THE YALE LAW JOURNAL

Subscription price $4.50 per year *80 cents per number*
Canadian subscription price $5.00 per year; Foreign, $5.25 per year
Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

IRREPARABLE INJURY IN CONSTITUTIONAL CASES

NO MAXIM is more familiar than the commonplace that courts pass upon the constitutionality of statutes and other acts of government only when the issue is inevitably presented in litigation.[1] It is this fiction that courts settle cases, and do not as such declare the right and wrong of constitutional conflicts, which more than any other defines the place, the scope and the speed of judicial review, and keeps it within limits more or less tolerable in a nominally democratic political system.[2] Operational studies of the several technical phases of this concept, as they have been stretched and twisted in constitutional law, contribute illuminating detail to the analysis of judicial review as an institution, and of the judicial process as an art.

1. For a discussion of this doctrine, see the concurring opinion of Brandeis, J., in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936); Arnold, *Trial by Combat and the New Deal* (1934) 47 HARV. L. REV. 913.

2. See Comment, *The Case Concept and Some Recent Indirect Procedures for Attacking the Constitutionality of Federal Regulatory Statutes* (1936) 45 YALE L. J. 649. Among the recent cases in which the Supreme Court has refused to pass upon the constitutionality of a statute in injunction suits because of a failure to show irreparable injury are Moor v. Texas & N. O. R. R., 297 U.S. 101 (1936) (Cotton Control Act); Spielman Motor Co. v. Dodge, 295 U. S. 89 (1935) (National Industrial Recovery Act); Premier-Pabst Sales Co. v. Grosscup, 298 U. S. 226 (1936) (discriminatory liquor license law).

For the manipulation of these private law ideas, especially of those used to test the appropriateness of an exercise of judicial power, has been a conspicuously effective item of juristic technique throughout the life of the Supreme Court. Merely orthodox judges have automatically accepted the canons which purport to determine the propriety of dealing with conflicts in court as "cases":—*e. g.*, the statutes and conventions which set the boundaries of jurisdiction, the simple rules associated with the formulation of a "case in controversy," and the maxims of discretion in equity. Judges anxious to extend the power of the courts have weakened, and judges anxious to confine that power have tried to fortify such restrictions on judicial review. The result is that in no other part of the literature of constitutional law are technical rules so flexible and so submissive to judicial will, although no constitutional rules look so convincingly impersonal when written into opinions; and nowhere can one watch more clearly the push and pull of the competing attitudes which determine the form and in part the substance of judicial review.

This Comment will be concerned with the current rôle of one such concept in constitutional litigation—that of irreparable injury. It is one of the conventional rules of equity that relief may be had only if the remedy at law is inadequate. Of the various allegations that may be used to satisfy this requirement, the one most commonly employed in attacking the constitutionality of a statute by injunction is the threat of irreparable property damage.[3] The idea reference of the phrase is of baffling vagueness. Efforts to vitalize the term by re-defining it at greater length have done little to clarify its meaning. Thus, it is said that the injury must be material and actual, not fanciful and theoretical;[4] that by irreparable injury is not meant such as is beyond all possibility of compensation or repair, but an injury, whether great or small, that ought not to be inflicted, and for which no fair or reasonable redress can be had in a court of law;[5] and that the injury may be irreparable either because of its nature or because of the irresponsibility of the party committing it.[6]

Nor does an analysis of the cases granting injunctions in constitutional litigation on the ground of irreparable injury reveal that the term has any

3. Although the rule is frequently stated that equity protects only property rights [see EATON, EQUITY (2d ed. 1923) 542; LEWIS & SPELLING, THE LAW OF INJUNCTIONS (1926) 118], it is now recognized that other interests may receive the protection of a court of equity. See Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 YALE L. J. 115; Chafee, *The Progress of the Law, 1919–1920* (1921) 34 HARV. L. REV. 388, 407.

4. Genet v. Delaware & H. Canal Co., 122 N. Y. 505, 529, 25 N. E. 922, 926 (1890); EATON, EQUITY (2d ed. 1923) 530.

5. LEWIS & SPELLING, THE LAW OF INJUNCTIONS (1926) 86.

6. *Id.* at 85.

single accepted connotation in that area. An attempt has been made to classify some of the more recent decisions according to the standards the courts apparently have in mind when dealing with this concept. Roughly, the cases fall into three principal categories: (1) those requiring an absolute amount of injury as a pre-requisite to injunctive relief; (2) those which attempt to measure the injury in relative terms, thereby adopting the test of a balance of convenience; (3) those which either ignore the concept or apply it merely as an empty form, thus rendering it innocuous as a limitation upon the court's power to decide constitutional issues.

Absolute Standards of Injury. The cases within the first category are not entirely homogeneous. While they all purport to require some absolute degree of injury, the quantum of injury which suffices ranges from quite apparent damage to highly intangible harm. Probably the cases in which the element of irreparable injury is present in its most obvious form are those involving statutes which impose a direct pecuniary loss on the persons affected. Such cases often arise out of attacks on the constitutionality of public utility regulation and tax statutes. As an example of the former class of cases, suppose that the legislature, or a commission exercising legislative powers, orders a railroad to lower its fares. The change is to be made immediately and the usual provisions for judicial review will not afford any chance of relief for some time. Penalties such as heavy fines for the railroad and imprisonment of its employees are imposed for a violation of the order. Although the railroad contends that the proposed rates are so low as to be confiscatory, and hence unconstitutional as a deprivation of property without due process of law, it is effectively prevented from violating the order and asserting its contention as a defense in the ensuing prosecution by the threat of the drastic penalties which will be imposed if the statute is upheld. If it complies with the order until the constitutional issue can be decided by the statutory method of judicial review, it suffers an irreparable loss every time it accepts a fare at the new low rate. Consequently the railroad is entitled to an injunction against the officer charged with enforcing the order so that an immediate court decision may be had on the constitutional question.[7]

7. *Ex parte* Young, 209 U. S. 123 (1908); Tyson v. Banton, 273 U. S. 418 (1927). It is held that the penalty is itself unconstitutional if it is so heavy as to deter a person from litigating his constitutional rights. But this does not prevent the bringing of an injunction suit for the dual purpose of restraining the enforcement of the invalid penalties and obtaining a decision upon the constitutionality of the separable regulatory features of the statute. Phoenix Ry. v. Geary, 239 U. S. 277 (1915); Willcox v. Consolidated Gas Co., 212 U. S. 19 (1909). An interesting logical impasse is presented when the court decides that an injunction is a proper method of raising the constitutional issue because of the threat of serious injury from the penalties, and enjoins the enforcement of the penalties because they prevent raising the question of constitutionality. Oklahoma Operating Co. v. Love, 252 U. S. 331 (1920).

