

1976

Prospective Remedies in Constitutional Adjudication

Doug R. Rendleman

Repository Citation

Rendleman, Doug R., "Prospective Remedies in Constitutional Adjudication" (1976). *Faculty Publications*. 892.
<https://scholarship.law.wm.edu/facpubs/892>

Copyright c 1976 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

West Virginia Law Review

Volume 78

February 1976

Number 2

PROSPECTIVE REMEDIES IN CONSTITUTIONAL ADJUDICATION

DOUG RENDLEMAN*

The archetypal constitutional plaintiff represents a class, sues in federal court, and asks the court to declare something unconstitutional and to effect a remedy against a local or state government official. If this litigant succeeds, the court must accommodate its remedy to federalism's perquisites. The remedy should advance some substantive or constitutional purpose. The mutual respect compelled by federalism exacerbates the inherent difficulties of attaining a successful remedy. This article examines the remedial relationships between class actions, declaratory judgments, and injunctions.

The remedial task is to convert law into results. Most people comply with the law when it is communicated and known. Federalism operates without friction when state and local officials respect and enforce federal law. But law is often out of touch with individual, cultural, or regional values: prohibition was widely ignored; school prayers continue; and school desegregation still faces widespread opposition.

Stare decisis means that courts tend to follow earlier decisions. Unless a higher court in the hierarchy has decided a binding precedent, however, a court need only follow an older case if "correct." Even "binding" precedent merely tells a court what to do; it says nothing coercive to a layman.

The bitter-end defendant poses the remedial dilemma. For example, four years after the Supreme Court held the Virginia miscegenation statute unconstitutional,¹ a white soldier and his black fiancee applied for a marriage license in Calhoun County,

* Associate Professor of Law, College of William and Mary.

¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

Alabama. The probate judge refused the license because it was "illegal." A deputy attorney general agreed, saying, "[w]hen the U.S. Supreme Court rules in a case it is just binding on people in that particular case They don't just wipe these laws off the books all over the United States because of one ruling."²

When people deny precedential value, a stiffer prospective remedy is in order to ensure compliance. Courts have several remedies. Simply "taking over" is probably the most extreme judicial remedy. The legal word for a judicial takeover is receivership, managed by a receiver or a master. Courts usually use receivers in economic insolvency; a receiver for a moral or constitutional bankrupt would be an innovation. Federal courts almost always refuse to appoint receivers to state and local government posts.³

Second, the court may enjoin and compel the defendants, at the risk of contempt, to do, to forebear, or to cease. Litigants and courts favor injunctions, the central prospective remedy.

Third, the court may merely declare, telling the parties how the law affects the controversy. Declaratory judgments are an emerging constitutional remedy.⁴

Several "persuasive" techniques make up the fourth alternative. A court may do nothing except retain jurisdiction, obviously implying, "I am keeping my eye on you."⁵ The court may also appoint monitors or observers, or ask the parties to form committees, to file periodic reports, and to submit plans. These alternatives may be summoned alone or in combination with declaring and enjoining.⁶

² Tuscaloosa News Dec. 4, 1971 at 1, col. 1. A few days later, a federal district court held the Alabama statute unconstitutional. *United States v. Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970).

³ See *Goode v. Rizzo*, 506 F.2d 542, 548 (3d Cir. 1974); *Wyatt v. Aderholt*, 503 F.2d 1305, 1317 (5th Cir. 1974). Courts may use "monitors" or committees to force defendants to share authority. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 25 (2d Cir. 1971). But see Schumacher, *Court Takes Over S. Boston High*, *Washington Post*, Dec. 10, 1975, at 1, col. 1; Note, 24 *RUT. L. REV.* 115 (1969).

⁴ See, e.g., *Alsager v. District Court*, 518 F.2d 1160 (8th Cir. 1975).

⁵ See, e.g., *Lankford v. Schmidt*, 240 F. Supp. 550, 562 (D. Md. 1965). Less infatuated with moral suasion, the court of appeals remanded with orders to enter an injunction. *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966).

