh's City Charter*, 297 Pa. 502, 147 Atl. 525 (1929); *Perry v. City of Elizabethton*, 160 Tenn. 102, 22 S. W. (2d) 359 (1930). The disposition of the Supreme Court to cite the *Grannis* and *Willing* cases in support of its opposition to advisory opinions, or moot cases, or the review of administrative conclusions (see 31 COL. L. REV. 594) indicates regrettable confusion as to the nature of a declaratory judgment.

⁵⁸ The numerous state cases which have dealt with the question of justiciability have given consideration to all the requisites of judicial power established by the Supreme Court. See 31 COL. L. REV. 561 *et seq.*

⁵⁹ *Supra* note 3.

by declaratory action, and even if they were so presented, the court has full discretion to decline a declaration. But this is no reason for denying to litigants and to the federal courts the speedy determination of disputed legal issues raised on more or less undisputed facts, "the declaration of a rule of law," the types of cases practically universally submitted for declaratory judgment. The fears of "advance determinations" on inadequate "experience of actual operation" of statutes must vanish before the established results of actual experience of the declaratory judgment in the United States and foreign countries. *Semper plus metuit animus ignotum malum.*

E. M. B.

NIXON v. CONDON—DISFRANCHISEMENT OF THE NEGRO IN TEXAS

ON May 26, 1927, the Governor of Texas officially informed the Legislature¹ that the United States Supreme Court in *Nixon v. Herndon*² had declared unconstitutional a Texas statute³ prohibiting negroes from voting in Democratic primaries. With the same message, he submitted for legislative consideration a repeal of this article and "the enactment of a statute which will vest power in the executive committee of the several political parties to determine the qualifications requisite to membership in such parties." Within less than a week, this recommendation had been translated into a bill containing an emergency clause reciting a public necessity, which passed the House of Representatives by a vote of 77 to 26.⁴ The Senate handled the proposed enactment with kindred expedition, and within four months of the Supreme Court's declaration that "it is too clear for extended argument that color cannot be made the basis of statutory classification," the executive committee of the Democratic party of Texas had passed a resolution that "all white Democrats . . . and none other" be allowed to participate in the forthcoming primary elections.

An action in tort⁵ against the primary officials was soon begun by the same negro who had successfully attacked the statute in *Nixon v. Herndon*. The District Court dismissed the suit on the

¹ TEX. H. R. J. 40th Leg. 1st C. S. 207.

² 273 U. S. 536, 47 Sup. Ct. 446 (1927).

³ TEX. REV. CIV. STAT. (1925) art. 3107. A Federal District Court in *Chandler v. Neff*, 298 Fed. 515 (W. D. Tex. 1924), had refused to grant an injunction against enforcement of the statute.

⁴ TEX. H. R. J. 40th Leg. 1st C. S. 301.

⁵ *Nixon v. Condon*, 34 F. (2d) 464 (W. D. Tex. 1929). See Notes (1930) 15 CORN. L. Q. 262; (1930) 43 HARV. L. R. 467; (1930) 39 YALE L. J. 423.

ground that no violation of the fourteenth or fifteenth amendments was shown, since the plaintiff's exclusion from participation in the primary was not the result of action by a state agency.⁶ The Supreme Court reversed⁷ on the ground that the resolution of the party committee, adopted pursuant to statutory authorization was the act of a state agency. Consequently, it fell directly within the authority of *Nixon v. Herndon* and was invalid as a denial by the state of the equal protection of the laws.

The move thus rebuffed is the latest of a long series of measures which Southern political ingenuity has devised in an attempt to disfranchise the negro race.⁸ The social upheaval which followed the Civil War and reconstruction period witnessed a radical shift of political power from the landowning aristocracy to the lower classes of "poor white" tenant farmers, wage earners, and small-scale business men. This group brought with them a racial feeling the intensity of which is traceable to the "poor white's" hatred and jealousy of the negro slave who occupied the only stratum of society below him and at the same time deprived him of an economic advantage as menial servant and laborer for the upper classes of white society.⁹ Fostered by such antipathy the Ku Klux Klan and other "public safety" organizations managed to maintain the "purity" of the election booth for a decade by recourse to threats and violence.¹⁰ But with the decline of the militant spirit which had been engendered by the War of the States, private enforcement became lax.¹¹ Blacks as well as whites were marching to the polls. Then and then only were legal steps taken to nullify the fourteenth and fifteenth amendments. Edu-

⁶ The application of the fourteenth and fifteenth amendments was early restricted to actions of agents of the state. *United States v. Reese*, 92 U. S. 214 (1875); *United States v. Cruikshank*, 92 U. S. 542 (1875).

⁷ *Nixon v. Condon*, 52 Sup. Ct. 484 (U. S. 1932).

⁸ See generally, LEWINSON, RACE, CLASS, AND PARTY (1932); Johnson, *A Negro Looks at Politics* (1929) 18 AMERICAN MERCURY 88; Roofter, *Race in Politics* (1929) 7 SOCIAL FORCES 435. The early constitutions of many states restricted the suffrage to whites. The problem of negro suffrage was by no means a new one after the Civil War. See REUTER, THE AMERICAN RACE PROBLEM (1927) 150.

⁹ SPERO AND HARRIS, THE BLACK WORKER (1931) 3-15. The "poor white" class, consisting of almost half the population of the Southern States, were victims of the slave system. "The poor white envied the slave's security and hated him for his material advantages, while the slave envied the white man's freedom and hated him for the advantages of his whiteness. Each group, in an effort to exalt itself, looked down upon the other with all the contempt which the planter aristocracy showed to both." See also Buck, *Poor Whites of the ante-bellum South* (1926) 31 AM. HIST. REV. 41.

¹⁰ LEWINSON, *op. cit. supra* note 8, at 54-58.

¹¹ It seems quite probable that this apathy was caused in part by a division of the Southern whites during the agricultural depression of the eighties and nineties. Neither faction was reluctant to seek the negro vote. See LEWINSON, *op. cit. supra* note 8, at 68-74.

cational tests were required for voting,¹² poll tax payments were prescribed,¹³ and the famous Grandfather clause¹⁴ was passed. These measures were only partly satisfactory. Educational tests served to disqualify white as well as black illiterates, and were feared as a sword which the dominant political organization might use against its opponents. The poll tax was a burden upon all classes, and besides allowing negroes who could pay the tax to vote, it operated to exclude whites as well as negroes. And the Grandfather clause was declared unconstitutional by the Supreme Court in a decision¹⁵ which signified that it was willing to examine the intention as well as the particular wording of a disfranchising statute.

In Texas, exclusion of negroes from Democratic primaries had for some time been quietly accomplished by order of the County executive committees,¹⁶ instructing primary officials to allow only white Democrats to vote.¹⁷ This disfranchisement of the "newly captured savage"¹⁸ was in part a result of the composite phe-

¹² The Constitution of Mississippi in 1898 (art. 12, § 244) required that "every elector in addition to the foregoing qualifications, shall be able to read any section of the constitution of this state; or shall be able to understand the same when read to him, or give a reasonable interpretation thereof." See LOVE, *THE DISFRANCHISEMENT OF THE NEGRO* (1899) 15: "In Mississippi a negro may be as rich as Dives and as wise as Solomon and yet he may not be able to satisfy an ignorant and partisan registration officer that he is qualified to be an elector; while a white man may be as poor as Lazarus and may not possess the intellectual outfit of a hottentot and yet he will experience no difficulty in convincing the same individual that he is qualified to exercise all the rights and privileges of that class whose 'destiny it is to dominate.'"

¹³ LEWINSON, *op. cit. supra* note 8, at 80.