In the other recurring situation where irreparable injury is readily apparent in the form of a direct pecuniary loss, a tax statute is involved. Assume that it contains no provision for refunding illegally collected taxes; that there are penalties for failure to pay promptly, or there is a summary procedure for collection; and that the collector himself is financially irresponsible, his bond being inadequate. Under these circumstances, the taxpayer who refuses payment hoping to assert his defense that the statute is unconstitutional in the consequent suit for collection either subjects himself to penalties or his property to liens; and if he pays the tax, he has little chance of later recovering it, in view of the sovereign's immunity from suit, even though the statute is subsequently held invalid.[8] Many courts have therefore granted injunctions promptly when confronted with such facts.[9] In other tax cases where direct pecuniary loss in involved, some courts have been willing to hold that although the remedy at law is theoretically adequate,[10] the actual uncertainty attendant on any attempt to recover illegally collected taxes from an unwilling sovereign is a sufficient threat of irreparable injury to justify relief even in the face of the statute which expressly forbids a federal court to enjoin the collection of taxes.[11] This situation is perhaps best illustrated by the cases involving the constitutionality of the Agricultural Adjustment Act.[12]

When attacks were made upon that Act, several hundred injunctions were entered against the collection of the processing tax,[13] despite the fact that

8. See Field, *Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501.

9. Even the failure to allow interest on taxes paid under protest justifies an injunction against collection of an invalid tax. Procter & Gamble Distributing Co. v. Sherman, 2 F. (2d) 165 (S.D.N.Y. 1924); Southern California Telephone Co. v. Hopkins, 13 F. (2d) 814 (C.C.A. 9th, 1926), *aff'd*, 275 U.S. 393 (1928). And the fact that payment of the tax would place the taxpayer in danger of insolvency is ground for equitable relief. Raymond v. Chicago Traction Co., 207 U.S. 20 (1907).

10. Furthermore, it has been held that the remedy is inadequate in the federal courts and hence a federal court may enjoin collection of the tax if the legal remedy is cognizable only in a state court. City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934); see Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction* (1929) 43 HARV. L. REV. 426.

11. REV. STAT. § 3224 (1867), 26 U.S.C. § 1543 (1934). This section has been held to be merely declaratory of the generally acknowledged rule of equity that the collection of a tax will not be restrained solely upon the grounds of its illegality. Hence "extraordinary circumstances" justify the issuance of an injunction. Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); Hill v. Wallace 259 U.S. 44 (1922). It has also been held that this statute does not prevent enjoining the collection of penalties which purport to be taxes. Lipke v. Lederer, 259 U.S. 557 (1922); Regal Drug Co. v. Wardell, 260 U.S. 386 (1922); see Comment (1935) 49 HARV. L. REV. 109; (1932) 41 YALE L. J. 769.

12. 48 STAT. 31 (1933), 7 U.S.C. § 601 (1934).

13. See Cohen v. Durning, 11 F. Supp. 824, 828 (S.D.N.Y. 1935). Very few of these cases were reported.

a suit for the recovery of illegally assessed taxes was maintainable at law.[14] Subsequently an amendment to the Act was proposed to the effect that if the tax were declared unconstitutional, a recovery could be had at law only by those processors who could show that they had not passed the tax on to their customers. The fact that such a bill was pending and might possibly be adopted was regarded by many courts as a sufficient threat of irreparable injury to warrant injunctive relief.[15] Other courts took the view, however, that this threatened contraction of the legal remedy was not enough to justify such a remedy.[16] On August 24, 1935, the proposed amendment was enacted, together with a provision forbidding action either for a declaratory judgment or for an injunction against the collection of processing taxes.[17] Yet injunctions continued to be issued, even by the courts which had previously refused to grant them.[18] But there still remained a substantial number of federal courts which continued to refuse to enjoin the collection of processing taxes.[19] Finally the United States Supreme Court, in the case

14. 47 STAT. 286 (1932), 26 U.S.C. §§ 1672, 1673 (1934).

15. Neild Mfg. Corp. v. Hassett, 11 F. Supp. 642 (D. Mass. 1935); Gold Medal Foods v. Landy, 11 F. Supp. 65 (D. Minn. 1935); Washburn Crosby Co. v. Nee, 11 F. Supp. 822 (W.D.Mo. 1935); Inland Milling Co. v. Huston, 11 F. Supp. 813 (S. D. Iowa 1935); Danahy Packing Co. v. McGowan, 11 F. Supp. 920 (W.D.N.Y. 1935); John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105 (D. Md. 1935); Kingan & Co. v. Smith, 12 F. Supp. 328 (S.D.Ind. 1935).

16. Fisher Flouring Mills v. Vierhus, 78 F. (2d) 889 (C.C.A. 9th, 1935); Lake Erie Provision Co. v. Moore, 11 F. Supp. 522 (N.D. Ohio 1935); La Croix v. United States, 11 F. Supp. 817 (W. D. Tenn. 1935); Cohen v. Durning, 11 F. Supp. 824 (S.D.N.Y. 1935); Merkel, Inc. v. Rasquin, 12 F. Supp. 215 (E.D.N.Y. 1935).

17. 49 STAT. 770, 7 U.S.C. § 623 (Supp. 1935). The DECLARATORY JUDGMENT ACT was amended so as to prevent its application not only to processing taxes but to all taxes. 49 STAT. 1027, 28 U.S.C. § 400 (Supp. 1935).

18. Merchants' Packing Co. v. Rogan, 79 F. (2d) 1 (C.C.A. 9th, 1935); E. Regensburg & Sons v. Higgins, 79 F. (2d) 516 (C.C.A. 2d, 1935); Albers Bros. Milling Co. v. Vierhus, 80 F. (2d) 700 (C.C.A. 9th, 1935); G. R. B. Smith Milling Co. v. Thomas, 11 F. Supp. 833 (N.D.Tex. 1935); Baltic Mills Co. v. Bitgood, 12 F. Supp. 132 (D. Conn. 1935); Larrabee Flour Mills v. Nee, 12 F. Supp. 395 (W.D.Mo. 1935); A. P. W. Paper Co. v. Riley, 12 F. Supp. 738 (N.D.N.Y. 1935); *In re* Processing Tax Case, 13 F. Supp. 218 (W. D. Tex. 1935).