⁶ See generally, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 *YALE L.J.* 1338 (1975).

CLASS ACTIONS

Class actions are not precisely remedies, but enhance remedies by spreading the judgment's effect beyond named parties. A class action's primary purpose is to aggregate small claims into a plaintiff class, an economically feasible litigation unit.⁷ Litigants use class actions for substitutionary relief. If declaratory relief establishes liability for money damages, a plaintiff class expands the benefitted group.⁸ Conversely, an unsuccessful plaintiff's class action to recover money gives the defendant *res judicata* protection from a subsequent action by a class member.⁹

In *Caesar v. Kiser*,¹⁰ plaintiff charged that the North Carolina mechanic's lien statute was unconstitutional. The court declared the statutes unconstitutional in part, holding that plaintiff was entitled to recover damages, but declined plaintiff's request for a class action: "Since this action attacks the constitutionality of a statute, the effect of the declaratory judgment, in reality, provides the same relief for all persons who are affected by the statute. The request for a class action is, therefore, not necessary and is denied."¹¹

The declaration and money damages in *Caesar v. Kiser* made the named plaintiff "whole." What was the point of the class action? The group aggrieved by the named defendant was probably not large. The contemplated plaintiff class here would have added little to the declaration-damage remedy and maintenance of a class action would have injected new issues into the trial.

To allow money recovery for sales before the statute was declared unconstitutional, the court would have had to ignore persuasive precedent¹² and hold the decision retroactive. To expand recovery damage further, plaintiff should have sued defendant class of garage owners, with someone on plaintiff's side paying the bill

⁷ Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

⁸ See, e.g., *Brown v. Liberty Loan of Duval*, 392 F. Supp. 1023 (M.D. Fla. 1974).

⁹ 7A C. WRIGHT AND A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1789 (1972).

¹⁰ 387 F. Supp. 645 (M.D.N.C. 1975).

¹¹ *Id.* at 650. See also *Abbit v. Bernier*, 387 F. Supp. 57, 59 n.2. (D. Conn. 1974).

¹² *Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972).

for notice.¹³ When defendants received notice, they may have argued against inclusion.¹⁴

It may be difficult, as a practical matter, to attain full compliance with the decision in *Caesar v. Kiser*. If the decision is communicated effectively and if all garage owners are willing to obey, then the precedent will be effective. But consumers are diffuse and often poorly informed. A garage owner, either ignorant or unscrupulous, may act inconsistently with the holding.

Plaintiff, for law reform reasons, may seek to enjoin a defendant class to extend injunctive control over larger groups.¹⁵ But a defendant class may not add much to an injunction against named defendants. Whether or not plaintiff represents a class, ending the harm for one may benefit many;¹⁶ when a single plaintiff persuades a court to abate defendant's smoking chimney, all the neighbors breathe fresher air. Even though relief is not class based, courts may shape an injunction to benefit nonparties.¹⁷

Procedural devices which create almost the same effect as a defendant class exist to compel compliance with an injunction. Rule 25(d) substitutes a governmental defendant's successor as defendant and exposes a breaching successor to contempt.¹⁸ Rule 65(d) compels employees and cohorts to obey.¹⁹ Rule 65(d), however, requires notice of the injunction which may dilute contempt as a sanction.²⁰

¹³ *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974).

¹⁴ FED. R. Civ. P. 23(c)(2)(A). Even though rule 23, by its terms only, requires notice in (b)(3) or damage actions, some courts have insisted that due process also requires notice in (b)(1) and (b)(2) actions. *See, e.g., Eisen v. Carlisle & Jacquelin* 391 F.2d 555, 564-65 (2d Cir. 1968).

¹⁵ *See, e.g., Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966).

¹⁶ *See, e.g., Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963); *Hoehle v. Likins*, 405 F. Supp. 1167, 1175 (D. Minn. 1975); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1191, 1200 n.1 (E.D. Va. 1975).

