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George W. Pugh

THE FEDERAL DECLARATORY REMEDY: JUSTICIABILITY, JURISDICTION AND RELATED PROBLEMS*

GEORGE W. PUGH†

The declaratory action is the intelligent response to a procedural void. To understand the necessity for the action, we must understand the void.

Procedure represents the body of doctrinal rules which prescribe the etiquette of counsel and courts. It deals with the means, not the ends of litigation, and in a purely theoretical sense, it may be set apart from the so-called "substantive rights" which give procedure its life and meaning. But, of course, from a practical standpoint, the two are inseparable. Since procedure exists solely to complement and implement the "rights" afforded by law, it might appear that the body of procedural doctrine would be but a compendium of pragmatically proved efficient conduct. The articulate law student can provide ample evidence to the contrary.

At their inception individual procedural rules may actually represent what is then conceived to be the most efficient method of implementing the right in question. But legal history shows that procedures become habit, stylized and ritualized. Legal reform has not always been reflected in correlative procedural change. The "law may change, but procedures fail to fade away," and may perhaps remind the literary of the grimace of the disembodied cat.[1] To many lawyers, their procedural knowledge represents a substantial part of their skill, their stock in trade. Tampering with such vested interests quite naturally meets with stern rebuff. Yes, it is no wonder that procedural reform moves slowly.

Background of the Federal Declaratory Remedy

The roots of the federal declaratory action run deep. It may be traced from its origins in Roman law and the law of the Middle Ages to Scotland, and in the nineteenth century from Scotland to England and thereafter to this country.[2] Although it is quite true that from time immemorial Anglo-American courts of equity had afforded what amounted to declaratory relief in narrowly restricted areas (such as the action to quiet title), there was no concept, even in equity, of a

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†Assistant Professor of Law, Louisiana State University.

1. See Judge Frank's allusion to Alice in Wonderland in Cover v. Schwartz, 133 F.2d 541, 551, (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943).

2. See Borchard, Declaratory Judgments 87 *et seq.* (2d ed. 1941). See also Moore's Federal Practice (2d ed.) ¶ 57.03. All references to the Moore treatise in the following footnotes are to the Second Edition of that work.

general declaratory action. Perhaps equity's failure to provide general declaratory relief is to be attributed to the realization that such a procedure would subvert the right to jury trial. But, whatever the reason, the fact remains that until comparatively recently general declaratory relief was unknown to the Anglo-American system.

Thus despite the existence of real and actual controversy between vehement adverse parties, judicial redress was oftentimes refused. Unless the action could be fitted into some tightly knit category (such as the action to quiet title) declaratory relief was denied. Contracting parties differing on the proper interpretation of their rights and obligations were forced to act at their peril. The client of the counsel who guessed wrong was mulcted in damages. To paraphrase Congressman Gilbert, a party had to take his step in the dark before he turned on the light.[3] The answer to this procedural void may appear obvious, but the intelligent response was given only after a prolonged stutter.

Lord Brougham is largely responsible for the English declaratory action.[4] In a speech before the House of Commons in 1828, he called attention to the advantages of the declaratory action used in Scottish courts and thereafter made repeated attempts to secure the adoption of an English declaratory act. By 1883, the way had been paved in England for a wide application of the declaratory remedy.

Progress in this country came much later. In the latter part of the nineteenth century, Rhode Island[5] and Maryland[6] enacted statutes affording a limited form of declaratory relief; but it was New Jersey, in 1915, which enacted the first adequate declaratory act.[7] The articles of Professors Sunderland and Borchard, and other legal scholars[8] heralded the advantages of the new procedure, and the statutory response was rewarding. In 1922, the Uniform Declaratory Judgment Act was proposed, and today only some four states fail to provide some form of declaratory remedy.[9]

The late Professor Borchard, the architect of the American declaratory remedy, was the foremost authority in the field. He wrote numerous articles urging the merits of the new action, and criticizing those courts which had veered from its salutary aims. The first and

3. 69 CONG. REC. 2030 (1928).
4. MOORE'S FEDERAL PRACTICE ¶ 57.03.
5. R.I. Pub. Laws 1876, c. 563, §§ 16-17.
6. Md. Pub. Laws 1888, c. 478.
7. N.J. Laws 1915, c. 116, § 7, p. 185. See BORCHARD, DECLARATORY JUDGMENTS 132 (2d ed. 1941).
8. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1 & 105 (1918); Cooper, *Locking the Stable Door before the Horse is Stolen*, 16 ILL. L. REV. 436 (1922); Hale, *Wanted—A Declaratory Judgment Act in Oregon*, 3 ORE. L. REV. 232 (1924); Kerr, *Declaration of Rights without Consequential Relief*, 53 AM. L. REV. 161 (1919); Schoonmaker, *Declaratory Judgment*, 5 MINN. L. REV. 32 & 172 (1920-1921); Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69 (1917); Sunderland, *The Courts as Authorized Legal Advisors of the People*, 54 AM. L. REV. 161 (1920).
9. MOORE'S FEDERAL PRACTICE ¶ 57.02[1].

second editions of his *Declaratory Judgments* are works of erudition and wisdom, and have been constantly referred to by the courts. His prodigious labors are largely responsible for the presence of the Federal Declaratory Judgment Act.

It was in the federal sphere that resistance was most severe. It is hallowed hornbook law that federal constitutional courts do not render advisory opinions, and many thought that advisory opinions and declaratory actions were practically synonymous. The years of reassuring state experience failed to allay their fears. In 1927, the Supreme Court indicated by dictum in *Liberty Warehouse Co. v. Grannis*[10] that a declaratory judgment is in effect an advisory opinion. Despite this dictum, a bill authorizing the use of the declaratory action was passed by the House of Representatives on January 25, 1928.[11] By May 18 of that year hearings on the bill were concluded by the Senate Committee on the Judiciary, but on May 21, 1928, the movement was dealt a death blow by the Supreme Court's decision in the famous case of *Willing v. Chicago Auditorium Association.*[12]