The opinion was expressed that such an amendment was void as a denial of due process of law. See A.P.W. Paper Co. v. Riley, *supra;* Inland Milling Co. v. Huston, 12 F. Supp. 554 (S. D. Iowa 1935); Danahy Packing Co. v. McGowan, 12 F. Supp. 457 (W.D.N.Y. 1935); Gold Medal Foods v. Landy, 12 F. Supp. 406 (D. Minn. 1935).

19. Some courts held that the remedy at law under the amended statute was still adequate. Jose Escalante & Co. v. Fontenot, 79 F. (2d) 343 (C.C.A. 5th, 1935); Rickert Rice Milling Co. v. Fontenot, 79 F. (2d) 700 (C.C.A. 5th, 1935); Meridan Grain Co. v. Fly, 12 F. Supp. 64 (S. D. Miss. 1935); Henrietta Mills v. Hoey, 12 F. Supp. 61 (S.D.N.Y. 1935); Merkel, Inc. v. Rasquin, 12 F. Supp. 215 (E.D.N.Y. 1935); Rieder v. Rogan, 12 F. Supp. 307 (S.D.Cal. 1935). These courts relied upon United States v. Jefferson Electric Co., 291 U.S. 386 (1934), which upheld a state

of *Rickert Rice Mills v. Fontenot,* seemingly upheld this use of the injunction by granting first a temporary restraining order,[20] and later, after having declared the Agricultural Adjustment Act unconstitutional,[21] a permanent injunction against the collection of the processing tax.[22]

In other situations, injunctions have been granted where the challenged statute did not impose any direct pecuniary loss, but threatened an indirect injury, the severity of which was much more difficult to ascertain. Thus, equitable relief has been granted merely on the ground that the complainant was entitled to freedom from harassment by government officials. This is the basis upon which injunctions have been issued against the activities of the Labor Relations Board. The terms of the Act creating that Board prevent an attack upon its constitutionality based upon the usual complaint that injurious regulations are being imposed under the threat of penalties. The orders of the Board are not self executing, but can be enforced only upon application to a circuit court of appeals, and penalties are imposed only for disobedience of the court order.[23] Accordingly, no direct injury can result to a complainant until there has been an adjudication as to the constitutionality of the Act, for he need not comply with an order until then, and he incurs no penalties in refusing to obey.[24] But complainants have alleged

---

sales tax statute requiring, as a condition precedent to the recovery of an illegal assessment, proof that the tax had not been passed on to purchasers. At least one court took the view that a common law action against the collector would furnish an adequate remedy. Frye & Co. v. Vierhus, 12 F. Supp. 597 (W.D. Wash. 1935). Some courts took the position that regardless of the adequacy of the legal remedy, they had no jurisdiction under the statute to enjoin the collection of the processing taxes. Rickert Rice Milling Co. v. Fontenot, *supra;* Meridan Grain Co. v. Fly, *supra;* Rieder v. Rogan, *supra;* Grosvenor-Dale Co. v. Bitgood, 12 F. Supp. 416 (D. Conn. 1935); Jones v. Viley, 12 F. Supp. 476 (D. Idaho 1935); Louisville Provision Co. v. Glenn, 12 F. Supp. 545 (W.D.Ky. 1935).

20. 296 U.S. 569 (1935).

21. United States v. Butler, 297 U.S. 1 (1936).

22. 297 U.S. 110 (1936). In Huston v. Iowa Soap Co., (C.C.A. 8th, 1936) 4 U.S.L. WEEK 85, the court, in refusing to enjoin the collection of the cocoanut oil processing tax, declared that the *Rickert* case was no authority for the issuance of an injunction, since in that case the Supreme Court decided only that the impounded funds should be returned to the petitioner. However, the *Rickert* case was relied upon in a recent decision restraining the collection of the new "windfall tax." Kingan & Co. v. Smith, S. D. Ind., (1936) 4 U. S. L. WEEK 98, 106, 120.

23. NATIONAL LABOR RELATIONS ACT, 49 STAT. 449, 453, 29 U.S.C. §§ 151, 160 (Supp. 1935).

24. In this respect the LABOR ACT is comparable to Section 10 of the FEDERAL TRADE COMMISSION ACT, 38 STAT, 717 (1914), 15 U.S.C. § 41 (1934). Grounds for an attack upon the latter Act by injunction were held to be lacking in Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160 (1927). And in Federal Trade Commission v. Maynard Coal Co., 22 F. (2d) 873 (App. D. C. 1927), an injunction was denied although penalties had already begun to accrue. But *cf.* Federal Trade Commission v. Millers' National Federation, 23 F. (2d) 968 (App. D. C. 1928); see Comment (1936) 4 GEO. WASH. L. REV. 391.

that they were threatened with irreparable injury in that they were being subjected to the inconvenience and expense of taking part in an administrative hearing; that they would lose good will from the resulting publicity; and that there was being created a condition of unrest, distraction, and a lowered efficiency among their employees as a result of the Board's investigations or elections. In several cases, injunctions were issued to prevent the continuance of this alleged harassment.[25] But other courts held that such annoyance was too speculative and indirect to warrant relief, contending that the incidental effort involved in cooperating with a government administrative body was in no sense irreparable injury.[26]

While in the cases affording relief from harassment the injury alleged is indirect and somewhat difficult to measure, there is at least the threat of imminent annoyance. In another group of cases, the grounds for injunction seem even more intangible, in that no present threat of injury exists, the injunction being granted in order to protect the complainant from the dread that some time in the future he might have to choose between suffering injury by complying with a statute or by incurring heavy penalties.