¹⁴ Constitution of Louisiana, § 5, provided that no person entitled to vote before 1867 and no son or grandson of such person should be disqualified by reason of his failure to possess the educational or property qualifications prescribed by the constitution. The Grandfather clause was never accorded complete support from the white ranks: "There are in Alabama as in all the States, large numbers of Negroes, who perhaps would be unable to establish legitimacy of birth, but could, nevertheless easily establish the identity of white fathers or grandfathers." Birmingham Age-Herald, June 5, 1912, quoted in LEWINSON, *op. cit. supra* note 8, at 84.

¹⁵ *Guinn and Beal v. United States*, 238 U. S. 347, 35 Sup. Ct. 926 (1915). The election officials who used the Grandfather clause to deprive large numbers of negroes of suffrage rights were later tried and convicted of conspiracy to deprive citizens of constitutional rights. *Guinn v. United States*, 228 Fed. 103 (1915).

¹⁶ LEWINSON, *op. cit. supra* note 8, 113.

¹⁷ This action also was taken pursuant to statutory authority: TEX. REV. CIV. STAT. (1911) art. 3092. "Provided, that the executive committee of any party for any county may prescribe additional qualifications for voters in such primaries, not inconsistent with this title."

¹⁸ The typical attitude is expressed in exceedingly strong language in an essay on *The Buck Negro*, 1 WRITINGS OF W. C. BRANN (1898) 24. But see HOPE, *THE NEGRO AND THE ELECTIVE FRANCHISE* (1905) 51.

nomenon of racial prejudice which manifested itself in a demand that party, religious group, and other social institutions be lily-white. The negro, in theory, could organize his own party,¹⁹ church, or social organization, and with that-privilege, it was argued, he could not reasonably complain of racial discrimination. To no less extent, however, the movement to disfranchise the negro is traceable to a conviction in the Texas mind that to invest the negro with the balance of power, besides opening the possibility of "black government," would initiate a mad struggle between the opposing factors of the white Democrats to secure the negro vote by purchase, barter, and corruption.²⁰ Strife has been bitter within the party and examples are not wanting where the negro vote has actually been used in attempts to obtain electoral control.²¹ Thus is presented the strange picture of one race disfranchising another to save itself from the consequences of its own vices.

The unity on the negro suffrage question of otherwise opposed factions of Texas Democrats, therefore, is not difficult of explanation. The representative from the rural sections votes for an anti-suffrage measure because he is appalled at the spectre of an election lost as a result of negro votes cast under the influence of "Wall Street" money in the hands of urban interests. The representative from the urban centers, on the other hand, casts his vote for the same legislation because he fears the consequences which will follow if the uninstructed black goes with the illiterate white to the polls under the influence of soapbox damnation of the "money interests." Neither faction is confident of its ability to organize an auxiliary negro machine of stability and permanence. The magnitude of this task and the fear of reprisal from the opposing faction have, perhaps as much as any prejudice against the negro, brought about a united stand for negro disfranchisement.

The recent Texas statutes seem to have reduced to fundamental issues the dramatic tournament which had its inception in the War of the States. The Texas Legislature passed a statute²²

¹⁹ The argument was made by counsel for the state of Texas in *Nixon v. Herndon*, *supra* note 2, that the negro might form his own Democratic party and thereby receive equal protection of the laws. *Dallas News*, March 8, 1907, at 1

²⁰ This argument acquires real significance when viewed in the light of the situation which has developed in South Texas, where a political machine subsidizes an illiterate Mexican balance of power to enable itself to control the political destiny of thirteen Texas counties. See Weeks, *The Texas-Mexican and the Politics of South Texas* (1930) 24 *AM. POL. SCI. REV.* 606.

²¹ The immediate incident which resulted eventually in the passage of the first Texas anti-negro-suffrage statute was caused by a petty struggle for control of negro voters in San Antonio.

²² *TEX. REV. CIV. CODE* (Vernon, 1928) art. 3107.

categorically denying negroes the privilege of voting in Democratic primaries. This act seems to have been drafted under the assumption that it would be challenged only under the fifteenth amendment, which presumably applied only to that election which was "the final choice of an officer by the duly qualified electors."²³ Attempts were made by counsel for both sides to have the case decided on the issue of whether the primary was an election within the scope of the fifteenth amendment.²⁴ Thus the question whether the act of primary officials in denying suffrage was an act of a state agency and so invalid would have been answered.

Mr. Justice Holmes, however, writing for a unanimous Court in *Nixon v. Herndon* refused to pass upon the question of the applicability of the fifteenth amendment, it being "hard to imagine a more direct and obvious infringement of the fourteenth," the amendment which, while applicable to all, "was passed . . . with a special intent to protect the blacks from discrimination against them."²⁵ The language of the opinion shows no effort to conceal the lack of sympathy with which Mr. Justice Holmes regarded the purpose of the act.²⁶ An aside, however, uttered as he concluded the reading of his opinion, demonstrated his realistic appreciation of the futility of judicial interference: "I know that our good brethren, the negroes of Texas, will now rejoice that they possess at the primary the rights which heretofore they have enjoyed at the general election."²⁷

Thus arose the occasion for the statute authorizing the executive committee to determine the qualifications requisite to membership which, in *Nixon v. Condon*, met the same fate as its predecessor. It was recognized by all as a direct attempt to disfranchise the negro.²⁸ Its only material opposition before enactment

²³ The phrase is from *United States v. Newberry*, 256 U. S. 232, 41 Sup. Ct. 469 (1921). Discussion in local political circles was based on the assumption that the statute would be upheld on the basis of this definition.

²⁴ Letter from Hon. Fred C. Knollenberg of plaintiff's counsel (April 21, 1932): "Of course in that case there was a direct violation of the 15th amendment, and I tried my best in argument to get the Supreme Court to lay the decision under that amendment . . . And that leaves us in the dark as to just what the fifteenth amendment means by the word 'voting.'"

²⁵ *Nixon v. Herndon*, *supra* note 2, at 541.

²⁶ "The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

²⁷ The statement is quoted on the authority and with the permission of an auditor who was present at the time the opinion was read.

²⁸ The emergency clause attached to the new statute called attention to the "public necessity" created by the Supreme Court's action in holding

came from those who feared a possible extension of its application beyond the purpose for which it was created.²⁹ The State Senate attempted to obviate this possibility by adding amendments denying the committee power to bar groups from the primaries because of former political affiliations, or membership or non-membership in organizations other than the political party.²⁹ Nevertheless the executive committee met before the 1930 primaries and adopted a resolution barring as candidates all who had violated the party pledge by bolting the party in the 1928 presidential campaign. Thereupon a special act³¹ was passed by the Legislature conferring upon the Supreme Court of the State original jurisdiction to hear mandamus proceedings against party officials in order to compel "the performance of duties imposed upon them by law."³² Acting thereunder, the Supreme Court in *Love v. Wilcox*³³ issued a writ commanding the executive committee to certify for the primary ballot the name of an aspirant who had bolted the party in 1928. The Court held that the contested resolution was expressly forbidden by statute and so invalid, whether the committee acted as an "agency of the state" or as "a mere agency of the party." In a later case,³⁴ the validity of a resolution requiring a strict party pledge as a condition to voting in the primaries was at issue. The Court upheld the resolution³⁵ on the ground, among others, that the statute was a "grant of power to the State Executive Committee of a party to determine who shall participate in the acts of the party."

the previous statute unconstitutional. TEX. LAWS (1927) c. 67, § 2. State Senator Thomas Love in an interview, stated that "this act had for its purpose the barring of negroes from Democratic elections, and no other purpose." Dallas Morning News, May 3, 1932 at 1.