The facts of the *Willing* case are striking, and the decision in that case presents an illuminating though disheartening picture of the blind spot of the then existing procedures. At the end of the nineteenth century, plaintiff had entered into a long-term corporate lease, and had constructed a large auditorium building in Chicago. The business venture had proved a financial failure, but it appears that because of changed economic conditions, the lease right itself had increased in value. Plaintiff lessee proposed to give the lessor ample security before proceeding to tear down the old building and erecting in its place a far more expensive structure, a modern skyscraper. But plaintiff was unable to secure the lessors' consent, and feared that upon the commencement of demolition, or after the new building had been erected, the lessor would come in to assert a forfeiture of the lease on the ground of "waste." To avoid this impasse, plaintiff sought a definite decision as to whether the proposed action would constitute a basis for a forfeiture of the lease, and brought in the state court an action in the nature of an action to quiet title. The cause was removed to the federal court, and eventually was taken to the United States Supreme Court. The Court's opinion is not clear as to the extent to which the claim of the lessee was contradicted by the lessors, but the record[13] shows that defendants unequivocally asserted that the proposed action would constitute "waste" and confer upon lessors the

10. 273 U.S. 70, 74, 47 Sup. Ct. 282, 71 L. Ed. 541 (1926).
11. 69 CONG. REC. 2025 (1928); referred to the Senate Committee on the Judiciary on January 26, 1928, 69 CONG. REC. 2061 (1928).
12. 277 U.S. 274, 48 Sup. Ct. 507, 72 L. Ed. 880 (1928), discussed in MOORE'S FEDERAL PRACTICE ¶¶ 57.03, 57.12.
13. Transcript of Record, pp. 169, 182, Willing v. Chicago Auditorium Ass'n, *supra* note 12. Discussed in BORCHARD, DECLARATORY JUDGMENTS 186 (2d ed. 1941).

right of reentry. Writing the opinion of the Court, Justice Brandeis held that the case lacked the essential elements needed in the federal court to maintain an action to remove a cloud upon title, and the case was remanded to the state court. In the light of existing procedure, the holding itself can be justified. But Justice Brandeis went further and in dictum stated that the instant action was equivalent to an action for a declaratory judgment. "To grant that relief," said Justice Brandeis, "is beyond the power conferred upon the federal judiciary."[14] This statement was unnecessary and, in fact, constituted an advisory opinion by the Court that the declaratory action would not meet the justiciability requirements of the Federal Constitution.[15] This was a purely gratuitous annunciation of the meaning of the judiciary clause of the Constitution. But the obiter had lethal effect, for the pending congressional legislation providing for federal declaratory relief was killed.

It is astonishing that such a forward looking man as Justice Brandeis should have taken this position with respect to the declaratory action. Subsequent decisions have clearly established the constitutionality of federal declaratory relief in appropriate cases,[16] but the dictum of the *Willing* case has never been specifically overturned. It may be here noted, however, that it is at least conceivable that the Brandeis dictum will once again take its toll, and that the Court will hold that declaratory relief under such circumstances would violate the justiciability provisions of the Constitution.[17] To so hold would be to ignore the realities. The parties in the *Willing* case were obviously adverse, with real, substantial and immediate adverse legal interests.

Federal declaratory relief was delayed six years by the *Willing* dictum. When the Court was actually called upon to determine the constitutionality of declaratory relief, the answer was in the affirmative. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*[18] came to the Supreme Court from the highest state court of Tennessee. The action had been brought under the provisions of the Uniform Declaratory Judgments Act, which had been adopted by the Tennessee legislature. Unless the case presented a "case" or "controversy" within the meaning of the Constitution, the Supreme Court would have been powerless to review the Tennessee decision. The Court very properly found that the case presented a justiciable controversy and fell within the ambit

14. Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289, 48 Sup. Ct. 507, 72 L. Ed. 880 (1928).

15. On the use of dictum as advisory opinion, see Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643, 650 *et seq.* (1935). See MOORE'S FEDERAL PRACTICE ¶ 57.03.

16. MOORE'S FEDERAL PRACTICE ¶ 57.04.

17. See discussion MOORE'S FEDERAL PRACTICE ¶ 57.12.

18. 288 U.S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191 (1933).

of its constitutional and statutory appellate jurisdiction. Speaking for the Supreme Court, Justice Stone stated:

> "The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts."[19]

Surprisingly enough, the *Willing* dictum was not much discussed in the *Nashville* case. Instead *Willing* was cavalierly distinguished with the brief statement that plaintiff in the *Nashville* case was not seeking "a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in"[20] *Willing v. Chicago Auditorium Association.* A more forthright disclaimer of the Brandeis dictum would have been much more desirable, but the *Nashville* decision nevertheless served a highly useful purpose. It laid a solid foundation for the Federal Declaratory Judgment Act, which became the law of the land in 1934, the year after the *Nashville* decision.

THE FEDERAL DECLARATORY JUDGMENT ACT

The Federal Declaratory Judgment Act is short, simple and clear. It is far more brief and concise than its counterpart, the Uniform Declaratory Judgment Act. The two acts contain essentially the same provisions, and the Uniform Act, with the decisions interpreting it, provides a guide to the scope and function of the Federal Act.[21] To facilitate subsequent analysis, the Federal Act as it now reads is set out in full:

> "§ 2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> "§ 2202. Further relief.
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Rule 57 of the Federal Rules of Civil Procedure provides that the procedure for obtaining declaratory relief under the Federal Act

19. 288 U.S. at 264.
20. 288 U.S. at 262.
21. See the Committee Note of 1937 to Rule 57, MOORE'S FEDERAL PRACTICE ¶ 57.01[2]; and for discussion of relationship between Uniform and Federal Acts, see *id.*, ¶ 57.02[1].

shall be in accord with the provisions of the Rules,[22] and explicitly states that the right to jury trial may be demanded as in other civil actions.[23] Like the Federal Declaratory Judgment Act, Rule 57 is brief and to the point providing:

> "Rule 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to Title 28, USC, § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

The constitutionality of the Federal Act was clearly established by *Aetna Life Insurance Co. v. Haworth.*[24] Speaking for a unanimous court, Chief Justice Hughes stated that the Act is procedural in nature and is restricted in application to "controversies which are such in the constitutional sense."[25] In its control over the practice and procedure of federal courts, "Congress is not confined to traditional forms or traditional remedies."[26]

JUSTICIABILITY

A discussion of the nature and function of the Federal Declaratory Judgment Act must necessarily involve a discussion of the limitations of the "case and controversy" provision of the judiciary clause of the Constitution. It is clear from the *Haworth* decision, and from the Act itself, that the action applies only to "controversies which are such in the constitutional sense." The Act has neither broadened the court's jurisdiction nor altered the concept of justiciability.[27] Thus the whole question of "case and controversy" is imported into an analysis of the nature and function of the federal declaratory action. What, then, is the meaning and effect of this facet of the judiciary clause?[28]

Regardless of the wisdom of restricting the federal judiciary to actions involving a "case and controversy," the limitation is in fact present. Reduced to its essence, the phrase prescribes a *sine qua non* of justiciability, and requires an *adversary* proceeding. Thus the action must present for present adjudication the disputed rights and obligations of adverse parties with real and immediate adverse legal in-

22. If the Rules are inapplicable to a particular proceeding, or to a particular federal court, then the declaratory action is governed by the procedures regularly used in that court for that type of proceeding. See *infra* this discussion, and see MOORE'S FEDERAL PRACTICE ¶ 57.22[1].