For example, in *Kern Trading Co. v. Associated Pipe Line Co.*, a state statute purported to empower the state railroad commission to regulate the use of pipe lines and provided penalties for those who failed to comply.[27] The regulations were subject to review in the state supreme court, and hence, under the rule of *Prentis v. Atlantic Coast Line R. R.*, could not be attacked in the federal courts until review in the state courts was exhausted.[28] A stockholder of the Associated Company filed a bill in the federal court to enjoin the Company from complying with the regulations and to restrain the state officials from enforcing the penalties, claiming that the statute was unconstitutional and that the Company was being coerced into obedience by the penalties. The bill disclosed no threat by the officials other than an

25. Stout v. Pratt, 12 F. Supp. 864 (W. D. Mo. 1935), *aff'd*, (C. C. A. 8th, 1936) 3 U. S. L. WEEK 1241; Bendix Products Corp. v. Beman, 14 F. Supp. 58 (N. D. Ill. 1936); Eagle-Picher Lead Co. v. Madden, 15 F. Supp. 407 (N. D. Okla. 1936); El Paso Electric Co. v. Elliott, 15 F. Supp. 81 (W. D. Tex. 1936); Bethlehem Shipbuilding Corp. v. Meyers, (D. Mass. 1936) 3 U. S. L. WEEK 1257; Oberman & Co. v. Pratt, (W. D. Mo. 1936) 4 U. S. L. WEEK 184.

26. Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5th, 1936), *cert. denied* Oct. 12, 1936, (1936) 4 U. S. L. WEEK 145; Carlisle Lumber Co. v. Hope, 83 F. (2d) 92 (C. C. A. 9th, 1936); Bemis Bag Co. v. Feidelson, 13 F. Supp. 153 (W. D. Tenn. 1936), *aff'd*, No. 7325, (C. C. A. 6th, 1936); Ohio Custom Garment Co. v. Lind, 13 F. Supp. 533 (S. D. Ohio 1936); Precision Castings Co. v. Boland, 13 F. Supp. 877 (W. D. N. Y. 1936); Associated Press v. Herrick, 13 F. Supp. 897 (S. D. N. Y. 1936); Bethlehem Shipbuilding Corp. v. Nylander, 14 F. Supp. 201 (S. D. Cal. 1936); Buchsbaum v. Beman, 14 F. Supp. 444 (N. D. Ill. 1936); John Blood & Co. v. Madden, 15 F. Supp. 779 (E. D. Pa. 1936); Jamestown Veneer Corp. v. Boland, 15 F. Supp. 28 (W. D. N. Y. 1936).

27. 217 Fed. 273 (N. D. Cal. 1914).

28. 211 U. S. 210 (1908).

investigation to determine whether the terms of the statute applied to the Company. Yet in order that the Company and its stockholders might be relieved from dread, the court granted an injunction restraining the state officials from attempting to collect any fees or penalties until the validity of the regulations had been passed upon by the state court.

Relief from dread also seems to be the ground upon which some injunctions have been issued against the threatened revocation of milk licenses under the Agricultural Adjustment Act. The policy of the Administration was to issue licenses to all producers and distributors within a defined area whether the licensees desired them or not. The Act empowered the Secretary of Agriculture to revoke and suspend these licenses after due notice and opportunity for hearing if their terms, which included the regulations made by the Administration, were violated.[29] Any person who did business without a license was subject to a maximum fine of $1,000 per day. Producers who were unwilling to comply sought to have the Administration restrained, and some injunctions were issued, seemingly upon the showing of no other injury than that the complainant was being subjected to a certain amount of investigation and the dread of penalties which might be inflicted after notice and hearing and revocation of his license.[30] But other courts took the contrary view that in such a situation there was no immediate danger of injury, and hence denied the applications on grounds of prematurity.[31]

The Balance of Convenience. In striking contrast with the cases which treat irreparable injury in absolute terms as being either existent or nonexistent in a particular situation are the decisions looking to the balance of convenience, in which it is repeated that injunctions are denied unless the

29. AGRICULTURAL ADJUSTMENT ACT, § 8(3), 48 STAT. 34, 35 (1933), since replaced by 49 STAT. 753, 7 U. S. C. § 608c(14) (15) (Supp. 1935).

30. Darger v. Hill, 76 F. (2d) 198 (C. C. A. 9th, 1935); Edgewater Dairy Co. v. Wallace, 7 F. Supp. 121 (N. D. Ill. 1934); Douglas v. Wallace, 8 F. Supp. 379 (W. D. Okla. 1934); Royal Dairy Farms v. Wallace, 8 F. Supp. 975 (D. Md. 1934); Columbus Milk Producer's Ass'n v. Wallace, 8 F. Supp. 1014 (N. D. Ill. 1934); *cf.* Time Supply Stores, Inc. v. Hawking, 9 F. Supp. 888 (S. D. Fla. 1935). These cases appear to conflict with the familiar rules that a court will not anticipate an unlawful act by an administrative officer, and that injunctions will not issue until administrative remedies have been exhausted. Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929); Fenner v. Boykin, 271 U. S. 240 (1926); First National Bank v. Albright, 208 U. S. 548 (1908); see Alpert, *Suits against Administrative Agencies under NIRA and A.A.A.* (1935) 12 N. Y. U. L. Q. 393; Black, *At What Stage May a Licensee Seek Relief under the Agricultural Adjustment Act?* (1935) 12 N. Y. U. L. Q. 354.

31. Sparks v. Mellwood Dairy, 74 F. (2d) 695 (C. C. A. 6th, 1934); Yarnell v. Hillsborough Packing Co., 70 F. (2d) 435 (C. C. A. 5th, 1934); Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934); *cf.* Abe Rafelson Co. v. Tugwell, 79 F. (2d) 653 (C. C. A. 7th, 1935) (Perishable Agricultural Commodities Act).

benefit to be derived from them would outweigh the inconvenience they would cause.

A representative case is *Corbus v. Alaska Treadwell Gold Mining Co.*, where a stockholder sought to restrain the collection of a tax.[32] In dismissing the bill the Supreme Court pointed out that the tax amounted to only $1,875 annually upon a $50,000 corporation, or less than a dollar a year for complainant's share, and that this was not serious enough to justify thwarting the policy of Congress that a tax must be paid before its validity is challenged.