²⁹ A member of the House of Representatives in recording his reasons for voting against the bill, stated that "in my humble judgment it is far more dangerous to entrust our whole political destiny to a few men than the scare of the negro question could ever be." The executive committee could "ostracize a man at will and set up a standard to suit itself." TEX. H. R. J. 40th Leg. 1st C. S. (1927) 302.

³⁰ The Legislature subsequently repealed this amendment in order to allow the executive committee to pass resolutions barring from the primaries all Democrats who had voted the Republican ticket in 1928. The bill was vetoed by the governor "in the interests of party harmony." See *Love v. Wilcox*, 28 S. W. (2d) 515, 524 (Tex. 1930).

³¹ Senate Bill No. 16, approved Feb. 14, 1930.

³² An attempt was made in *White v. Lubbock*, 30 S. W. (2d) 722 (Tex. Civ. App. 1930), to bring a mandamus action against the party officials in order to enforce a negro's right to vote in the primary. It was held that the action would not lie in equity and that there was no illegal discrimination against the negro under the statute.

³³ *Op. cit. supra* note 30.

³⁴ *Love v. Buckner*, Texas Supreme Court, April 21, 1932.

³⁵ Opponents of the statute have derived amusement from its present status, wherein the executive committee is allowed to bar whites but not negroes from the primaries. Dallas News, May 3, 1932 at 1.

Meanwhile, other Southern states were disfranchising negroes under similar statutes.³⁶ In Virginia, an action was brought against the primary officials, and both the Federal District Court³⁷ and the Circuit Court of Appeals³⁸ denied the power of the Democratic executive committee to pass a resolution restricting participation in the primaries to white voters. The opinion of the District Court, adopted by the Circuit Court of Appeals, insisted that a primary should be regarded as a general election; that under decisions of the Virginia courts,³⁹ there was no fundamental difference between a primary and an election; and that the contested resolution of the executive committee was an "official act." Although the Court did not expressly so conclude, its reasoning seems clearly to bring the primary within the purview of the fifteenth amendment.⁴⁰ The investment of the party officials with power to determine the qualifications of primary voters, and thus presumably to disfranchise the negro, was characterized as an attempt by the Legislature to "do indirectly that which it had no authority to do directly."

In arriving at a contrary result in *Nixon v. Condon*, the Federal Courts in Texas distinguished the Virginia case on the ground that primaries in Virginia were conducted at public expense, and that since the primary officials drew compensation from the state, they were officials of the state.⁴¹ On the other hand, the District Court maintained, a political party in Texas is a "voluntary organization," and the statute granting it power to prescribe qualifications requisite to membership was not needed to confer such power; "it merely recognized a power that already existed."⁴²

³⁶ See, for example, ALA. CODE (Michie, 1928) § 612; FLA. COMP. LAWS (1927) § 377. In South Carolina, by party rule, a negro is allowed to vote in the primaries if "the affidavits of ten white men are produced showing that applicant voted for Wade Hampton for governor in 1876, and for Democratic candidates ever since." LEWINSON, *op. cit. supra* note 8, at 236.

³⁷ *West v. Bliley*, 33 F. (2d) 177 (E. D. Va. 1929).

³⁸ *Bliley v. West*, 42 F. (2d) 101 (C. C. A. 4th, 1930). See Notes (1929) 33 LAW NOTES 101; (1930) 16 VA. L. REV. 193.

³⁹ *Commonwealth v. Willcox*, 111 Va. 849, 69 S. E. 1027 (1911).

⁴⁰ "The General Assembly of Virginia having provided the primary as a method (though optional) for the nomination of candidates, and the Supreme Court of Virginia having declared it when adopted an inseparable part of the election machinery, it would seem to me necessarily to follow that the Legislature cannot be delegation or otherwise give vitality to a claimed right which it is itself prohibited by the Constitution from enacting into law."

⁴¹ The Virginia Courts paid only passing attention to this distinction.

⁴² An early recognition of this attitude caused criticism of the Legislature for risking Supreme Court action in passing a new statute: "It is an anomaly for the state to grant power which it does not possess to a political party that already possesses such power." *Dallas News*, March 9, 1927, at 1. The Governor in submitting the recommendation to the Legislature that

Mr. Justice Cardozo in writing for the majority of the Supreme Court in *Nixon v. Condon* refused either to affirm or deny "whether a political party in Texas has inherent power today to determine its own membership." He placed the decision upon the narrow ground that the executive committee had acted under the authority of a state statute in adopting the contested resolution and had therefore functioned as a state agency. It was argued that since the executive committee exercises only delegated powers,⁴³ and since no authority to prescribe qualifications for primary voters was ever delegated by the party convention, the committee acted under the authority of the statute as "delegates of the state" in excluding negroes.

Mr. Justice McReynolds, dissenting,⁴⁴ discussed as the determinative issue whether the Texas primary was to be treated as a general election and therefore as a state function. His conclusion that there is a fundamental difference between the two, while directly in line with the authority of Texas decisions,⁴⁵ nevertheless fails to take account of the realities of Texas politics.⁴⁶ Contests for public office are won or lost in the Democratic primary, the general election serving only to endorse the Democratic candidate there selected. To be more than a gesture, therefore, the privilege to vote must be extended to primary participation.

Conventionally, the primary has been considered in the same category as the party caucus which it succeeded: a private organization subject to state regulation only when subjected to specific legislation. Thus the courts have frequently held that laws punishing fraud,⁴⁷ bribery,⁴⁸ and wagering⁴⁹ in elections did not apply to offenses committed in primaries. Similarly in Texas, a statute conferring voting privileges upon women in primary elections was upheld on the ground that a constitutional clause limiting suffrage to male citizens did not apply to primaries.⁵⁰

In *United States v. Newberry*,⁵¹ the Supreme Court was con-

the statute be passed, acted on the advice of "one of the leading and best lawyers of this state." Letter of His Excellency, Dan Moody.

⁴³ 2 BRYCE, MODERN DEMOCRACIES 40.

⁴⁴ Justices Butler, Sutherland, and Van Devanter concurred in the dissent.

⁴⁵ *Koy v. Schneider*, 110 Tex. 369, 218 S. W. 479 (1920); *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180 (1916).

⁴⁶ Thus in 1926, a total of 821,234 votes were cast in the first Democratic primary; 766,318 votes were polled in the second primary; while in the general election, 265,507 votes were cast. Of this number, the Republican party polled 31,531. TEXAS ALMANAC (1928) 167.

⁴⁷ *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294 (1902).

⁴⁸ *People v. Cavanaugh*, 112 Cal. 674, 44 Pac. 1057 (1896).

⁴⁹ *Commonwealth v. Wells*, 110 Pa. 463, 1 Atl. 310 (1885).

⁵⁰ *Koy v. Schneider*, *supra* note 45.

⁵¹ *Supra* note 23.

fronted with the question of the status of primary elections. An indictment had been brought against Newberry for violation of the Corrupt Practices Act⁵² in securing his nomination for the United States Senate in a primary election. The Court was unanimous only in its decision that the case should be reversed. Four justices, Mr. Justice McReynolds writing the opinion, agreed that the constitution granted no power to Congress to legislate with reference to any political contest other than one involving "the final choice" of the electorate.⁵³ Primaries, according to Mr. Justice McReynolds, are "in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."⁵⁴

In his dissenting opinion in *Nixon v. Condon*, Mr. Justice McReynolds did not discuss the question of the status of primary elections except in relation to the Texas situation. He cited only Texas cases, and in refusing to draw upon the authority of *United States v. Newberry*, left open the inference that the questions presented in the two cases were distinct. By so employing his arguments, Mr. Justice McReynolds seemingly was attempting to save his opinion in the *Newberry* case from being placed finally in the category of a lost cause. With this angle of the case completely ignored by the majority opinion, he might well have proceeded as if his argument on the point were conceded and have confined his dissent to the simple question of the state agency of primary officials while acting under authority of the state statute. This was the issue of the case selected as determinative by the majority opinion, and by discussing the question of the difference between primary and election in his dissent, the Justice has apparently used poor strategy.