23. For discussion of the right to jury trial in declaratory actions, see MOORE'S FEDERAL PRACTICE ¶ 57.30.

24. 300 U.S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000 (1937).

25. 300 U.S. at 240.

26. *Ibid.*

27. MOORE'S FEDERAL PRACTICE ¶¶ 57.04, 57.11-57.16, 57.23.

28. For a more detailed analysis of justiciability, see MOORE'S FEDERAL PRACTICE ¶ ¶57.11-57.16.

terests. By invoking the magic term "justiciability," the courts confine themselves to what they conceive to be their proper judicial sphere. The limitations of the doctrine are elusive, highly abstract, and difficult of application in the specific instance. By generalizing, one runs the risk of tending to obfuscate rather than clarify. But perhaps it may be helpful to give a pragmatic analysis of interrelationship between the declaratory action and certain facets of the justiciability concept.

The requirements of justiciability actually break down into three major categories, concerning generally: (1) the nature of the dispute, (2) the interest of the parties litigant, and (3) the "ripeness" of the controversy. These will be discussed in turn, with special emphasis upon the effect of doctrinal modes of thought upon the efficacy of the declaratory remedy.

1. *The Nature of the Dispute*

To be adjudicated by a federal constitutional court, a dispute must be of a "legal" nature. It is, of course, very difficult to lay down any broad, high-level abstractions as to the precise pragmatic meaning of "legal." Whether or not a controversy is "legal" depends on tradition and history. The disputes falling within the ambit of judicial cognizance vary from century to century and from society to society, and, in a responsive institutional environment, the meaning of "legal" alters with the change in mores and governmental structure. A violation of social or religious norms may be a "legal" wrong in certain societies but not in others.

What has traditionally come under the cognizance of our own courts is probably too ragged and ill-defined a line to be susceptible to high-level abstraction. This generally presents no great practical problem, however, for in the specific case, it is not normally difficult to ascertain whether or not this or that dispute is of a "legal" nature. Decision and tradition have generally solidified our habits of thought in this regard, and layman and lawyer alike can make an intelligent "sense" determination. For example, it is a part of our consciousness that courts will not adjudicate a question of social etiquette or correct grammatical usage. But there is one area which is fraught with difficulty and ambiguity, and which has been of considerable importance with respect to the declaratory remedy. The shades of "legal" and "political" questions[29] often blend into fast union. What then is the reason and purpose for the distinction, and what are the actual criteria of delineation?

As a result of the very nature of the judiciary, and of the implications and power ramifications of the doctrine of judicial review, the

29. See the discussion and the cases collected in MOORE'S FEDERAL PRACTICE ¶ 57.14.

direct and immediate determination of the "legal" nature of a dispute is a function of the judiciary. But this is not untethered supremacy. In the background are potent deterrents to an irresponsible assumption of power by the judiciary. By the appointment prerogative, by the allotment of jurisdiction, and, of course, by the power of impeachment, the heavy hand of legislative and executive restraint is omnipresent. If our tri-partite division of authority is to be meaningful, it is highly important that the prerogatives of each branch be respected by the others. This is the essence of the "political question."

When a court states that a question is political, it is in fact renouncing all authority to adjudicate the issues involved.[30] It does not necessarily deny the presence of disputed issues, but states instead that the settlement of the controversy is in hands other than its own. This statement provides the key to the proper meaning of "political" question. The historic function of the judiciary has not been legislation as such but adjudication (with, of course, a necessary interstitial policy determination). In any judicial adjudication, the court is furnished by precedent or legislation with at least the broad outlines of policy. It is quite true that the judiciary must *ascertain* the broad applicable policy, but it does not itself make that policy in the specific case. It finds it. And the same is true with respect to political problems. Many cases before the courts involve an underlying political determination. An excellent example of this is found in *Oetjen v. Central Leather Company*,[31] a replevin action as to goods confiscated by the Carranza Government of Mexico. The Supreme Court took judicial notice of the fact that the Carranza Government had been given *de facto* and *de jure* recognition by the political branch of our government, and hence applied the rule of law applicable to acts of state of a recognized foreign government. Had the Court found that the political arm of our government had not recognized the Carranza Government, then another rule of law would have been applied. In both instances the title adjudication would be underpinned by the political determination by the appropriate governmental organ. But the fact that ultimate adjudication hinged upon the *ascertainment* of an underlying political determination did not remove the dispute from the proper orbit of judicial cognizance.

But in other cases presented to the courts, the entire controversy is political in nature, and any attempted adjudication by the courts would be an infringement upon the prerogatives of the other branches of government. An example of such a case is *Colegrove v. Green*,[32] where a declaratory action was brought to invalidate a state statute

30. *Ibid.*
31. 246 U.S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726 (1918), discussed in MOORE'S FEDERAL PRACTICE ¶ 57.14.
32. 328 U.S. 549, 66 Sup. Ct. 1198, 90 L. Ed. 1432 (1946), discussed in MOORE'S FEDERAL PRACTICE ¶ 57.14.

dividing a state into congressional districts. This statute was contested on constitutional grounds, and it was alleged that the districts in question lacked compactness of territory and were not approximately equal in population. Writing the opinion of the Court, Mr. Justice Frankfurter noted that the fact that a declaratory action was the vehicle for presentation did not alter the question of justiciability. Investigating the propriety of a judicial determination of the issues involved, he stated:

> "The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House, and left to that House determination whether States have fulfilled their responsibility."[33]

Mr. Justice Frankfurter makes it quite clear that the unconstitutional nature of the action complained of does not suffice to confer federal jurisdiction. If the Constitution has placed determination of the controversy in question with the political arm of the government, then the courts must keep "hands off."