A similar problem came up in *Ashwander v. Tennessee Valley Authority*, which was a suit for an injunction brought by a relatively small group of public utility stockholders—1900 persons owning 40,000 preferred shares—for the purpose of challenging the constitutionality of the federal government's electric power projects in the Tennessee Valley.[33] Four justices, speaking through the Chief Justice, concluded that "while their holdings are small . . . they should not be denied the relief which would be accorded to one who owned more shares."[34] McReynolds, J., dissenting, also took that view. But the other four justices, in an opinion by Mr. Justice Brandeis, asserted that the record was barren of any evidence that the property of the complainants was in such peril as to justify equitable relief.

The balance of convenience approach is more apt to be taken in the lower federal courts where an opinion on a constitutional question does little to remove the doubt leading to the controversy. Several of the lower courts enjoined the collection of processing taxes and impounded the funds on this basis.[35] In many of the cases, no opinion was expressed as to the constitutionality of the Agricultural Adjustment Act.[36] The ground of these decisions was simply that with the funds impounded, the government ran little risk of losing the money to which it would be entitled if the Act were subsequently upheld, whereas if the taxpayer was compelled to pay the taxes, he would run a very considerable risk of being unable to recover them even though the Act were ultimately invalidated.[37]

---

32. 187 U. S. 455 (1903).

33. 297 U. S. 288 (1936).

34. *Id.* at 318.

35. See, *e.g.*, Danahy Packing Co. v. McGowan, 11 F. Supp. 920, 923 (W. D. N. Y. 1935); John A. Gebelein, Inc. v. Milbourne, 12 F. Supp. 105, 121 (D. Md. 1935); Kingan v. Smith, 12 F. Supp. 329, 337 (S. D. Ind. 1935).

36. Injunctions may also be issued by courts which believe the challenged statute to be constitutional: R. C. Tway Coal Co. v. Glenn, 12 F. Supp. 570 (W. D. Ky. 1935); or when the court holds that the act is not applicable to complainant: Modern Woodmen of America v. Casados, 15 F. Supp. 483 (D. New Mex. 1936).

37. Compare Independent Workers v. Beman, 13 F. Supp. 627 (N. D. Ill. 1936), in which a preliminary injunction against the National Labor Relations Board was granted pending final determination of the constitutional question, on the ground that injury to the complainant would be certain and irreparable, while the granting of the

Where the balance of convenience doctrine is employed, the trial court's discretion necessarily becomes of great importance, since the decision turns upon the particular facts of each case. And to the extent that the trial court's discretion is controlling, the principle of *stare decisis* has little effect. This explains why one district judge, after examining the probable injury to the parties, refused to enjoin the collection of processing taxes[38] although the circuit court of appeals for that circuit had already granted an injunction in a similar case;[39] and conversely, why a district court in another circuit, after making a finding of irreparable injury, refused to dissolve an injunction it had issued against the collection of processing taxes[40] despite the fact that the circuit court for that circuit had previously affirmed a decision denying such relief,[41] the latter holding being interpreted merely as a refusal to interfere with the trial court's discretion.

The balance of convenience doctrine has been extended to authorize the granting of an injunction even when the actual quantum of irreparable injury is very small. Cautionary injunctions are issued when some injury might possibly ensue, and when there seems to be no harm in maintaining the status quo until the constitutional question is finally settled. This relief is regarded as especially appropriate when an early decision by the Supreme Court is expected. Restraining orders were issued upon cautionary grounds against the administration of the Bituminous Coal Conservation Act;[42] and

injunction would not seriously damage or inconvenience the defendants. See also Pratt v. Stout, (C. C. A. 8th, 1936) 3 U. S. L. WEEK 1241; Precision Castings Co. v. Boland, 13 F. Supp. 877, 886 (W. D. N. Y. 1936) (refusing an injunction against the Labor Board "if it is shown that they [the injuries to complainant] are in the public interest and the burden is imposed on all alike."); Birkheiser v. Los Angeles, 11 F. Supp. 689 (S. D. Cal. 1935) (refusing to dismiss an injunction against the enforcement of an ordinance forbidding the nighttime delivery of milk because "when the equities of the respective suitors are weighed and the grave constitutional questions are considered, greater injury is threatened by removing the restraint that now exists than by continuing it temporarily." A bond of $50,000 was required to indemnify the city against any increased expense which might be incurred by reason of nighttime inspection of milk); *cf.* Munoy v. Porto Rico Power Co., 83 F. (2d) 262 (C. C. A. 1st, 1936); Atlantic Pipe Line Co. v. State Tax Board, 12 F. Supp. 265 (W. D. Tex. 1935) (the confusion which would result from suspending the taxing power of state and county was specified as a reason for not enjoining an allegedly unconstitutional tax); Menominee & Marinette L. & T. Co. v. Menominee, 11 F. Supp. 989 (W. D. Mich. 1935) (Municipal power plant to be financed by P.W.A.).

38. Rieder v. Rogan, 12 F. Supp. 307 (S. D. Cal. 1935); Compare Moor v. Texas & N. O. R. R., 75 F. (2d) 386, 390 (C. C. A. 5th, 1935), *cert. dismissed*, 297 U. S. 101 (1936).

39. Merchants' Packing Co. v. Rogan, 79 F. (2d) 1 (C. C. A. 9th, 1935).

40. G. R. B. Smith Milling Co. v. Thomas, 11 F. Supp. 833 (N. D. Tex. 1935).

41. Jose Escalante & Co. v. Fontenot, 79 F. (2d) 343 (C. C. A. 5th, 1935).

42. Westmoreland Coal Co. v. Rothensies, 13 F. Supp. 321 (E. D. Pa. 1935); R. C. Tway Coal Co. v. Glenn, 12 F. Supp. 570 (W. D. Ky. 1935) (after holding the Act to be constitutional).

a number of courts took that approach in the processing tax cases,[43] thus avoiding a close examination of the adequacy of the remedy at law.