¹⁷ *See, e.g., Brito v. Zia Co.*, 478 F.2d 1200, 1207 (10th Cir. 1973).

¹⁸ *Miller v. Carson*, 401 F. Supp. 835, 843 (M.D. Fla. 1975); *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd per curiam sub nom, McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964).

¹⁹ *Miller v. Carson*, 401 F. Supp. 835, 844 (N.D. Fla. 1975); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945) (*dicta*).

²⁰ *Garrigan v. United States*, 163 F. 16, 21-23 (7th Cir. 1908), *cert. denied*, 214 U.S. 514 (1909).

Plaintiffs may consider a defendant class to achieve effective relief against all who may frustrate the right asserted but even this tactic is not perfect. Rules 25(d) and 65(d) do not reach diffused, private defendants. Garage owners, for example, are not united by an agency relationship. Moreover, viewed from the other side, backing an injunction against a defendant class with contempt creates potential unfairness. Plaintiff chooses the representative and putative class members may lack a realistic opportunity to litigate the injunction.

Defendant classes create immense problems of notice, communication, enforcement, and fairness in contempt. The class shifts the focus from a plaintiff's personal grievance to the collective grievances of the class. Given these additional difficulties inherent in class actions, it should surprise no one that courts are reluctant to grant injunctive relief against a class especially where the court may be content, as in *Caesar v. Kiser*, with individual redress and the educational effect of a declaratory judgment.

Many of the class action's virtues are ephemeral, speculative, or adequately performed by other devices. If plaintiff omits the class action, will nonparties be injured or prejudiced? Dissatisfied nonparties need not stand idly outside a nonclass suit gnashing their teeth. They may, if adequately connected to the controversy, intervene as plaintiffs or defendants and participate as parties. Even after judgment, nonparties may be allowed to intervene to appeal,²¹ or to alter or modify an injunction.²² Alternatively, nonparties with plaintiff interests may file a second suit against the same defendants and ask the court to preclude those defendants from relitigating issues adjudicated in the first suit.²³

Class actions have several incidental benefits. A class of plaintiffs makes the case more difficult to moot when the named plaintiff graduates, gets a haircut or promotion, or leaves the state.²⁴ If a court allows mailed rather than served notice, a class of defendants may be cheaper to sue. Finally, if both plaintiffs and defendants are classed, plaintiff's lawyer can pick names to style the

²¹ *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

²² FED. R. CIV. P. 60(b)(5); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

²³ *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

²⁴ *Sosna v. Iowa*, 95 S. Ct. 553, 556-59 (1975).

lawsuit cleverly. A lot may be said for a case named *Sherman v. Atlanta*.

At times defendant classes are indispensable to effective relief. One commentator states, "Where a question of law is decisive . . . , the concept of *stare decisis* furnishes almost the same advantages as a class action. . . . [A] decision on the law effectively binds non-parties without upsetting our assurance that due process has been done" ²⁵

As comparing *Schneider v. Margossian*²⁶ with *Callahan v. Wallace*²⁷ reveals, such faith in precedent as a remedy is touching but perhaps naive. In *Schneider*, the issue was whether it was constitutional for a plaintiff to attach or garnish a defendant's bank account without notice to defendant. Such *ex parte* process, the court held, violated due process. The plaintiff sued all court clerks as a class. The state Attorney General told the clerks and sheriffs to cease issuing and serving the writs. The court denied plaintiff's request for a class of clerks, saying "we are not persuaded by the prospect of other district court clerks proceeding in disregard of our decision" ²⁸ Denying the plaintiff the opportunity to sue a defendant class in *Schneider*, the court expressed its confidence that communicated precedent was sufficient to end the unconstitutional practice.

Callahan presents a contrast. In 1966, a federal court enjoined an Alabama justice of the peace from trying infractions because, the court held, it was unconstitutional for the justice of the peace to collect fees only for convictions.²⁹ In 1968, another federal court held the Alabama statutes unconstitutional and enjoined the named defendants from proceeding in justice of the peace courts.³⁰ In 1969, the Supreme Court affirmed the second case.³¹

"[T]he then Attorney General of Alabama," the *Callahan* court said, "took no action, or very belated action, to inform justices generally that they should cease the trial of traffic cases."