2. *The Interest of the Parties Litigant*

The second requirement of justiciability concerns the interest of the parties litigant.[34] The multiplicity of judicial utterances on this subject has at times obscured the nature of the interest requirement, and slavish adherence to inadequate and inarticulate verbalizations has occasionally resulted in unjust and unrealistic decisions. Restricted to its proper sphere, however, the interest requirement performs a salutary and necessary function. As the phrase "case and controversy" itself indicates, adjudication in a federal constitutional court is premised upon the adversary method. A discussion as to whether or not another system would be more efficient and just is not within the purview of the present discussion. Suffice it to say that the adversary method is a part of present day constitutional dogma and, absent radical constitutional alteration, the adversary method must be lived with.

Under adversary procedure, the judge is merely the arbiter between adverse claimants. Society provides the arena and the referee, and the combatants must do the rest. Somehow it is believed that as a result of this trial by combat,[35] truth and justice will emerge triumphant. But the system is not quite so naive as might appear, for it is grounded upon a *sine qua non* of "interest" in each of the parties litigant. This "interest" requirement serves to prompt an adequate ferreting out of law and fact. Otherwise our blind justice would in-

33. 328 U.S. at 554.
34. See generally MOORE'S FEDERAL PRACTICE ¶¶ 57.11, 57.12, 57.15.
35. See Arnold, *Trial by Combat and The New Deal*, 47 HARV. L. REV. 913 (1934).

deed be blind. However unsatisfactory the adversary system may be, it would be even more unworkable if it were not for the interest requirement.

If judicial decisions had no other effect than an *ad hoc* determination between the immediate parties litigant, then a failure to fulfill the interest requirements would result in little harm. A party violating the interest requirement would but stand to lose his inadequate interest. But of course many judicial decisions have a far greater consequence than the value of the rights immediately adjudicated. *Present decisions are future precedents.* And the acceptance of the concept of precedent is underpinned by an abiding faith in the validity of the adversary method.

Pragmatic considerations should control as to the interest required of the parties litigant in the particular case. Improvident and ill-considered precedent should, of course, be avoided. It is suggested that the cases dealing with the interest requirement in fact break down into two broad subdivisions: (1) actions between private individuals (or corporations), and (2) actions between a private individual (or corporation) and the government or a governmental agency or official. Actions solely between private individuals in turn break down into two groups: (1) those actions in which the decision will be of little if any immediate significance beyond the parties to the action and those in privity with them, and (2) those actions in which the decision will be of immediate significance beyond the immediate parties, as for example, actions involving the constitutionality of statutes or the validity of patents. Where the action would be of little effect beyond the parties to the action and those in privity with them, then there is scant probability that the apparent adversity is fictitious. The fact that the action has been commenced and defended is persuasive evidence of the sincerity of adversity. Hence, there is little reason to suppose that the court is being called upon to make precedent apart from adjudication. The only real question involved is one of substantive legal doctrine: whether or not the defendant is under a legal obligation, and whether the obligation is owed to the plaintiff (or to persons represented by him). If it be found that no legal obligation is owed by the defendant to the plaintiff (or to those represented by him), then the court need not and should not pass upon the issue as to whether the defendant is under an obligation to some third person. Whether a decision denying that plaintiff is owed a duty be considered a denial "upon the merits" or, alternatively, a denial of "interest," and hence a denial of "jurisdiction," is normally of little practical importance.[36] In either case, the decision is *res judicata* be-

36. But note the situation presented in a bill to quiet title. If the court refuse to entertain the cause on the ground that the cloud sought to be removed is not grave enough to ground a bill to quiet title, then plaintiff is denied effective relief because his case is really "too good." See Thompson v. Etowah

tween the parties. And in both cases the effect upon precedent is the same, for the decision constitutes a holding that under such circumstances no duty is owed by the defendant *to the plaintiff*.

But where the decision in an action between private parties would be of immediate significance beyond the parties to the action and those in privity with them, then there is a far greater possibility that the action is brought for precedential rather than adjudicative purposes. Perhaps the ostensible adversity is fake and fiction. There is here the possibility that the parties will *purposely* fail to present the real issues of fact and law to the court. Precedents bottomed upon such a presentation must be avoided. Hence the court should satisfy itself that the apparent adversity is in fact real. Once satisfied of the sincerity of the parties, the court must apply the applicable substantive legal doctrine. Here, as in the situation previously discussed, the court must determine whether or not a legal obligation is owed by the defendant to the plaintiff. The problem involved is the same as that already noted.

But different considerations are involved in the second large group of cases, those between a private person or corporation and the government or a governmental agency or officer. As with political questions, there is here the problem of judicial interference with governmental matters. Perhaps, too, the outmoded concept of sovereign immunity has left its mark, and there is a resulting judicial reticence against tinkering with the relationship between citizen and state. These cases involve actions by parties seeking relief from governmental action, and hence involve important questions of power. Certain of these areas are well defined by statute and present no serious interest question, as for example, suits for the recovery of taxes illegally collected[37] and suits under the Federal Tort Claims Act.[38] But there is much confusion as to the interest required in many of the actions involving relief from governmental action. There has been a great profusion of judicial utterances on this question, and an excellent critical discussion of their meaning is to be found in the concurring opinion of Mr. Justice Frankfurter in the *Joint Anti-Fascist* case.[39] The scope and space limitations of the present discussion prevent a re-examination of those decisions. But the cases collected by Mr. Justice Frankfurter show that a prime consideration in these decisions has been an attempt to avoid an undue interference by the judiciary with the political branch of government. Although would-be "tests" are enunciated in many of the cases, these "tests" are conflicting and confusing, and provide no workable thumb-

Iron Co., 91 Ga. 538, 17 S.E. 663 (1893); Bishop v. Moorman, 98 Ind. 1, 49 Am. St. Rep. 731 (1884).

37. 62 STAT. 933 (1948), 28 U.S.C.A. § 1346(a)(1) (1950).

38. 62 STAT. 933 (1948), 28 U.S.C.A. § 1346(b) (1950).