Disregard of Irreparable Injury. There are two classes of cases in which the existence of irreparable injury is apparently of very little practical importance. The first is suggested by several decisions in which, despite the apparent adequacy of the remedy at law, an injunction was granted without mention of the grounds on which equitable relief was predicated.[44] The explanation of this omission may well be that the parties did not raise the question, inasmuch as the defense that there is an adequate remedy at law can be waived,[45] provided that the court does not raise the point on its own motion.[46]

The second and more noteworthy group consists of cases which, although sometimes making obeisance to the conventional requirement of irreparable injury, apparently proceed on the theory that a complainant who is affected by an unconstitutional statute is entitled to judicial protection without any further showing of injury, and that if other remedies will not give him adequate protection, injunctive relief is proper.[47] These decrees which recognize an enforceable "right to be let alone" are typically issued by courts who are confident that the statute which is attacked is unconstitutional in its entirety, and thus are able to conclude that the wisest policy is to restrain the enforcement of the statute at the earliest possible moment. For example, in *Hill v. Darger,* complainants were engaged in the milk business. The Secretary of Agriculture, acting through the local market administrator, was preparing to revoke their licenses under the Agricultural Adjustment Act, but had not yet done so. In granting an injunction against the market administrator, the district court explained the grounds of injunctive relief in these simple terms: "One who performs any act violative of individual right must find statutory warrant for the authority that he attempts to exercise, and in default of such warrant he may be enjoined."[48]

43. Albers Bros. Milling Co. v. Vierhus, 80 F. (2d) 700 (C.C.A. 9th, 1935); E. Regensburg & Sons v. Higgins, 79 F. (2d) 516 (C.C.A. 2d, 1935); Danahy Packing Co. v. McGowan, 11 F. Supp. 920 (W. D. N. Y. 1935).

44. Among the more important of such cases are Hammer v. Dagenhart, 247 U.S. 251 (1918); Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935).

45. American Mills Co. v. American Surety Co., 260 U.S. 360 (1922).

46. Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927); Allen v. Pullman's Palace Car Co., 139 U. S. 658 (1891); see (1926) 36 YALE L. J. 143.

47. This is logically consistent with the idea behind such cases as Allgeyer v. Louisiana, 165 U. S. 578 (1897), that the right to conduct one's business as one pleases is a property right; hence any regulation of business, however beneficial, is a taking of property.

48. 8 F. Supp. 189, 191 (S. D. Cal. 1934), *aff'd,* 76 F. (2d) 198 (C.C.A. 9th, 1935); *cf.* Mississippi Valley Hardwood Co. v. McClanahan, 8 F. Supp. 388 (W. D. Tenn. 1934).

Many of the cases in this group seem to recognize in addition to the right to be let alone a right to litigate constitutional issues.[49] In *Hart Coal Corp. v. Sparks,* for example, complainant sought to enjoin the district attorney from enforcing the penalties for violation of a code under the National Industrial Recovery Act, contending that the Act was unconstitutional, and that heavy penalties were threatened for those who did not obey. The district court held the Act unconstitutional and granted the injunction, but made no specific finding of irreparable injury.[50] The Circuit Court of Appeals reversed for the reason that such injury had neither been found by the judge nor was sufficiently obvious on the record to permit an appellate court to make such a finding, "especially in view of the contention that the wage and hour scale is but a part of a stabilizing program which includes also the stabilization of prices of the plaintiff's product."[51] When the case went back to the district court it was urged by counsel that this language required, as a prerequisite to injunctive relief, a finding that the injury to the plaintiff was so substantial as to outweigh the benefits of price stabilization. But the district court replied that such could not have been the meaning of the appellate court, else the situation might arise in which an unconstitutional statute could not be attacked because its benefits outweighed the injuries it caused.[52]

---

49. It is sometimes said that if the act is entirely void as to the complainant the administrative remedy which it provides is also void and complainant need not avail himself of it. From this it is concluded that an injunction is a proper remedy. See Darger v. Hill, 76 F. (2d) 198 (C. C. A. 9th, 1935) (milk license); Stout v. Pratt, 12 F. Supp. 864 (W. D. Mo. 1935) (National Labor Relations Board); Royal Dairy Farm v. Wallace, 8 F. Supp. 975 (D. Md. 1934). But none of the Supreme Court cases generally cited for this proposition go so far as to say that the enforcement of a void act can be enjoined without a proper showing of irreparable injury. See Norton v. Shelby County, 118 U. S. 425 (1886) (holding that an unconstitutional statute creates no rights); Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) (injunction against zoning ordinance held proper because the existence of the ordinance injured the value of land); Oklahoma Operating Co. v. Love, 252 U. S. 331 (1920) (risk of heavy penalties deterred review in state courts); *cf.* Northport Power Co. v. Hartley, 283 U. S. 568, 570 (1931).

50. 7 F. Supp. 16 (W. D. Ky. 1934).

51. Sparks v. Hart Coal Corp., 74 F. (2d) 697, 700 (C. C. A. 6th, 1934).

52. The court said: "Whenever the government unconstitutionally interferes with the right of a citizen to do business in his own way, that interference constitutes an injury to the property rights of the citizen. If that interference takes the form of exacting the payment of wages in excess of what the citizen is willing to pay, to the extent of the increased wages this citizen has been injured in his property rights. Surely, in such a situation the government cannot justify its action by demonstrating that the increased wages are more than absorbed by increased profits flowing to the citizen as a result of operating his business under the illegal regulation thereof by the government. If such is the law then a benevolent despotism at Washington can take charge of all business in this country, regulating wages and hours of service and all the other elements thereof, and the citizen would have no redress unless he could

In this group of cases the threat of a penalty for noncompliance with an unconstitutional statute is of itself recognized as sufficient grounds for equitable relief, regardless of whether compliance with the act would result in any substantial irreparable injury.[53] For example, in *Lipke v. Lederer* the complainant alleged that unconstitutional penalties had been levied against him in the guise of a tax, and that because he refused to pay them his property was about to be seized by warrant of distress.[54] A majority of the court held that the threatened injury to the complainant was sufficient to entitle him to an injunction against the tax collector, although, as the dissenting justices pointed out, he might have avoided all injury merely by submitting to the unconstitutional statute temporarily, paying the amount which was demanded, and then bringing a suit for recovery at law.

The issue of whether the consequences of compliance should be considered also arose when the validity of the Bituminous Coal Conservation Act was being attacked. The statute made compliance with the code voluntary, but assessed an excise tax of 15% on the sale price of coal at the mine with a 90% drawback for those who filed an acceptance of the code.[55] The Act further provided that any person aggrieved by an administrative order issued thereunder could obtain review in the circuit court of appeals,[56] and that acceptance of the provisions of the code and the drawing back of taxes would not estop any producer from contesting the constitutionality of the Act.[57] It would therefore appear that although a producer who signified his willingness to comply with the code might be subjecting himself to some disturbance of his usual manner of doing business, he was not necessarily

---

demonstrate that operation under government supervision would result in a loss to him which otherwise would not have been sustained." 9 F. Supp. 825, 828 (W. D. Ky. 1935).