²⁵ Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 446 (1960).

²⁶ 349 F. Supp. 741 (D. Mass. 1972).

²⁷ 466 F.2d 59 (5th Cir. 1972).

²⁸ 349 F. Supp. at 746.

²⁹ *Hulett v. Julian*, 250 F. Supp. 208 (M.D. Ala. 1966).

³⁰ *Bennett v. Cottingham*, 290 F. Supp. 759 (N.D. Ala. 1968).

³¹ *Bennett v. Cottingham*, 393 U.S. 317 (1969).

Further "there was evidence that in answer to specific inquires the Attorney General advised that the Supreme Court case applied only to the county in which the defendant justices resided."³² Sheriffs and troopers continued to lodge and try charges in justice courts.

Callahan was brought to stop this. All justices of the peace, all sheriffs, the public safety director, and other state officials comprised the defendant class. The court of appeals affirmed full injunctive relief against the defendant class.³³

Plaintiffs' attorneys contributed not to the development of new law but to the enforcement of existing law. With a class action, they enjoined everybody with a capacity to thwart plaintiffs' constitutional right, and established the proposition that the United States Supreme Court's decisions apply in all parts of the state of Alabama.³⁴

In *Schneider* and *Callahan*, the courts respectively denied and granted the inclusion of defendant classes. Those decisions turned on whether the court thought action against a class necessary to enforce an injunction and to attain compliance with the law. If people obey without more, precedent suffices; a defendant class to enlarge the ambit of injunctive relief is unnecessary. Habitual and insolent resistance, however, evokes sterner measures.

INJUNCTIONS AND DECLARATIONS

A declaratory judgment is a remedy or a procedural tool hiding behind a remedy. A declaration may serve as a foundation for an injunction or damages. Declaratory relief, formerly concealed within suits to quiet title, to rescind, to interplead and to reform, has emerged as an independent, freestanding remedy.

Two types of litigants seek declaratory relief—plaintiffs who could sue for damages or an injunction but disdain to do so and people embroiled in an actual controversy which has not developed to the stage at which someone could seek damages or an injunction. A declaratory judgment is a final judicial determination clarifying and settling legal relations by telling the parties to a contro-

³² 466 F.2d at 61 and n.2.

³³ *Id.* at 62.

³⁴ *Id.*

versy what their rights and obligations are.³⁵ Declarations refine precedent by identifying the people and the problem.

A plaintiff may ask a court for either declaratory or injunctive relief before suffering actual injury. Both, as discussed here, lack substitutionary features and are prospective remedies. Before either enjoining or declaring, courts insist upon an actual, mature, or ripe controversy; courts disdain to enjoin or declare in response to hypothetical, abstract or green questions.³⁶

Callahan answered the question whether an injunction adds anything to declaration. If all were law abiding, a declaration would be the equivalent of an injunction.³⁷ But the world is not such a pleasant place. Violation of a declaration is not contempt.³⁸ Injunctions *command* parties to obey. If parties violate an injunction, the court may hold them in contempt. In the abstract, an injunction may be viewed as a declaration backed by a contempt sanction.

Before declarations became accepted, courts said that without contempt, injunctions would merely advise.³⁹ Today, however, observers view the noncoercive declaration as virtuous. Courts and commentators frequently say that the declaratory judgment is the more civilized and milder remedy.⁴⁰ Professor Borchard put it this way: "The adjudication, not the command, is the essence of judicial power, and in our civilized communities, it is the adjudication, and not the command, which evokes respect and official sanction, because it is a determination by the societal agent appointed to perform that function, and thus irrevocably fix legal relations."⁴¹ Declarations may lack an injunction's contempt teeth, but a society committed to the rule of law should not always need a bite to back up its bark.