The course now open to the leaders of the anti-negro-suffrage forces is clear. They may well conclude from the language of Mr. Justice Cardozo that their purpose may be attained by repealing the ineffective statute and procuring the Democratic convention to delegate to the executive committee power to determine the qualifications of participants in primaries. This will

⁵² 36 STAT. 822-824, as amended by 37 STAT. 25-29.

⁵³ In *United States v. Gradwell*, 243 U. S. 476, 37 Sup. Ct. 407 (1916), the question of the similarity of primaries and elections was before the Court. An indictment was found against several defendants for procuring ineligible persons to vote in a primary. Without deciding whether Congress had power to control primary elections, the Court held that the statute under which the indictment was brought did not apply.

⁵⁴ Only four Justices agreed to this statement of the decision. Mr. Justice McKenna concurred in the opinion as applied to the particular statute, but reserved opinion on the question of the power of Congress. Chief Justice White and Justices Brandeis, Pitney, and Clarke were in agreement that the case should be reversed, but differed as to the particular error committed.

likely be the next move, and it is a fair guess that the Supreme Court will not hold the convention and executive committee to be state agencies. There will then be no reasonable basis for holding that they are possessed of authority "originating or supposed to originate in the mandate of the law." Nor does it seem probable that the situation would be far different if the statute were repealed and the executive committee then prescribed the qualifications without delegation of authority from either the convention or the state. The possibility, however, that any state control over primaries may be used as a ground for classifying them as state agencies may provoke a more drastic move: repeal of all state laws pertaining to primary elections. This seems to be under consideration at the present time in Texas,⁵⁵ where Mr. Justice Cardozo's opinion has been construed as intimating that regulation of the primary by the state has made parties and their representatives "the custodians of official power . . . agencies of the state, the instruments by which government becomes a living thing."⁵⁶

THEORIES OF ENFORCEMENT OF COLLECTIVE LABOR AGREEMENTS

COLLECTIVE agreements¹ between unions and employers vary from simple schedules of wages or hours to elaborate documents requiring a closed shop and regulating such subjects as arbitration of disputes, rights of seniority, hire of apprentices, shop conditions, and use of safety appliances and labor saving devices.² The union frequently confers upon the employer the privilege of using its label, stamp, or shop card;³ it may expressly engage to refrain from ordering a strike or boycott;⁴ and occasionally the union goes so far as to undertake to enforce the agreement on its members by fines and penalties.⁵ Essentially the collective

⁵⁵ N. Y. Times, May 8, 1932, at 6.

⁵⁶ It is not impossible that the verdict of the Supreme Court will be accepted as final in Texas. The Committee on Resolutions of the Democratic State Convention passed a resolution on May 24, 1932 to the effect that the State Convention would take no action to bar negroes from the primaries. However, this may mean nothing more than that the Resolutions Committee deems it politic to attempt disfranchisement by repeal of the statute and action of the executive committee.

¹ For a bibliography on this subject see COMMONS AND ANDREWS, *PRINCIPLES OF LABOR LEGISLATION* (1927) 552.

² Schaffner, *The Labor Contract from Individual to Collective Bargaining* (1907) BULLETIN OF THE UNIVERSITY OF WISCONSIN No. 182 (Collective Agreements in Appendix at 136-182).

³ THE COMMONWEALTH OF MASSACHUSETTS, BUREAU OF STATISTICS (1917) *Collective Agreements between Employers and Labor Organizations* 128-26. See also statistics, at 207-233.

agreement is a statement of the conditions under which a continuing service is to be performed, rather than a contract of employment.⁶ However, when the employer promises to hire, and the union, to supply union men,⁷ or the court implies such a promise on the part of the union,⁸ a close approximation of a contract of employment is attained.

Collective bargaining, the central activity of trade unions,⁹ is vital to liberty of contract, as only in combination can the employees approximate the employer's bargaining power.¹⁰ The agreements into which this bargaining crystallizes must be adequately enforced by the courts not only to give effect to the intent of the parties and insure fair dealing between them, but also to avoid the inevitable alternative to judicial sanction, strikes and lockouts, costly alike to employer, employee, and consumer.¹¹ The employee, for his individual protection, must be given recourse against the employer for any damages directly occasioned by the employer's breach of the agreement.¹² Theoretically the employer should be given a reciprocal right against the employee. However, this will be of little practical value since collection of damages is seldom feasible,¹³ and specific performance or an injunction against breach is not available.¹⁴ It is therefore essential that the employer be given a right against the union, to compel both its conformity to the agreement and its use of

⁴ Such provisions are frequently included in the collective agreements referred to, *supra* notes 2 and 3.

⁵ For an interesting discussion of this aspect see BLOCH, *LABOR AGREEMENTS IN COAL MINES* (1931) 291-322.

⁶ Hamilton, *Collective Bargaining* (1930) ENCYC. SOC. SCIENCES, 628.

⁷ *Goldman v. Cohen*, 222 App. Div. 631, 227 N. Y. Supp. 311 (1st Dep't 1928).

⁸ *Maisel v. Sigman*, 123 Misc. 714, 205 N. Y. Supp. 807 (1924); *Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores & Longshoremen's Benevolent Society*, 265 Fed. 397 (D. La. 1920).

⁹ See Hamilton, *Collective Bargaining*, *supra* note 6.

¹⁰ See language of Justice Holmes, dissenting in *Coppage v. Kansas*, 236 U. S. 1, 27, 35 Sup. Ct. 240, 248 (1915). For the nature of the right to organize, see *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 50 Sup. Ct. 427 (1930); see COMMONS AND ANDREWS, *op. cit. supra* note 1, at 125.

¹¹ For judicial recognition of this necessity see *Weber v. Nasser*, 236 Pac. 1074, 1076 (Cal. App. 1930), appeal dismissed, 210 Cal. 607, 292 Pac. 637 (1930); *Schlesinger v. Quinto*, 201 App. Div. 487, 500, 194 N. Y. Supp. 401, 411 (1st Dep't 1922).

¹² For the measure of damages occasioned by such breach, see *Gary v. Central of Georgia Ry. Co.*, 37-Ga. App. 744, 141 S. E. 819 (1928). For state legislation aimed at the protection of the employee, see Legis. (1931) 44 HARV. L. REV. 1287.

¹³ See *Shaffner*, *op. cit. supra* note 2, at 22 (laborer seldom has property in excess of statutory exemption).

¹⁴ *Stevens, Involuntary Servitude by Injunction* (1920) 6 CORN. L. Q. 235.

discipline to reach any employee who is a union member.¹⁵ Conversely, the union must be enabled to enforce the agreement against the employer since it alone has power to invoke the one means of effective enforcement, an injunction against continued breach.¹⁶ Moreover, should the employer commit such a breach as hiring non-union men or refusing to dismiss men expelled from the union, the employee could show no money damages and his relief would depend entirely upon the union's ability to enforce the agreement.