39. Joint Anti-Fascists Refugee Committee v. McGrath, 341 U.S. 123, 71 Sup. Ct. 624, 95 L. Ed. 817 (1951), discussed and quoted at some length in MOORE'S FEDERAL PRACTICE ¶ 57.11. See also discussion in *id.* ¶ 57.21[3].

nail definition of the interest required to contest the validity of governmental action. The delicate balance of power between the judiciary and the political arm of government must be maintained, and yet again the individual oppressed by illegal governmental acts should have some form of redress. Recognizing these conflicting forces, Mr. Justice Frankfurter states:

> "Whether 'justiciability' exists, therefore, has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."[40]

In a zealous attempt to restrict themselves to "cases and controversies," courts have at times given too expansive an application to the interest requirement, and have hence made mockery of its essential validity. *Ex-Cell-O Corporation v. Chicago*[41] is a striking example of the harm that results from a slavish adherence to incomplete verbalizations. A manufacturer of paper milk containers sold to Chicago dairy companies brought an action for a declaratory judgment that the milk ordinance of that city did not preclude the use of paper containers, and alternatively, that if the ordinance did preclude such use, then the ordinance was in fact unconstitutional. The court freely admitted that the plaintiff had an ultimate pecuniary interest in the subject matter in dispute, but relying upon *Massachusetts v. Mellon*,[42] it dismissed the action on the ground that plaintiff did not have a "direct" interest. Under the reasoning of the court, plaintiff would have had sufficient interest only if the ordinance in question had prohibited the manufacture of his product. The fact that it might *prohibit the use* of such product did not suffice to create the requisite interest!

Massachusetts v. Mellon had held that an ordinary taxpayer lacks sufficient interest to contest the validity of an alleged unconstitutional congressional appropriation. The court in the *Ex-Cell-O* case quoted Mr. Justice Sutherland's statement in the *Mellon* case as controlling:

> "The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[43]

The *result* reached in the *Mellon* case is patently sound. If every taxpayer were allowed to contest the validity of congressional appropriations, then the judicial process would be swamped by the

40. 341 U.S. at 156 (concurring opinion).
41. 115 F.2d 627 (7th Cir. 1940), discussed in MOORE'S FEDERAL PRACTICE ¶ 57.15.
42. 262 U.S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923).
43. Massachusetts v. Mellon, 262 U.S. 447, 488, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923); quoted in Ex-Cell-O Corp. v. Chicago, 115 F.2d 627, 628-29 (7th Cir. 1940).

profusion of litigation. The decision as to the disposition of funds legally severed from a taxpayer is essentially a political determination, made through the people by their respresentatives, in congress assembled.

But the Court's use of the word "direct" was unfortunate. There is no happy road to determining the interest required of a party seeking relief against his government, and the "direct" test is an inadequate and incomplete verbalization. The "directness" of the injury complained of is but one of the factors to be considered in determining the necessary interest. In discussing the "direct" test, Mr. Justice Frankfurter very well stated in his concurring opinion in the *Joint Anti-Fascist* case:

> "But it is not always true that only the person immediately affected can challenge the action. The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him 'standing' to assert a right of action. *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229. On this principle an alien employee was allowed to challenge a State law requiring his employer to discharge all but a specified proportion of alien employees, *Truax v. Raich,* 239 U.S. 33, and a private school to enjoin enforcement of a statute requiring parents to send their children to public schools, *Pierce v. Society of Sisters,* 268 U.S. 510. The likelihood that the interests of the petitioner will be adequately protected by the person directly affected is a relevant consideration, compare *Columbia [Broadcasting] System v. United States,* 316 U.S. 407, 423-24, with *Schenley [Distillers] Corp. v. United States,* 326 U.S. 432, 435, as is probably, the nature of the relationship involved. See *Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U.S. 207, 220. *Truax v. Raich,* 239 U.S. 33, 38-39."[44]

In the *Ex-Cell-O* case plaintiff was not contesting a congressional appropriation: he was contesting the validity of an ordinance severely affecting his business. To deny that plaintiff in the *Ex-Cell-O* case had sufficient interest to maintain the action is unrealistic in the extreme. It might well have been that his entire business depended upon the validity of the contested ordinance. His interest was not one shared by the public at large, for to the general public of Chicago the significance of the controversy was slight—the difference between glass bottles and paper containers. Likewise the interest of the dairies was small, the profit differential between their use of bottles and paper containers. But to the plaintiff manufacturer of paper containers, the interpretation and validity of the ordinance was all important. It was he above all others who had perhaps the greatest interest, and who would make the most zealous attempts to ferret out law and fact. Unless the manufacturer were able to bring the suit, there is a strong possibility that the validity of the statute would go uncontested, and that in the absence of his "day in court," plaintiff's business might be

44. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154, 71 Sup. Ct. 624, 95 L. Ed. 817 (1951).

ruined. To deny him the right to contest the validity of the ordinance is to make mockery of the salutary and necessary interest requirement.

3. *The Ripeness of the Controversy*

The third requisite of justiciability concerns the ripeness of the controversy. For clarity of analysis it is well to distinguish the interest and ripeness requirements. In the foregoing analysis we discussed the requisite connection between the parties litigant and the subject matter in dispute. In the following discussion of ripeness, we shall consider the relationship between justiciability and the timeliness of presentation.

Although reminiscent of Rabelais' Bridlegoose,[45] the ripeness requirement is in fact a necessary consequence of the adversary method, for, like the interest requirement, it militates toward an adequate presentation of law and fact, and tends to decrease ill-considered and ill-advised precedent. *Even though the existence of an active dispute be recognized, a federal constitutional court should not and must not adjudicate disputes before or after a certain stage.* As unrealistic as this statement may at first appear, it is believed that the following discussion will establish its validity.

Like plants and animals, disputes have an observable life pattern. They germinate, grow and expand, perhaps propagate and then die. Circumstances may interrupt the pattern and bring about early demise; the disagreement may be effectively killed or settled by mutual good will, or societal coercion. But if left to itself or nurtured and cultivated, the controversy may achieve great longevity and profuse progeny. Since in an orderly society unsettled disputes are generally considered undesirable, it is natural to assume that the courts should be available to the contending parties at the earliest practical moment. To this most would assent. The question then is this: What is the proper stage for judicial action?