³⁵ E. BORCHARD, DECLARATORY JUDGMENTS 299 (1934).

³⁶ *Steffel v. Thompson*, 415 U.S. 452, 458-460 (1974); *Chacon v. Granata*, 515 F.2d 922 (5th Cir. 1975); *Gulf Oil Corp. v. Federal Energy Ad.*, 391 F. Supp. 856, 864 (W.D. Pa. 1975); *Fletcher v. Bealey*, 28 Ch. 688 (1885). *Cf.*, *Rondeau v. Mossinee Paper Corp.*, 95 S. Ct. 2069, 2075 (1975); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

³⁷ 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 22 (1972).

³⁸ *Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974).

³⁹ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

⁴⁰ *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 467 (1974).

⁴¹ E. BORCHARD, DECLARATORY JUDGMENTS 10 (1934).

Because we distinguish between injunctions as coercive and declarations as noncoercive, the sanctions and prospective effect of those rulings differ. To preserve a controversy for adjudication, procedure allows preliminary injunctions and temporary restraining orders before final judgment.⁴² Violation of these interlocutory orders is contempt.⁴³ Because declarations neither compel nor forbid conduct, there are no interlocutory declarations punishable by contempt.⁴⁴

Applying the doctrine of res judicata to a declaration may convert it from an advisory opinion into a judgment in the traditional sense.⁴⁵ But because injunctions guide conduct in a changing future, some observers think res judicata inapposite for injunctions.⁴⁶

A declaration may be easier to obtain than an injunction. Equity limits the granting of injunctions. Plaintiff must be threatened with "irreparable injury" and reveal "clean hands" before a court will enjoin. But these limits do not circumscribe corresponding declaratory relief.⁴⁷ Second, because a court intrudes less when declaring than when enjoining, a single federal judge may declare a state statute unconstitutional; to enjoin state authorities from enforcing the same statute a three judge panel must be convened.⁴⁸

Courts recognize that there are times when it is propitious to declare but unseemly to enjoin. In *Powell v. McCormack*,⁴⁹ the question was whether the United States House of Representatives

⁴² FED. R. CIV. P. 65(a),(b).

⁴³ *United States v. United Mine Workers*, 330 U.S. 258 (1946).

⁴⁴ *But cf.*, *Doran v. Salem Inn, Inc.*, 95 S. Ct. 2561 (1975). (Preliminary injunction in declaratory judgment case).

⁴⁵ *Ma Chuck Moon v. Dulles*, 237 F.2d 241 (9th Cir. 1956), *cert. denied*, 352 U.S. 1002 (1957); 28 U.S.C. § 2201 (1970); RESTATEMENT OF JUDGMENTS § 77 (1942); E. BORCHARD, DECLARATORY JUDGMENTS 10-11 (1934); S. Rep. No. 1005, 73d Cong., 2d Sess. 2 (1934).

⁴⁶ *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1080-81 (1965); RESTATEMENT OF JUDGMENTS § 54(b) (1942).

⁴⁷ *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974); *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227, 241 (1937); *Age of Majority Educational Corp. v. Preller*, 512 F.2d 1241, 1245 (4th Cir. 1975); *Airways Theatre Inc. v. Canale*, 366 F. Supp. 343, 346-47 (W.D. Tenn. 1973). *But cf.*, *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971).

⁴⁸ *Alsager v. District Court*, 518 F.2d 1160, 1166 (8th Cir. 1975); *Age of Majority Educational Corp. v. Preller*, 512 F.2d 1241, 1245 (4th Cir. 1975).