Unfortunately, however, in the development of the law of collective agreements the courts have adopted rules whose utility is limited to the particular type of situation for which they were invoked.¹⁷ The most important of these rules historically, is based on the theory that the agreement creates a usage which becomes a part of any existing or subsequent employment contract between the employer and an employee in the absence of a deliberately conflicting contract between them.¹⁸ Although this theory provides a realistic interpretation of the nature and effect of collective agreements as between employer and employee,¹⁹ its application has been strictly limited by the courts.²⁰ It is seriously defective, moreover, in failing to create any obligations

¹⁵ (1930) 30 COL. L. REV. 410. The employer may be deprived of this right (David Adler & Sons Co. v. Maglio, 200 Wis. 153, 228 N. W. 123 (1929)) or even of his protection under the agreement (Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N. Y. Supp. 87 (1931)) if he violates it first.

¹⁶ (1930) 43 HARV. L. REV. 1158; see Mason, *Organized Labor as Party Plaintiff in Injunction Cases* (1930) 30 COL. L. REV. 466.

¹⁷ Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572 (comprehensive discussion of the existing rules and their deficiencies).

¹⁸ See *Hudson v. Cincinnati, N. O. & F. P. Ry. Co.*, 152 Ky. 711, 154 S. W. 47 (1913) (a leading case though not a holding on the point); *Hall v. St. Louis-San Francisco Ry. Co.*, 224 Mo. App. 431, 28 S. W. (2d) 687 (1930); *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S. W. 436 (1920).

¹⁹ Note (1924) 24 COL. L. REV. 409.

²⁰ The usage theory has been so stated as to preclude recovery by an employee who did not know of the agreement. *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 468, 9 S. W. (2d) 692, 694 (1928). The farthest that any court has gone in this direction is to allow recovery when the employee knew of the agreement but not of the specific term at issue. *Mastell v. Salo*, 140 Ark. 408, 215 S. W. 583 (1919). No case was found in which an employee not a member of the union was allowed recovery of damages from his employer under the usage theory. But see *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (1920) (non-union employee enjoins union employees and employer from depriving him of his seniority rights) and *United States Daily Publishing Corp. v. Nichols*, 32 F. (2d) 834 (App. D. C. 1929) (employer bound though not a member of the Association making the agreement). In two cases express ratification by the employee was required. *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S. W. 136 (1904); *West v. Baltimore and Ohio Rr. Co.*, 103 W. Va. 417, 137 S. E. 654 (1927).

between the employer and the union.²¹ More recently the theory has been advanced that the agreement between the employer and the union is a valid contract.²² While the major deficiency of the usage theory is thereby remedied, since the employer and the union are given mutual rights against each other, no provision is made for the status of the individual employee except as it is determined in his separate contract of employment.²³ Several courts have apparently attempted to overcome this disadvantage by permitting the employee to recover from the employer as a third party beneficiary of the agreement.²⁴ The apparent willingness with which the courts have allowed recovery on this basis to an employee who had no knowledge of the agreement,²⁵ or was not a member of the union,²⁶ is in marked contrast to their reluctance to grant such relief on the equally adequate usage theory.²⁷ This may be due to the courts' desire to avoid making the usage theory conversely available for the imposition of the obligations of the collective agreement on such employees. This result is obtained by use of the third party beneficiary theory under which no obligation is imposed on the party benefited. However, this theory is hardly satisfactory, since it fails to give the employer a remedy against the individual employee. Moreover, if the agreement is between the employee's union and an employer's association, the employee has no remedy against his employer unless it can be said that the employer's association in entering into the collective agreement acted as agent of the individual employer.²⁸ And it is difficult logically to apply third party beneficiary principles to the situation existing under collective agreements since the effect of the union's bargain is to establish a status of employment conditions under which both the employer and the employee are obligated to perform certain duties; whereas in the third party beneficiary cases the promisee contemplates performance by the promisor alone. A somewhat unconventional theory advanced by one court treats the union as the employee's agent, and the agreement as his individual contract of employ-

²¹ See Fuchs, *Collective Labor Agreements in American Law* (1925) 10 ST. LOUIS L. REV. 1, 3-7.

²² *Ribner v. Rasco Butter and Egg Co.*, 135 Misc. 616, 238 N. Y. Supp. 132 (1929); *Weber v. Nasser*, *supra* note 11; *Gilchrist v. Metal Polishers Union*, 113 Atl. 320 (N. J. Ch. 1919).

²³ As suggested below, however, it is possible to remedy this deficiency by employing some other theory along with the usage theory.

²⁴ *Blum & Co. v. Landau*, 23 Ohio App. 426, 155 N. E. 154 (1926); *Johnson v. American Railway Express Co.*, 163 S. C. 191, 161 S. E. 473 (1931).

²⁵ *Gulla v. Barton*, 164 App. Div. 293, 149 N. Y. Supp. 952 (3d Dep't 1914) (both unions incorporated).

²⁶ *Yazoo & M. V. Rr. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931).

²⁷ *Supra* note 20.

²⁸ This is apparently the basis of *Blum & Co. v. Landau*, *supra* note 24.

ment.²⁹ This rationale is open to the criticism that such agency does not exist in fact when the employee is not a member of the union, and is difficult to discover where the employee became a member of the union after the inception of the agreement.²⁹ Furthermore, the contract between the union as the employee's agent and the employer has been said to be illusory since the union's principal, the employee, need not accept the employment at all; and if he does, he may, at his option, make a different contract.³¹

• It is suggested that the most effective legal formula capable of contemporary use in the enforcement of collective agreements would be treatment of the agreement as a valid contract between the employer and the union, creating a usage which becomes a part of all existing and subsequent individual employment contracts, unless either the employer or the employee, with actual knowledge of the agreement, voluntarily waives its benefits.³² Even though the agreement is quite different from an ordinary bilateral contract,³³ it may nevertheless be considered as one in order to rationalize its enforcement.³⁴ Consideration for the employer's promise, when not specifically mentioned in the agreement, may be found in the implied promise of the union to refrain from interfering with the employer's conduct of the business.³⁵ A promise not to interfere is undoubtedly a legal detriment as the right of a union to call a peaceful strike for a "lawful" purpose not in violation of any covenant is now universally recognized.³⁶ Adequate means of enforcement of the agreement against

²⁹ *Barnes & Co. v. Berry*, 156 Fed. 72 (C. C. Ohio 1907). For the similarity between this case and the French system, see *infra* note 32.

³⁰ For the tendency of the agency rule to make the terms of employment rigid, see *Piercy v. Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923) and *Ahlquist v. Alaska Portland Packers Ass'n*, 39 F. (2d) 348 (C. C. A. 9th, 1930).

³¹ *Rice*, *op. cit. supra* note 17, at 594.

³² The system in force in France, developed under similar principles of law, treats the agreement as a contract between employer (or employer's association) and union to which individual employees are made parties through representation. By statute any conflict between the individual contract and the agreement is resolved in favor of the latter. See Fuchs, *The French Law of Collective Labor Agreements* (1932) 41 YALE L. J. 1005. For an able discussion of the much more comprehensive and thorough system of regulation in Germany, see Fuchs, *Collective Labor Agreements in German Law* (1929) 15 ST. LOUIS L. REV. 1.

³³ Duguit, *Collective Acts as Distinguished from Contracts* (1918) 27 YALE L. J. 753 (a philosophical analysis).

³⁴ Note (1930) 16 CORN. L. Q. 96.

³⁵ *Harper v. Local Union No. 52*, digest of case in U. S. Daily, May 14, 1932, at 498 (Tex. Civ. App.); Note (1931) 19 CALIF. L. REV. 183.