45. RABELAIS, GARGANTUA Bk. III, c. XL, pp. 108-09 (Urquhart and Motteux transl. 1550). After having explained that he decided his cases by shooting dice, Judge Bridlegoose was asked why he bothered to study the papers and pleadings so meticulously. Judge Bridlegoose explained in part that: "Thirdly, I consider, as your own worships used to do, that time ripeneth and bringeth all things to maturity, that by that time everything cometh to be made manifest and patent, and that time is the father of truth and virtue. *Gloss. in l. I. cod. de servit. authent. de restit. et ea quae pa. et spec. tit. de requisit. cons.* Therefore is it that, after the manner and fashion of your other worships, I defer, protract, delay, prolong, intermit, surcease, pause, linger, suspend, prorogate, drive out, wire-draw, and shift off the time of giving a definitive sentence, to the end that the suit or process, being well fanned and winnowed, tossed and canvassed to and from, narrowly, precisely, and nearly garbled, sifted, searched, and examined, and on all hands exactly argued, disputed, and debated, may, by succession of time, come at last to its full ripeness and maturity. By means whereof, when the fatal hazard of the dice ensueth thereupon, the parties cast or condemned by the said aleatory chance will with much greater patience, and more mildly and gently, endure and bear up the disastrous load of their misfortune, than if they had been sentenced at their first arrival unto the court, as *not. gl. ff. de excus. tut. l. tria. onera.*"

In attempting to find an answer to this question, it is advisable to study a typical situation. Let us assume a dispute involving the propriety and validity of an ordinance prohibiting the use of paper milk containers. To side-step further discussion of the interest problem, let us further assume that party plaintiff contesting the ordinance is a local dairyman who has been selling milk in such containers, and that his action is brought against appropriate city officials and others having the requisite interest.[46]

Our hypothetical dispute might take somewhat the following chronological pattern: (1) articles appear in the press urging the adoption of an ordinance prohibiting the use of paper milk containers; (2) plaintiff dairyman writes letters to the local newspapers setting forth the merits of paper milk containers and arguing the unconstitutionality of the proposed legislative action; (3) an ordinance to abolish the use of such containers is introduced in the city council; notice to the public is given, and hearings are held; (4) plaintiff dairyman attends the hearings and makes strenuous and extensive arguments against the proposed measure; (5) despite plaintiff's vigilance and lobbying skill, the measure is adopted by a unanimous city council, and submitted to the Mayor for his signature or veto; (6) a week later the ordinance is signed by the Mayor, and is to take effect one month thereafter.

When should plaintiff be able to secure judicial adjudication of the disputed issues? It is fundamental to the federal judicial process that the primary function of judicial decision is adjudication, not legislation. The doctrine of stare decisis gives rule making or legislative effect to judicial pronouncements, and in this sense judicial action actually impinges upon the function of the legislature. Perhaps as a result of the legislative aspects of judge-made law, the courts properly restrict themselves to those cases in which their pronouncements provide a final and effective adjudication of the rights and obligations of the parties before it. The doctrine of res judicata causes the adjudication to take on finality as to the parties litigant and those in privity with them. If courts did not restrict themselves to cases involving adjudication, then there would be little to separate the function of the courts from that of the legislature. By entertaining abstract and/or hypothetical questions, the prerogatives of the legislature could be undermined. Federal constitutional courts thus confine themselves to adjudications conclusive upon the parties litigant, and cite as authority the "case and controversy" clause of the Constitution. "Advisory opinions,"[47] "hypothetical"[48] and "moot"[49] questions are tag-lines sometimes used to describe issues that contravene this notion.

46. This assumption pretermits further discussion of the problems raised by the Ex-Cell-O case, note 41 *supra*, and accompanying text.
47. See discussion and cases collected in MOORE'S FEDERAL PRACTICE ¶ 57.12.
48. *Ibid.*
49. See discussion and cases collected in MOORE'S FEDERAL PRACTICE ¶ 57.13.

Now to return to the hypothetical ordinance. It could hardly be denied that an active dispute existed long prior to the Mayor's signature of the ordinance. But could or should the courts have provided an arena? Nearly all would agree that judicial redress at this stage would be unadvisable. Until the ordinance is passed by the city council, the matter is still within the hands of the legislative organ of government. Even were the dispute subject to judicial cognizance at this stage, the court would normally refrain from discussing such questions as the advisability or wisdom of the ordinance, for such issues are peculiarly legislative in nature, and exempt from judicial control, except insofar as the legislation in question is unreasonable and arbitrary. But prior to the adoption of the ordinance, the dispute is essentially concerned with advisability and desirability—not with constitutionality. It would be unwise for the courts to pass upon the interpretation or constitutionality of a proposed ordinance before final legislative action. If this were done, the work of the courts would be vastly increased. In addition, the courts would be denied the perspective derived from pragmatic observation of the effect of the legislation in the particular instance. Because of the obvious difficulty in thus interpreting statutory provisions *in abstractu,* it is believed no precedential effects should adhere. But unless precedential effect be attributed to the *in abstractu* determination, a judicial pronouncement would be of minute utility, for the essence of the action would be to secure a preview of judicial attitude. The rights of future litigants would be prejudiced by affording practical or theoretical precedential effects to such abstract determinations. It has already been pointed out that the essential function of the judiciary is adjudication, not legislation. But the essential effect of this type of pronouncement would be precedential, or rule-making, not adjudication.

One of the glories of our governmental structure is that a private individual can secure judicial determination as to the meaning and constitutionality of a particular statute *as applied to him in a specific case.* To the extent that precedential effects would attach to such abstract and hypothetical pronouncements, the rights of the individual litigant would suffer. For these reasons, it is believed that courts should not be open at this premature stage. But this does not mean that the legislature must engage in "blind flying." To the extent that expert legal advice is needed as to the probable court interpretation and constitutionality of proposed action, it should be supplied by other and more appropriate governmental organs, such as the attorney general's office, or expert legislative advisory committees.

It is a more difficult question whether the courts should attempt adjudication after passage of the bill, but prior to the signature of the Mayor. Now the provisions of the bill have been concretized, but still

it is a matter of conjecture as to whether or not the bill will become law, for it may still be struck down by a veto of the Mayor. The decision of the political arm of government has not yet been finally reached. For these reasons, and because comparatively little harm could come to the contending parties by waiting for executive action, it is believed that once again it would be unwise to open the judicial arena to the contending parties.

Assume, however, that after the signature of the bill by the Mayor, but before the effective date of the ordinance, a declaratory action is brought by the dairyman against the appropriate city official to secure a declaration that the ordinance in question is unconstitutional and void. Now for the first time, the dispute is the proper subject of litigation. The decision of the political arm of government has been finally reached. The parties to the litigation are now able to show the effect of the operation of the ordinance on the business in question. To insist that the parties wait until the effective date of the ordinance would force the plaintiff either to comply with the ordinance or subject himself to its penal provisions. This is an unnecessarily harsh decision. If it is impossible for the court to visualize the effect of the ordinance in operation, or if for any other valid reason the court feels that judicial action should be delayed, then the matter can be efficiently and effectively handled by a *discretionary denial* of the assumption of jurisdiction.[50] But here the court should not fall back upon the language of justiciability, for to do so is to deny jurisdiction of the subject matter, and thus to create precedent which will perhaps cause the denial of justice in future meritorious cases.