⁴⁹ 395 U.S. 486 (1969).

had power to exclude a duly elected person who met the age, citizenship, and residency qualifications. The Supreme Court reversed a court of appeals decision that the political question doctrine barred relief and remanded for further proceedings. Apparently recognizing the hazards implicit in officiously interposing, the Court stated that "a Court may grant declaratory relief even though it chooses not to issue an injunction."⁵⁰

The United States Supreme Court has refined its ability to declare instead of enjoin in one abstruse but crucial type of proceeding: suits in which a present or potential state criminal defendant asks a federal court to relieve him from a state prosecution. The federal courts in those cases must integrate their duty to protect citizens' constitutional rights with separation of powers and federalism interests of the highest order. The Court distinguished injunctive from declaratory relief, saying "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."⁵¹

In *Roe v. Wade*⁵² and *Doe v. Bolton*,⁵³ the Court stated the reason for separating the remedial questions. The Court held that the statutes which forbade almost all abortions were unconstitutional. The district court had declared without enjoining. The Court approved. "[W]e assume," the majority observed, "the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional."⁵⁴

Justice Brennan, in his separate opinion in *Perez v. Ledesma*⁵⁵ and his majority opinion in *Steffel v. Thompson*,⁵⁶ distinguished

⁵⁰ 395 U.S. at 499.

⁵¹ *Zwicker v. Koota*, 389 U.S. 241, 254 (1967).

⁵² 410 U.S. 113 (1973).

⁵³ 410 U.S. 179 (1973).

⁵⁴ 410 U.S. at 166. The Court also mentioned that the statutes did not abridge free speech. *Id.* This may bear on the federal court's decision to intercede. But once the answer is affirmative, this observer cannot determine whether the fragile nature of first amendment freedoms provides a reason to distinguish one remedy from another. See also, *Doe v. Bolton*, 410 U.S. 179, 201-02 (1973).

⁵⁵ 401 U.S. 82, 93-131 (1971).

⁵⁶ 415 U.S. 452 (1974). See also *Hicks v. Miranda*, 95 S. Ct. 2281 (1975) (*Younger* applies if state suit begins before "proceedings of substance on the merits" occur in federal court); *Huffman v. Pursue*, 95 S. Ct. 1200, 1207 n.16 (1975).

declaratory from injunctive relief. *Steffel's* holding is narrow: if state authorities threaten but have not commenced a criminal prosecution, then comity, equity, and federalism do not preclude a federal declaratory judgment that the prosecution or statute violates the Constitution, although those same principles might preclude an injunction against an actual prosecution.⁵⁷ The reasoning is important. There are differences between declaratory and injunctive relief. Congress, when passing the declaratory judgment act, intended to supply federal litigants with a milder and less meddlesome remedy than the injunction. Thus, a declaration may be proper where an injunction is impolitic.

Some generalizations emerge concerning declarations and injunctions in constitutional adjudication. The remedies are separate. Declarations are less intrusive.⁵⁸ Indeed, to declare without enjoining may be part of a judge's considerable remedial discretion.⁵⁹ Courts begin to consider declaratory relief when an injunction may endanger inter- or intra-governmental relations. If it appears that the defendant will obey, an injunction may be officious and otiose; a declaration may suffice.⁶⁰

Lower courts declare without enjoining in a variety of circumstances,⁶¹ and often render remedial decisions equivalent to declarations without articulating the distinctions.⁶² Judge Carven states

⁵⁷ 415 U.S. 452, 475 (1974).

⁵⁸ *Id.* at 469; H.R. Rep. No. 1264, 73d Cong., 2d Sess. 2 (1934).

⁵⁹ *Rondeau v. Mosinee Paper Corp.*, 95 S. Ct. 2069, 2076-78 (1975); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); O. FISS, *INJUNCTIONS* 91-93 (1972); FED. R. CIV. P. 54(c).

⁶⁰ *Alsager v. District Court*, 518 F.2d 1160, 1165 (8th Cir. 1975).

⁶¹ *Miller v. Miller*, 504 F.2d 1067 (9th Cir. 1974); *United States v. Hunter*, 459 F.2d 205, 218-20 (4th Cir. 1971); *Bunton v. First National Bank of Tampa* 394, F. Supp. 793 (M.D.N.C. 1975); *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 629 (D.P.R. 1974); *Airways Theatre Inc. v. Canale*, 366 F. Supp. 343, 346-47 (W.D. Tenn. 1973); *Nader v. Bork*, 366 F. Supp. 104, 110 (D.D.C. 1973); *Smith v. U. of Tenn.*, 300 F. Supp. 777, 783 (E.D. Tenn. 1969); *Baker v. Binder*, 274 F. Supp. 658, 664-65 (W.D. Ky. 1967).