³⁶ For protection given the union, in a justifiable though violent strike, against unwarranted interference, see *Carpenters' Union v. Citizens Committee*, 333 Ill. 225, 164 N. E. 393 (1928). For a discussion of the right to strike, see *Sayre, Labor and the Courts* (1930) 39 YALE L. J. 682, 696

the union are available to the employer in the form of an injunction against continued breach by the union,³⁷ since the reasons for denying such enforcement against an employee, the unwillingness of a court to force a man to hire himself to another, and the fact that the employer can hire someone else, do not extend to protect the union.³⁸ Enforcement of the agreement between the employer and the employee is attained by incorporating the agreement into the individual contract of employment. This can be justified on the ground that the agreement is sufficiently well known to warrant an implication of knowledge and therefore of adoption of its terms by both employer and employee.³⁹ Under this doctrine, as under the third party beneficiary theory, the terms of the union's agreement should apply to non-union laborers when, and only when, such is the apparent intention of the parties to the agreement.⁴⁰ The requirement of a voluntary waiver accompanied by actual knowledge of the agreement would prevent an employer from disregarding its terms, when hiring an individual employee, and thus limiting its application to the detriment of both the employee and the union.⁴¹ It would also enable the employer to hire on different terms if the employee consented.⁴² Flexibility of the terms of employment is thus not impaired. Furthermore, opportunity for the union or the employer to initiate a change is supplied both by the short term for which most labor agreements are negotiated and by the common provision for withdrawal on thirty or sixty days' notice.⁴³ A presumption of acceptance by employees of any alteration could be implied from silence after adequate notice, which may consist of conspicuous posting of the new rules.

(general analysis of the legality of weapons used by labor and employer in and out of court).

³⁷ *Burgess v. Georgia, F. & A. Ry. Co.*, 148 Ga. 415, 96 S. E. 864 (1918). For the question of whether a union can sue and be sued, see FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1929) 82-89 (tabulations of federal and many state labor injunction in appendices); Dodd, *Dogma and Practice in the Law of Associations* (1929) 43 HARV L. REV. 977; Sturges, *Unincorporated Associations as Parties to Actions* (1924) 33 YALE L. REV. 383.

³⁸ See *Schlesinger v. Quinto*, *supra* note 11, at 499, 194 N. Y. Supp. at 410; (1931) 15 MINN L. REV. 251. But see *Chambers v. Davis*, 128 Miss. 613, 91 So. 346 (1922) where the court treats a seniority provision as unenforceable because somehow contaminated by personal service.

³⁹ Such is the usage rule as stated in *Hudson v. Cincinnati, N. O. & F. P. Ry. Co.*, *supra* note 18, at 717, 154 S. W. at 50.

⁴⁰ If their intent is otherwise it should be effectuated so as to protect the union from non-union "chiselers." That this is the law in France, see *Fuchs*, *op. cit. supra* note 32, at 1035.

⁴¹ *Cf.* the situation in *Gulla v. Barton*, *supra* note 25.

⁴² As in *Langmade v. Olean Brewing Co.*, 137 App. Div. 355, 121 N. Y. Supp. 388 (4th Dep't 1910).

⁴³ See THE COMMONWEALTH OF MASSACHUSETTS, BUREAU OF STATISTICS, *cit. supra* note 3; Bloch, *op. cit. supra* note 5, at 85; *United States Daily Publishing Corp. v. Nichols*, *supra* note 20.

PROTECTION OF LOCAL BUSINESS AGAINST
MOTOR VEHICLE COMPETITION

IN the effort to protect local markets against competitors whose invasion is made possible by the use of motor transport, attempts by legislation to erect trade barriers at state frontiers are confronted with overwhelming constitutional obstacles. Thus a statute imposing a license tax upon each truck used by dealers not maintaining a permanent place of business within the state, and excepting from its provisions those selling state-grown produce, has recently been declared invalid.¹ The decision would seem to be a foregone conclusion in view of the long line of decisions by which both tax and regulatory statutes² have been disapproved on the ground of a "burden" on interstate commerce. It has not been necessary for this result that the statutes should be actually discriminatory: they have been condemned even when the apparent effect was to place businesses operating across state lines in a position superior to that of those confined within the state.³ An apparent deviation, explained by the use made of state-maintained highways, is found in the cases sustaining license fees on motor vehicles operating in interstate commerce so long as they do not discriminate between resident and non-resident.⁴

¹ *Gramling v. Maxwell*, 52 F. (2d) 256 (D. N. C. 1931). The court did not find it necessary to consider the effect of the limitation to dealers maintaining a place of business within the state, the illegality of the discrimination against foreign produce being well established under previous decisions.

² *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454 (1886); *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592 (1887); *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829 (1894); *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229 (1903); *Real Silk Hosiery Mills v. City of Portland*, 268 U. S. 325, 45 Sup. Ct. 525 (1925). The Fourteenth Amendment may be relied upon to invalidate a statute which provides a discriminatory license fee against non-residents. *State v. Wiggin*, 64 N. H. 508, 15 Atl. 128 (1888). See also *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862 (1890). The statute required inspection of live animals by state inspectors within 24 hours before slaughter, and it appears from the opinion that the unreasonableness of the requirement as well as the mere burden on commerce was a reason for holding it invalid. The cases reveal the difficulty of classifying licensing ordinances as revenue measures or as exercises of the police power. See *Brennan v. Titusville*, *supra* at 302, 14 Sup. Ct. at 832 (some police power regulations affecting interstate commerce may be valid, but none that burden it); *Real Silk Hosiery Mills v. City of Portland*, *supra* note 2, at 336, 45 Sup. Ct. at 526.

³ See *Robbins v. Shelby Taxing District*, *supra* note 2, at 499, 501-2, 7 Sup. Ct. at 597, 598; *Caldwell v. North Carolina*, *supra* note 2, at 629, 23 Sup. Ct. at 232.

⁴ *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140 (1915); *Clark v. Poor*, 274 U. S. 554, 47 Sup. Ct. 702 (1927). Similarly, in the absence of federal regulation, state regulations as to safety and convenience are valid. *Hess v. Pawloski*, 274 U. S. 352, 47 Sup. Ct. 632 (1927); *Morris v. DUBY*,

Within each state, however, a different situation exists. In state constitutions, although there are numerous prototypes of the Fourteenth Amendment,⁵ no commerce clauses may be found.⁶ Yet the most dangerous rival of the small local merchant is commonly not a business operating on an interstate scale, but one located within the state and reaching its customers through its own system of motor deliveries. Ordinances attempting to bring such competitors within the scope of the regulatory powers of the municipality by defining peddlers and transient vendors in such a way as to exclude residents and persons having an established place of business within the city have been held invalid.⁷ The more effective weapon against the non-resident is the municipality's power, when so authorized by the state, to license businesses and occupations for revenue purposes. Disparity in license fees imposed upon persons engaged in the same business according to whether they are resident or non-resident is clearly illegal.⁸

274 U. S. 135, 47 Sup. Ct. 548 (1927) (limitation of maximum load to 16,000 lbs. is valid, even though complainants cannot operate profitably subject to such restriction). But certificates of convenience and public necessity may not be required of such carriers. *Buck v. Kuykendall*, 267 U. S. 307, 45 Sup. Ct. 324 (1925); at least it may not be made to depend upon discretion. See *Clark v. Poor*, *supra* at 556, 47 Sup. Ct. at 702. On the distinctions between contract and common carriers, and the power of the state to regulate the former, see *Michigan Public Utilities v. Duke*, 266 U. S. 570, 45 Sup. Ct. 191 (1925); *Frost v. Railroad Commission*, 271 U. S. 583, 46 Sup. Ct. 605 (1926); Comment (1931) 40 YALE L. J. 469.

⁵ See INDEX DIGEST OF STATE CONSTITUTIONS (1915) 971-973.