There is persuasive Supreme Court authority to indicate that judicial action at this stage is not violative of the constitutional requirement of "case and controversy,"[51] and it is believed that in the vast majority of the cases of this nature, the issues have been sufficiently narrowed to permit an intelligent adjudication of the dispute. There need be no fear as to the precedents that such adjudications might create.

A fortiori, judicial determination is proper after the effective date of the ordinance. Principles of justiciability are not affected by the fact that the action is presented via declaratory procedure rather than an action for injunctive relief, or a suit for damages. The issues are just as real, in one action as in the other, and just as susceptible of intelligent determination by the courts.

Assume now, however, that prior to judicial decision as to the validity of the disputed ordinance, the same is repealed by the city council. If no question of statutory penalties is involved, the case will

50. MOORE'S FEDERAL PRACTICE ¶ 57.08.
51. See Pierce v. Society of Sisters, 268 U.S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070 (1925) (injunction rendered against enforcement of statute despite fact that it was not to become operative until about three years from time of suit).

be declared "moot" by the courts, and the action dismissed without decision.[52] Is this wise or necessary?

Plaintiff dairyman may be very anxious to have the former ordinance declared unconstitutional. Perhaps he is interested in such a decision so that it will have precedential effect as to a similar case he is waging about a similar ordinance of another city. Should the judicial oracle keep mum? Here again it must be repeated that the essential function of the judiciary is adjudication. It is primarily this which separates it from the function of the legislative branch of government. Since the decision of the court would have no adjudicative effect upon the immediate legal rights and obligations of the parties litigant, its nature would be purely precedential. The theory of the adversary method, like the theory of precedent, is founded upon the notion that precedent is merely incidental to the judicial determination of actual and present disputes between adverse parties with adverse legal interests. Once an extra-judicial settlement is reached, then the interest of one or both of the parties is presumably materially decreased. To continue the action would create precedent without adjudication. Post-mortem judicial pronouncements must therefore be denied.

JURISDICTION AND RELATED PROBLEMS

But the mere fact that a federal declaratory action presents a justiciable controversy does not assure adjudication by a federal constitutional court. Federal courts are courts of limited jurisdiction; the scope of their power is specifically set forth by statute. The Federal Declaratory Act is procedural in nature and neither augments nor diminishes the *jurisdiction* of federal courts.[53] Since the Declaratory Act creates no new jurisdiction, a party seeking federal relief must be able to establish *jurisdiction* from other sources. In the absence of ancillary jurisdiction, he must be able to fit his case within the provisions of a special jurisdictional statute,[54] or within the terms of one of the two broad jurisdictional grants: that for diversity actions[55] or that for cases "arising under."[56] To establish diversity or federal question jurisdiction, the litigant must show two things: (1) that the matter in controversy exceeds $3,000, exclusive of interest and costs, and (2) either (a) that the diversity requirements are met, or (b) that the complaint well pleaded presents a substantial federal question.

52. For discussion of problem of moot questions, see MOORE'S FEDERAL PRACTICE ¶ 57.13.

53. For discussion of jurisdictional problems raised by the Federal Act, see MOORE'S FEDERAL PRACTICE ¶ 57.23.

54. Such as 62 STAT. 931 (1948), 28 U.S.C.A. § 1338 (1950), which confers jurisdiction in "any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks." For discussion of the use of the declaratory action in such cases, see MOORE'S FEDERAL PRACTICE ¶ 57.20.

55. 62 STAT. 930 (1948), 28 U.S.C.A. § 1332 (1950).

56. *Id.* § 1331 (1950).

Thus jurisdictional rules applicable to traditional procedures are equally applicable to the declaratory action. But it must be noted that although not actually jurisdictional, the Federal Declaratory Act does in fact make is possible in the federal courts to maintain an action which for procedural reasons could not have been previously adjudicated. It is clear from *Aetna Life Insurance Co. v. Haworth*,[57] for example, that in a proper case an insurer may take the initiative and secure a declaration that an insurance policy issued by it to the defendant is no longer in force.[58] Similarly, as a result of the new procedure, an accused infringer may secure a declaration as to patent invalidity or noninfringement.[59] Under the old procedures, such an adjudication was impossible, not because of the absence of jurisdiction, but because of the nonexistence of a procedural vehicle via which the issues could be presented. Clearly an action for a declaration of noninfringement of a patent is a suit arising under the patent laws, over which the federal courts have exclusive jurisdiction, regardless of jurisdictional amount. Under 28 U.S.C.A. Section 1338(b) (1950), an accused infringer may join with his substantial claim under the patent laws a related claim for unfair competition, and the litigant need not establish the presence of an independent jurisdiction. Here again the area of adjudication is widened, but jurisdictional principles remain constant.[60]

But even though a justiciable controversy be presented, and even though a federal statute confer the power of adjudication, *it is not mandatory that jurisdiction be assumed or exercised.* Although initially a matter of some doubt, the discretionary nature of the declaratory action is now beyond serious question.[61] This is as it should be. The Federal Declaratory Act is cast in broad, general terms. Thus, the Federal Act reflects a significant revulsion against the evils of stylized and ritualized procedural formulations. It would have been incongruous to rededicate procedure to doctrinal minutiae. But unless there be meaningful guides to the exercise of judicial discretion, both procedure and litigant would undoubtedly suffer from the untethered judicial freedom. Professor Borchard clearly and succinctly stated the guides to the exercise of judicial discretion in this area:

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy

57. 300 U.S. 227, 57 Sup. Ct. 461, 81 L. Ed. 617, 108 A.L.R. 1000 (1937).
58. For discussion of the use of the declaratory action in insurance litigation, see MOORE'S FEDERAL PRACTICE ¶ 57.19.
59. For discussion of the use of the declaratory action in patent cases, see *id.* ¶ 57.20.
60. *Id.* ¶ 57.23.
61. *Id.* ¶ 57.08.

giving rise to the proceeding. It follows that when neither of these results can be accomplished, the courts should decline to render the declaration prayed."[62]

A quantity of judicial utterances have treated of the exercise of judicial discretion with respect to the declaratory remedy, and by and large, judicial discretion in this area has been marked by wisdom and perspicacity.[63] The factors influencing the discretionary assumption or denial of jurisdiction are clearly discernible from the many cases, and to a large degree there is predictability in the particular case. It is very important to the administration of the declaratory remedy that judicial discretion be not arbitrarily or capriciously exercised, and to this end, there has been extensive appellate review. Thus the factors influencing the proper exercise of judicial discretion in this area have been clearly delineated. It is evident from Rule 57 that the existence of another adequate remedy does not *preclude* declaratory procedure.[64] But where the other available remedy is more efficient or effective, then in its discretion the court may refuse to entertain the declaratory action.[65]