⁶² *Buckley v. Vales*, 96 S. Ct. 612, 694 (1976) (30 day stay); *Doe v. Poelker*, 515 F.2d 541, 546 (8th Cir. 1975) (Plaintiff withdrew request for injunction; court granted a declaration equivalent to an injunction); *Compton v. Naylor*, 392 F. Supp. 575, 578 (N.D. Tex. 1975) (ruling delayed for 6 months); *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 628-29 (D.P.R. 1974) (mixed declaration and injunction); *Washington Activity Group v. White*, 342 F. Supp. 847, 854 (D.D.C. 1971) (request for injunction suspended thirty days to allow defendants to consider

the reason in *Turner v. Blackburn*: "To enjoin the clerk of one of 100 counties is unseemly and, we think, unnecessary. County and state officers of North Carolina are not, and never have been, indifferent to the commands of the Constitution as interpreted and applied by either state or federal courts. *Stare decisis* in a state dedicated to the rule of law can be as effective, we think, as injunction."⁶³

Courts must decide whether to enjoin or declare.⁶⁴ Enjoining, when declaring will suffice, may create the impression that the defendant will ignore the decision unless threatened by sanctions. If, however, defendants ignore a declaration, someone must reengage them in time and money, consuming additional litigation,⁶⁵ perhaps stirring local passions in the process.⁶⁶ Moreover, courts should err on strictness' side because a society which relies on litigants to comply voluntarily cannot ignore defiant losers. If the declaratory judgment is the court's civilized remedy, then assurance of public adherence to the rule of law is the key to the use of that remedy.

As Professor Whitten points out, the *Steffel* opinion fails to distinguish fully between enjoining and declaring.⁶⁷ But *Steffel* insists that declarations are less intrusive than injunctions. This general statement subsumes the absence of the contempt sanction. Moreover, the differences are not as clear as pure logic might impel.

"whether they wish to take any action in accordance with the principles set forth in this opinion").

⁶³ 389 F. Supp. 1256, 1261 (W.D.N.C. 1975).

⁶⁴ *Doe v. Zimmerman*, 405 F. Supp. 534, 537 (M.D. Pa. 1975); *In United States v. Brittain*, 319 F. Supp. 1058 (M.D. Ala. 1970), the Alabama miscegenation case discussed at n.1 supra, the court: (1) declared the statute unconstitutional, (2) enjoined enforcement at the state level, and (3) required the Attorney General to advise all probate judges that the law was invalid. Judge Garrity of *Schneider v. Margossian*, 349 F. Supp. 741 (D. Mass. 1972), is desegregating the schools of Boston with an injunction backed by contempt; see *Morgan v. Kerrigan*, 509 F.2d 618 (1st Cir. 1975).

⁶⁵ See, e.g., *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970).

⁶⁶ See, e.g., *Cine Com Theatres Eastern States, Inc. v. Lordi*, 351 F. Supp. 42 (D. N.J. 1972), *vacated and remanded*, 503 F.2d 1398 (3d Cir. 1974); *Hamar Theatres v. Cryan*, 365 F. Supp. 1312 (D.N.J. 1973), *prob. juris. noted*, 416 U.S. 954 (1974).

⁶⁷ See Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N. CAR. L. REV. 591, 681, 685 (1975).