⁶ Although there are numerous articles directed against monopolies and conspiracies in restraint of trade. INDEX DIGEST OF STATE CONSTITUTIONS 1004-1007. An ordinance discriminating against non-residents delivering products has been held invalid under Art. 2 § 32 of the Oklahoma Constitution. *Grantham v. City of Chickasha*, 9 Pac. (2d) 747 (Okla. 1932).

⁷ *Town of Pacific Junction v. Dyer*, 64 Iowa 38, 19 N. W. 862 (1884); *Saginaw v. Saginaw*, 106 Mich. 32, 63 N. W. 985 (1895); *Ideal Tea Co. v. Salem*, 77 Ore. 182, 150 Pac. 852 (1915); *Grantham v. City of Chickasha*, *supra* note 6. It has sometimes been stated that regulations of peddlers and transient vendors soliciting orders at dwellings are not only to protect residents from solicitation by irresponsible individuals but to protect local merchants from the competition of dealers who have contributed nothing to the property of the city. See *Graffy v. Rushville*, 107 Ind. 502, 506, 8 N. E. 609, 611 (1886). This view is disapproved, although it is recognized that protection of local merchants is often the motive for such ordinances. See *State v. Osborne*, 171 Iowa 678, 694, 154 N. W. 294, 298 (1915); *North Carolina v. Williams*, 158 N. C. 610, 616, 73 S. E. 1000, 1002 (1912).

⁸ *Muhlenbrinck v. Long Branch*, 42 N. J. L. 364 (1880); *Eales v. City of Barboursville*, 177 Ky. 216, 197 S. W. 634 (1917); *Ex parte Irish*, 122 Kan. 33, 250 Pac. 1056 (1926). The hunting license cases on discriminating between citizens on the basis of residence in particular counties are analogous. *Harper v. Galloway*, 58 Fla. 255, 51 So. 226 (1910); *Lewis v. State*, 110 Ark. 204, 161 S. W. 154 (1913); *State v. Barkley*, 192 N. C. 184, 134 S. E. 454 (1926). *Cf.* *State v. Philips*, 70 Fla. 340, 70 So. 367 (1915) (requiring \$3 license fee of non-residents, as against \$1 for residents of county, not so arbitrary as to invalidate statute).

A more difficult problem is raised when a business involving the sale and delivery of goods conducted from an establishment outside the city is taxed at a higher rate than one conducted from a permanent place of business within it. Some courts have rejected all arguments of "reasonable classification" here and looked to the plain fact that the non-resident pays more than the resident.⁹

In *Singer Sewing Machine Co. v. Brickell*¹⁰ the Supreme Court held that to justify separate classification for tax purposes there need not be a difference in the actual nature of the business but that a difference in the mode of conducting the business is sufficient. Under this rule it would be permissible to tax at one rate dealers not making deliveries and at another those in the same line of business who do deliver, basing the tax on the number of trucks or wagons used.¹¹ Recently, the Circuit Court of Appeals in *Campbell Baking Co. v. City of Harrisonville*¹² invoked the same rule to uphold a tax on persons selling or delivering goods under an ordinance which excepted persons having a fixed place of business in the city.¹³ In so doing the court seems clearly to have exceeded the authority of the *Singer* case, because that involved the distinction between agents selling directly from the wagon and those operating from a fixed establishment, whereas the only distinction in the Campbell case is the location of the plant.¹⁴ The same dubious result is reached in *Hoffman Candy Co. v. Newport Beach*¹⁵ by the California court, although the rule concerning the mode of doing business is repudiated.¹⁶

⁹ *Petersen Baking Co. v. Fremont*, 119 Neb. 212, 228 N. W. 256 (1929) (an additional element in this case is that the fee was so large as to be deemed confiscatory); *Hair v. City of Humboldt*, 133 Kan. 67, 209 Pac. 268 (1931).

¹⁰ 233 U. S. 304, 34 Sup. Ct. 493 (1914).

¹¹ Such a tax has been upheld but on the ground that it represented a proper graduation of the tax on persons in the same line of business, measuring the tax by the number of vehicles used. *Bramman v. City of Alameda*, 162 Cal. 648, 124 Pac. 243 (1912). The fact that trucks and wagons add to the cost of upkeep of streets would seem to be the soundest basis for such classification for tax purposes. *Cf. Bellingrath v. Town of Georgiana*, 23 Ala. App. 111, 121 So. 453 (1929) (tax on merchants' deliveries by truck discriminatory and invalid).

¹² 50 F. (2d) 670 (C. C. A. 8th, 1931).

¹³ This is the construction put upon the ordinance by the court. The actual wording of the ordinance excepts "any person selling at their regular established place of business." *Quaere* whether bakers are not equally selling at their regular place of business regardless of whether that is located within or without the city.

¹⁴ See dissenting opinion, *supra* note 12, at 680.

¹⁵ 8 Pac. (2d) 235 (1932). *Cf. Town of St. Helena v. Butterworth*, 198 Cal. 230, 244 Pac. 357 (1926); *In re Hines*, 33 Cal. App. 45, 164 P. 339 (1917).

¹⁶ The "mode of doing business" distinction had been previously rejected. *Ex parte Richardson*, 170 Cal. 68, 148 Pac. 213 (1915).

The ordinance at issue imposed a small license fee on stores within the city and a \$10 license fee per truck on those not falling within the definition but carrying on the business of transporting goods by truck within the city. An outside candy manufacturer challenged the tax as discriminatory because local establishments could make deliveries without paying a vehicle tax. The court was persuaded that the business taxed, and the only business conducted by the candy company within the city, was that of delivering goods by truck. Obviously, to permit municipalities to separate for purposes of definition that portion of an outside dealer's business which is conducted within its own limits is to open the door to a complete system of discriminatory fees.

In the *Campbell* case, to bring a bakery within the statutory term "merchant,"¹⁷ the court stresses the legal argument that title to the goods does not pass until delivery and that therefore the company is selling pies and cakes, as well as operating trucks, within the city. In the *Hoffman* case, on similar facts, the court rubs out the sales aspect altogether in order to analogize a candy company to the transfer or express business. This inconsistency of treatment suggests that in both cases the courts, in laboring with refinements of doctrine, are dimming the simple and fundamental issue between the need of reasonable freedom in classifying for revenue purposes and of freedom of trade between citizens of different communities.

Three recent federal cases dealing with statutes enacted by the 1931 Texas legislature illustrate in novel terms the means by which localized business may avail itself of the regulatory powers of state government as a protection against motor vehicle competition. The protagonists in this drama, as revealed by the opinion in the first case, *McLeaish v. Binford*,¹⁸ are on the one side persons engaged in hauling cotton, *uncompressed*, direct to the market-port of Houston and, on the other, persons operating cotton compresses in the interior of the state from which shipment is made to the ports by rail.¹⁹ The controversy is confined to transactions within the state. The statute at issue,²⁰ which had been fostered at every stage of its legislative history by a lobby of the

¹⁷ As to limitations upon the definition of "merchant" compare *Campbell Baking Co. v. City of Harrisonville*, *supra* note 11, at 675, 676-679 with *Grantham v. City of Chickasha*, *supra* note 6, at 750, 751.

¹⁸ 52 F. (2d) 151 (S. D. Texas 1931, decided Aug. 6), *aff'd*, 52 Sup. Ct. 207 (1932).

¹⁹ The railroads play a subordinate rôle, not appearing in the actual litigation. The traffic manager of the Texas and New Orleans Railroad made affidavit as to the increase of the cotton movement on trucks from 414,000 lbs. in 1928-29 to 1,180,000 in 1930-31 and predicted the practical monopolization of the port highways during the months August-October. See footnote to opinion, at 153.

²⁰ TEXAS GENERAL LAWS 1931, c. 121, §§ 3 and 4.