To be useful, and to justify the necessary judicial time and expense, the declaratory action must "settle the controversy."[66] But this does not mean that it must settle the *broader controversy.* The action need not lay at rest all of the manifold and multifarious issues that may be in controversy between the parties, but to be useful, it must finally determine all of the issues of some autonomous segment of the larger dispute. Hence it may be proper for a court to entertain an action brought by a liability insurer against its insured for a declaration of noncoverage under the policy, for it may be very advantageous and expedient to determine this autonomous matter separate and apart from the more intricate questions of the insured's liability to the injured third party.[67]

The fact that there is another pending coercive action in a state court involving the same issues may also have an important bearing upon the discretionary assumption of jurisdiction.[68] Of course it is sound policy to avoid a multiplicity of actions, but the question is this: which of the two actions should be permitted to proceed to

62. BORCHARD, DECLARATORY JUDGMENTS 299 (2d ed. 1941). Cited with approval in: American Casualty Co. of Reading, Pa. v. Howard, 173 F.2d 924 (3d Cir. 1949); Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703 (3d Cir. 1940); Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321 (4th Cir. 1937); Metropolitan Life Ins. Co. v. Hobeika, 23 F. Supp. 1 (E.D.S.C. 1940). See discussion in MOORE'S FEDERAL PRACTICE ¶ 57.08[1].

63. See cases collected and discussed in MOORE'S FEDERAL PRACTICE ¶ 57.08.

64. *Id.* ¶ 57.07.

65. *Id.* ¶ 57.08[3].

66. For discussion of the cases dealing with this problem, see *id.* 57.08[4].

67. See *id.* ¶ 57.08[4].

68. For an analysis of the effect of another pending action on the exercise of judicial discretion in this area, and for a discussion of the cases in point, see *id.* ¶ 57.08[6].

judgment? Some of the cases seem to place emphasis upon which of the two actions was first in time, but the better reasoned opinions attach much less importance to this chronological fact. The real issue is again one of utility: whether the federal declaratory action would be more efficient and effective than the pending action for coercive relief in the state court. But where the two actions are equally useful and meritorious, and it is evident that both would be dispositive of all the issues involved, then the chronological test may be properly resorted to as a dispositive rule of convenience.

There have been some attempts, especially by insurance companies, to use the declaratory action as a device for procedural fencing, as a means of jockeying a controversy into the desired federal court.[69] Thus attempts have been made to use the declaratory action as a device for avoiding the requirements of the removal statutes, but the discretionary power of the courts with respect to the declaratory remedy has proved an effective weapon in combating such attempts. Judge Parker's statement in *Maryland Casualty Co. v. Boyle Construction Co.*[70] is an excellent example of the court's persistent and efficacious efforts to avoid the misuse of the declaratory action:

> "The federal declaratory judgment act is an important development in procedural law and should be liberally construed. In giving it this liberal construction, however, we must be careful not to encroach upon the state jurisdiction; otherwise we may awake to find that such encroachment has resulted in the act's being repealed or being modified in such way as to render it practically valueless. It furnishes a convenient and appropriate remedy to liability insurance companies where there is a bona fide controversy with the insured over the coverage of the policy or over other matters which can be settled more satisfactorily in such suit than in the ordinary form of litigation; but insurance companies should not be permitted, under the guise of seeking declaratory judgments, to drag into the federal courts the litigation of claims between citizens of the same state over which it was never intended that the federal courts should exercise jurisdiction. If these efforts are persisted in and are sanctioned by the courts, such abuse of the remedy may well lead to the repeal by Congress of one of the most beneficent pieces of procedural legislation enacted in recent years."[71]

With the exceptions noted in Rule 81, a civil action for declaratory relief in a United States District Court is governed by the provisions of the Federal Rules of Civil Procedure. Where federal declaratory relief is available and the Federal Rules are inapplicable in the particular court in question or in the particular type of litigation involved, then, of course, the declaratory action is governed by the procedures regularly used in that court for that type of litigation.[72]

The vast majority of federal declaratory actions will hence be gov-

69. *Id.* ¶ 57.08[5].
70. 123 F.2d 558 (4th Cir. 1941), discussed in *id.* ¶ 57.19.
71. 123 F.2d at 565.
72. MOORE'S FEDERAL PRACTICE ¶ 57.22[1].

erned by the Federal Rules. And the utility of the declaratory action is greatly augmented by the provisions of the Federal Rules with respect to counterclaims,[73] cross-claims,[74] third-party claims,[75] and the free joinder of parties[76] and claims.[77] The application of the Federal Rules in a declaratory action is essentially the same as in other actions.[78] It is to be noted, however, that Rule 57 specifically provides that "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."[79]

The action has had its widest use in insurance[80] and patent[81] litigation, and in actions involving the validity and constitutionality of public acts.[82] But the use of the action is in no wise restricted to such cases.[83] Statutory amendment to 28 U.S.C.A. Section 2201 (1950) expressly excluded the use of the declaratory action with respect to federal taxes,[84] but aside from this exception, the use of the declaratory action pervades the whole gamut of litigation.[85]

CONCLUSION

The federal declaratory action has performed and continues to perform a much needed function. It is true that at times litigants, especially insurance companies, have attempted to subvert its true purposes, seeking to use it as a device for procedural fencing. But the discretionary power to deny the assumption of jurisdiction has proved an effective weapon in such cases. The action helps to fill the blind spots in traditional procedures. At times the new action has found itself bound by the strait jacket of traditional habits of thought. This has been especially true with respect to questions of justiciability. But taken as a whole, the decisions interpreting and implementing the Federal Act have been marked with understanding and even wisdom. The federal declaratory action serves its purpose well.

73. *Id.* ¶ 57.27.
74. *Ibid.*
75. *Ibid.*
76. *Id.* ¶ 57.25.
77. *Id.* ¶ 57.26.
78. *Id.* ¶ 57.22 *et seq.*
79. *Id.* ¶ 57.29.
80. *Id.* ¶ 57.19.
81. *Id.* ¶ 57.20.
82. *Id.* ¶ 57.18.
83. *Id.* ¶ 57.21.
84. *Id.* ¶ 57.18[1].
85. *Id.* ¶ 57.21[4].