53. In order to be consistent with the doctrine that equity acts only to prevent injuries which the complainant cannot himself avoid (see LEWIS & SPELLING, THE LAW OF INJUNCTIONS (1926) 46), the consequences of obeying an unconstitutional law should be considered as well as the consequences of disobedience. There are some cases which seem to sustain this view. See Bailey v. George, 259 U. S. 16, 20 (1922); Arkansas Bldg. & Loan Ass'n v. Madden, 175 U. S. 269, 274 (1899); Shelton v. Platt, 139 U. S. 591 (1891); Sparks v. Hart Coal Corp., 74 F. (2d) 697, 700 (C. C. A. 6th, 1934); Jewell Ridge Coal Corp. v. Early, 13 F. Supp. 610, 612 (W. D. Va. 1936).

Regarding the effect of a penalty, *per se*, see Wadley Southern Ry. v. Georgia, 235 U. S. 651, 662 (1915).

In Grosjean v. Musser, 74 F. (2d) 741 (C. C. A. 5th, 1935), an injunction against the collection of a cigaret tax was refused for want of federal jurisdiction because the amount in controversy was less than $3,000. The jurisdictional amount was held to be the amount of the tax and not the amount of the penalty that was threatened. *Cf.* McNutt v. General Motors Acceptance Corp., 298 U. S. 178 (1936).

54. 259 U. S. 557 (1922).

55. Section 3. 49 STAT. 993, 15 U. S. C. § 804 (Supp. 1935).

56. Section 6. 49 STAT. 1003, 15 U. S. C. § 810(b) (Supp. 1935).

57. See note 55, *supra*.

exposed to any substantial injury until the Board began to impose regulations, at which time he could litigate his rights in the circuit court of appeals. Nevertheless injunctions were granted preventing the collection of the 15% tax from non-members because an injunction was the only method by which a non-member could attack the constitutionality of the act without submitting to an unconstitutional statute.[58] One of the suits attacking this Act which went to the Supreme Court was a bill for an injunction brought by a coal producer against the collector of internal revenue.[59] The majority opinion stated briefly that the action was maintainable because of impending injury, presumably referring to the imposition of the 15% penalty-tax. The dissenting justices, on the other hand, declared that the complainants were crying before they were hurt, inasmuch as a subscriber to the code who was doubtful as to its validity was afforded complete protection under the terms of the Act. This conclusion of the dissenters was based, however, upon the assumption that the act was in part valid, a view not shared by the majority. The minority opinion explained, obiter, that if the whole statute were a nullity, the complainants were at liberty to resist the taxgatherer as a trespasser, and that it would be no answer to the prayer for injunctive relief to say that the complainants might avert the penalty by declaring themselves code members and later fighting the statute.[60]

Conclusion. The most obvious conclusion to be drawn from an examination of the constitutional cases involving the question of irreparable injury is that from a doctrinal standpoint they are hopelessly confusing, illogical and inconsistent. Even the relatively small group of Supreme Court decisions cannot be reconciled on the basis of legal theory. The extent of this

58. Pittsburgh Coal Co. v. Bell, 13 F. Supp. 37 (W. D. Pa. 1935); Pocahontas Fuel Co. v. Early, 13 F. Supp. 605 (W. D. Va. 1935). The latter court refused to issue a similar injunction on behalf of a producer who had joined the code. Jewell Ridge Coal Corp. v. Early, 13 F. Supp. 610 (W. D. Va. 1936). *Cf.* Mississippi Valley Hardwood Co. v. McClanahan, 8 F. Supp. 388 (W. D. Tenn. 1934) (enforcement of N.I.R.A. enjoined); Acme, Inc. v. Besson, 10 F. Supp. 1 (D. N. J. 1935) (enforcement of N.I.R.A. enjoined); Grandin Farmers' Co. v. Langer, 5 F. Supp. 425 (D. N. D. 1934) (enforcement of state grain embargo enjoined).

59. R. C. Tway Coal Co. v. Glenn, *sub. nom.* Carter v. Carter Coal Co., 298 U. S. 238 (1936), *rev'g* 12 F. Supp. 570 (W. D. Ky. 1935).

60. Cardozo, J., said: "If the whole statute were a nullity the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act [citing cases] . . . It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§ 3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser." 298 U. S. at 338.

confusion suggests that it does not result merely from differing views as to the ultimate content of legal ideas, but from more fundamental differences in judicial attitude brought into play because of the function now being performed by the concept of irreparable injury.

The political supremacy of the judiciary in the American system of government is limited only by the self-restraint of the judges, and by the form in which judicial power must be exercised: that is, by the fact that a court is a court, and can answer questions only when litigants ask, or at least suggest them. Some of the restrictions which surround the exercise of this supremacy are said to be imposed by the Constitution, like the familiar doctrine that a court will not pass upon the constitutionality of legislative or executive acts unless it is necessary to the settlement of the rights of adverse and presently interested parties to a case or controversy.[61] In other instances, however, the courts may accept self-imposed limitations derived from the body of private law doctrine. Of the latter class is the rule imported into constitutional litigation from equity that irreparable injury is a prerequisite to an injunction against the enforcement of an unconstitutional statute.[62]

What has happened is that the irreparable injury concept has been abused and distorted in constitutional litigation by judges willing to simplify access to the courts in constitutional cases. The attitude, now strongly ascendant, that procedural difficulties of framing constitutional cases should be minimized, is supported by two groups: those who distrust legislatures and view the courts as a bulwark for the protection of individual rights;[63] and those who argue on grounds of apparent efficiency and justice that since the constitutionality of important statutes is almost always adjudicated sooner or later, a decision should be obtainable as soon after the passage of an act as circumstances permit, so as to eliminate long periods of uncertainty during which much may be done which perhaps will eventually have to be undone.[64] Either one of these views would naturally support the policy of weakening inhibitions on the speedy exercise of judicial power, and therefore favor reducing to a minimum the requirements of the irreparable injury concept. But the objectives of those who seek a speedy method of judicial review might be attained better and more directly under declaratory judgment

61. See Comment (1936) 45 YALE L. J. 649.

62. *In re* Sawyer, 124 U. S. 200 (1888); Moor v. Texas & N. O. R. R., 297 U. S. 101 (1936); HIGH, INJUNCTIONS (4th ed. 1905) § 64.