Interior (cotton) Compresses and passed as an emergency measure under suspension of the rules, undertook to regulate the trucking of cotton and provided that loads of more than ten bales should not be hauled unless compressed, nor, even though compressed, except in vehicles completely enclosed. The preamble recited at length, and the court found that there existed, problems incidental to cotton trucking which made it a proper subject for regulatory classification. However, weighing the reasonableness of the act by its effect upon the business of the complainant truckers, the court found it restrictive to the point of prohibition and enjoined its enforcement.²¹ A second statute dealt with in *Sproles v. Binford*,²² provided for the general regulation of vehicles using the highways and was upheld, except for one section, against the complaints of truckers and others whose business was affected by the prospect of early enforcement. The section disapproved limited to a total weight of 7000 lbs. loads of commodities transported in containers weighing more than 500 lbs. although loads of a different character were permitted up to 24,000 lbs.²³ The discriminatory nature of this provision is revealed in the fact that bales of cotton weigh more than 500 lbs. on an average. The legislative history of this measure is not reported but the court granted a temporary injunction in favor of cotton truckers who complained that the section was arbitrary and discriminatory as to them.

The third statute,²⁴ at issue in *Stephenson v. Binford*,²⁵ treads in a larger domain, setting up a comprehensive system of highway carrier regulation, providing distinctive permits and certificates for contract and common carriers, and authorizing the refusal of permits to contract carriers when existing service by common carriers in the same territory is sufficient. In the opinion of the court the statute avoids the constitutional objections made by the Supreme Court in the *Frost* case²⁶ and, more re-

²¹ As to whether the power to regulate may be so exercised as to compel the discontinuance of a business not objectionable *per se*, see the discussion in the majority and dissenting opinions in *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662 (1917) which invalidated a statute prohibiting the taking of fees from those seeking employment. *Quacra* as to the authority of *Adams v. Tanner* in the case of statutes in which the prohibition is directed at a less essential aspect of the business.

²² 52 F. (2d) 730 (S. D. Texas 1931, decided Sept. 30), *aff'd* by United States Supreme Court, U. S. Daily, May 24, 1932, at 566.

²³ TEXAS GENERAL LAWS 1931, c. 282, § 3 (f). "One is reminded of a catch question, frequently propounded in childhood days, of which is the heavier, a pound of lead or a pound of feathers." *Sproles v. Binford*, *supra* note 22, at 736. However, bulk as well as weight may properly be considered as a factor in regulatory measures designed to secure the safe movement of traffic.

²⁴ TEXAS GENERAL LAWS 1931, c. 277.

²⁵ 53 F. (2d) 509 (S. D. Texas 1931, decided Oct. 26).

²⁶ *Frost v. Commission*, 271 U. S. 583, 46 Sup. Ct. 605 (1926).

cently, in *Smith v. Cahoon*²⁷ to regulatory statutes which fail to distinguish adequately between common and contract carriers. It does not appear that any cotton truckers intervened in this litigation, but that their interests are involved is apparent and under one section²⁸ giving the commission power to fix the character of tonnage which may be hauled and the number and size of boxes or bales of any particular commodity to be transported, requirements similar to those disapproved in *Sproles v. Binford* might be attempted. If so, the likelihood of successful resistance by appeal to the courts would be small, not only because the courts generally treat as final the action of an administrative body in determining the question of public convenience or necessity involved in granting or withholding a permit, when discretion so to do has once been validly delegated,²⁹ but because, even when the action is open to challenge on the ground of bias and "abuse" of discretion, the difficulties of proof for the individual applicants affected are extreme. Whether the statute itself will continue to withstand challenge³⁰ remains somewhat doubtful

²⁷ *Smith v. Cahoon*, 283 U. S. 553, 51 Sup. Ct. 582 (1931).

²⁸ § 14.

²⁹ See generally: FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) § 155; Albertsworth, *Judicial Review of Administrative Action* (1921) 35 HARV. L. REV. 127, 134-6; Wiel, *Administrative Finality* (1925) 38 HARV. L. REV. 447, 445-463. When the administrative body has discretion to grant a certificate of public convenience of necessity, the court will not substitute its judgment for that of the commission. *Lake Shore Electric Co. v. Public Utilities Commission*, 119 Ohio St. 61, 162 N. E. 279 (1928); *Appeal of Beasley Bros.*, 206 Iowa 229, 220 N. W. 306 (1928); *Denman v. Dep't of Public Works*, 157 Wash. 447, 289 Pac. 34 (1930); *Black Bus Line v. Henry*, 241 Ky. 602, 44 S. W. (2d) 580 (1931). Cf. *Seaboard Air Line Ry. v. Wells*, 100 Fla. 1631, 131 So. 777 (1931) (order quashed because commission under misconstruction of statute failed to consider railway transportation facilities in the territory). But if the record shows that the commission departed from its own conclusion and granted the certificate because of other factors, the order will be reversed. *Stark Electric R. Co. v. Public Utility Commission of Ohio*, 121 Ohio St. 550, 170 N. E. 360 (1930), *cert. den.* 51 Sup. Ct. 24. In order to avoid objection under the due process clause, statutes generally provide that as to carriers already operating the granting of a certificate is conditional only on compliance with certain requirements. In such case the court proceeding on appeal may be a trial *de novo* and the opinion of the commission important only as showing the ground on which it based its action. *Railroad Commission of Texas v. Rau*, 45 S. W. 413 (Texas 1931). So also if the statute provides that an action to set aside an order may be brought within a time limit, to be tried like other civil actions. *Atchison, T. & S. F. Ry. Co. v. Pub. Service Com.*, 130 Kan. 777, 288 Pac. 755 (1930).

The determination, by a commission acting within statutory powers, of public convenience and necessity invoked in granting a certificate is a legislative function and objection that the service would or would not promote public convenience presents no judicial question. *Appeal of Beasley Bros.*, *supra* at 229, 220 N. W. at 309.

³⁰ Enforcement of the statute has been enjoined as to interstate contract

under the views expressed by the Supreme Court in *New State Ice Co. v. Liebmann*³¹ relative to permits conditioned upon considerations of public expediency.³²

In determining the validity of statutes or ordinances, such as those at issue in the Texas highway or in the *Campbell* and *Hoffman* cases it is of course immaterial that an enactment taxing or regulating one business may have the effect of giving an artificial economic advantage to another. The power to select and classify cannot be exercised without discrimination, and the process of selection is necessarily governed by considerations of public policy of which the legislative body is the appropriate judge³³ when the businesses affected lie wholly within its jurisdiction. A very different element enters when classifications are so drawn that they distinguish between residents and non-residents. In this case special burdens are imposed upon non-residents by a legislature in which their interests are entirely unrepresented, and in which the larger public interest involved in the free flow of trade across local boundaries cannot be fairly weighed. Against such discriminations, arbitrary because not subject to democratic control, protection can be afforded only by the courts, and the admission of classifications, under whatever form of words, which discriminate on the basis of residence seems highly regrettable.

carriers, to the extent of the sections requiring permits, bonds, and the making of reports to the commission. *Sage v. Baldwin*, 55 F. (2d) 968 (N. D. Texas 1932).

³¹ 52 Sup. Ct. 371 (1932).

³² The strongest ground for upholding the statute would seem to be the right of the state to deny the use of the highways to carriers for hire and therefore to condition their use. That this conditioning of the use of state highways is not banned by previous Supreme Court decisions is the view of the court in *Stephenson v. Binford*, 516-517. See also Comment, *supra* note 4.

³³ That the power to tax may be used as an instrument of economic control is more than ever clear since the decisions in the chain store case. *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1931).