63. See Beck, *The Balance Wheel of the Constitution* (1934-35) PROCEEDINGS, N. H. BAR ASS'N 173; Otis, *The Constitution and the Courts* (1936) 4 KAN. CITY L. REV. 51; Reed, *Shall We Have Constitutional Liberty, or Dictatorship?* (1936) 7 Mo. B. J. 87; Williams, *The Attack upon the Supreme Court* (1923) 7 CONST. REV. 143.

64. See Fraenkel, *Constitutional Issues in the Supreme Court* (1936) 85 U. OF PA. L. REV. 27, 78; BORCHARD, DECLARATORY JUDGMENTS (1934) 302, 624; Comment (1932) 41 YALE L. J. 1195.

statutes than by an extension of the injunction.[65] For the declaratory judgment, as an alternative to the irregular injunction, has the advantage of not requiring a change of basic legal concepts, a fact manifestly of some importance if it is in the social interest to preserve these particular legal ideas relatively intact in their older form for private law purposes: the confusion of doctrine as to irreparable injury in constitutional cases may, for example, have unfortunate consequences if used as a precedent in private law suits.[66]

An entirely different attitude toward judicial review is taken by those who desire both to reduce the number of occasions for constitutional decisions and to postpone such occasions as long as possible when they cannot be entirely avoided, preserving the power of the courts for ultimate and unavoidable contingencies, few in number, and presumably great in influence. The feeling that we would be better off with fewer constitutional decisions is based in part on the belief that when courts pass upon the validity of statutes framed to remedy economic and social ills, they necessarily act as super-legislatures re-examining the wisdom of the measures, a function supposedly delegated to those who are responsible to the electorate. Moreover, it is felt that every such decision brings to a head a conflict between theoretically co-ordinate branches of the government, thus engendering friction which it would be wise to minimize.[67] The reason advanced for delaying to the utmost those constitutional determinations which are concededly inevitable is the simple one, rooted in a strong sympathy for the powers of legislatures, that the government should be given as long a time as possible in which to demonstrate the social utility of new legislation before the Supreme Court passes upon its "reasonableness." To the

65. A number of courts have recognized this to the extent of granting a declaratory judgment although refusing an injunction. *E.g.*, Penn v. Glenn, 10 F. Supp. 483 (W. D. Ky. 1935); Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934); Associated Industries v. Department of Labor, 158 Misc. 350, 286 N. Y. Supp. 459 (Sup. Ct. 1936). But *cf.* Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5th, 1936) (holding that a court of equity is not authorized to interfere with administrative proceedings by a declaratory judgment when it would not do so by injunction). See BORCHARD, DECLARATORY JUDGMENTS (1934) 169, 277, 551, 556.

66. Consider, for example, the possibility of using the *Ashwander* and the *Carter Coal* cases as a basis for strike litigation against the management of a corporation. Contrast their holding with that of other stockholders' suits involving no constitutional issues. United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261 (1917); Hawes v. Oakland, 104 U. S. 450 (1881).

67. See Frankfurter, *Mr. Justice Brandeis and the Constitution* (1931) 45 HARV. L. REV. 33, 79; Frankfurter & Hart, *The Supreme Court at October Term, 1934* (1935) 49 HARV. L. REV. 68, 90; Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002. Even the late James M. Beck contended that despite the advantages of a quick decision outright advisory opinions were undesirable because they plunged the court into the midst of a political controversy, thereby impairing its prestige. See Beck, *loc. cit. supra* note 63.

objection that a period of uncertainty will ensue, it is answered that any uncertainty is merely the result of a refusal to regard laws in practice, as well as in theory, as valid until the Supreme Court has passed upon them.

A court which proceeds on these premises will pass upon the constitutionality of an act in an injunction suit only when the conditions precedent to an exercise of its equity powers, viewed strictly, are satisfied—that is, when the complainant can show that he is being threatened with substantial and unavoidable injury irreparable at law. Relief from mere harassment and dread will not be granted, nor will a right to be free of unconstitutional statutes be recognized as such, without some other and definite complaint of injury. Occasionally the balance of convenience test might be adopted, but only for the purpose of denying injunctive relief despite a showing of irreparable injury where the threatened harm to the complainant is outweighed by the evils of impeding the administration of a statute which may eventually be held constitutional.[68]

This view of the judicial function regards as irrelevant to the process of constitutional litigation those considerations which relax the historic requirements of equity jurisdiction in private litigation, or which support the use in such litigation of the declaratory judgment. Like the advocates of the declaratory judgment, persons of this view support a judicial policy of confining the use of the injunction in constitutional cases; their reason, however, is not an interest in preserving the integrity of legal forms and concepts, but a general policy of minimizing access to the courts in constitutional cases. While future development of the declaratory judgment may make this solicitous limitation on the boundaries of the injunction academic, it remains to be seen how effective the declaratory judgment will become in fulfilling the ends now served by unorthodox injunctions.[69] Meanwhile, those who would contract judicial power repeat that the issue in constitutional

68. A report of Chairman of the Federal Power Commission states that from 1888 to December 1, 1935, 278 petitions for injunctions had been filed against 195 public authorities in the United States, causing a total delay of over 289 years, and a total direct expense of $376,000. SEN. DOC. No. 182, 74th Cong., 2d Sess. (1936). An amendment to the Tennessee Valley Act proposed by Senator Norris would require any person seeking an injunction against the Authority to post a bond which would cover a great number of possible injuries, including attorney fees, loss of revenue to the Authority, and increased cost of electricity to consumers. S. 2095, 74th Cong., 1st Sess. (1935).

69. The courts are by no means agreed as to what is a proper occasion for declaratory relief. Compare Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97 (C. C. A. 5th, 1936) and International Mutoscope Reel Co. v. Valentine, 247 App. Div. 130, 286 N. Y. Supp. 806 (1st Dep't 1936) (both holding declaratory judgment improper because injunction would be improper) with Nesbitt v. Manufacturers' Casualty Ins. Co., 310 Pa. 374, 165 Atl. 403 (1933) (holding declaratory judgment improper because other relief was available). See Comment, (1936) 46 YALE L. J. 286, 293, 299.