The separate opinions in *Steffel* reveal some disagreement about the declaratory judgment's attributes. Justice Rhenquist, concurring, asserted that declaratory judgments simply state rights and that federalism prevents a declaratory judgment that a prosecution is unconstitutional from becoming a foundation for a subsequent injunction.⁶⁸ A declaratory judgment is merely persuasive, neither *res judicata* nor binding precedent.⁶⁹ Justice White replied that a federal declaratory judgment is "more than a mere precedent"; indeed it "should be accorded *res judicata* effect in any later prosecution of that very conduct."⁷⁰ Nor must the winner of a federal declaration rest upon a state court plea of *res judicata*: "it would not seem improper to enjoin local prosecutors who refuse to observe adverse federal judgments."⁷¹

The majority opinion skated rapidly over the thin ice of *res judicata* and later injunctions. It merely accorded precedential effect to the declaration, stating that if the Supreme Court affirms a declaration that a prosecution is unconstitutional, then it will reverse any later criminal conviction.⁷² A more precise majority opinion might have destroyed unanimity. Justice White perceives a declaration as differing only a little from an injunction.⁷³ Justice Rhenquist, on the other hand, views a declaration as an advisory opinion in an actual controversy.⁷⁴ Justice Rhenquist repudiates Professor Borchard's idea that declarations are the civilized remedy and overlooks the policy of interposing *res judicata* after one full "day in court" to prevent duplicative, potentially inconsistent adjudications⁷⁵ and to ensure fairness, economy, and ultimately public respect. Justice White, it seems, holds the correct position.

As a thoughtful note points out, *Steffel's* meaning depends on the preclusive effect of a declaration and whether a declaration may be the basis for a later injunction.⁷⁶ Justice Rhenquist thinks that federal declarations are as legally binding as letters to the

⁶⁸ 415 U.S. at 479.

⁶⁹ *Id.*

⁷⁰ *Id.* at 477.

⁷¹ *Id.* at 478.

⁷² *Id.* at 470.

⁷³ *Id.* at 476-78.

⁷⁴ *Id.* at 484.

⁷⁵ *Id.* at 478-85. A. VESTAL, RES JUDICATA PRECLUSION 209-15 (1969); Whitten, *supra* note 67, at 682.

⁷⁶ Note, RUTGERS L. REV. 720, 747-50 (1975).

editor of the local newspaper.⁷⁷ But unless entitled to viability in res judicata situations, a declaration is an advisory opinion, unconstitutional under the "case or controversy" requirement.⁷⁸ Congress, moreover, intended a declaration to be a foundation for an injunction.⁷⁹

To preserve the distinction between declarations and advisory opinions, declarations must mean something. But if an injunction automatically follows a declaration, then a declaration appears to be at least a nascent injunction. To preserve the distinction between declarations and injunctions, declarations may not be coercive. Therein lies the dilemma.

Contempt is the crucible of an injunction. The true test of an injunction is whether it will support contempt. If the difference between enjoining and declaring is that injunctions include sanctions, then we may expect the courts to enforce violated injunctions with contempt.

We might assume from the few written opinions upholding contempt⁸⁰ that this is a remarkably law abiding nation. Recent history, however, lays that canard to rest. And one who looks will find many opinions in which the court could, but fails to utilize contempt.⁸¹ The contempt cases reveal those charged to uphold the law setting court orders to naught.

A strong policy of preserving respect for courts compels defendants to obey injunctions.⁸² Scorning federal court orders strikes a blow at federalism. Federal courts must protect federally guaranteed rights. Flouting injunctions dilutes the rule of law.

⁷⁷ 415 U.S. at 478-85.

⁷⁸ Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1865 (1975).

⁷⁹ 28 U.S. 2202 (1970); *Vermont Structural Slate Co. v. Tatco Bros. Slate Co.*, 253 F.2d 29 (2d Cir. 1958).

⁸⁰ See, e.g., *Griffin v. County School Board of Prince Edward Co.*, 363 F.2d 206 (4th Cir. 1966); *In re Herndon*, 325 F. Supp. 379 (M.D. Ala. 1971).

⁸¹ See, e.g., *Morgan v. Kerrigan*, 509 F.2d 618 (1st Cir. 1975); *Therault v. Carlson*, 495 F.2d 390 (5th Cir. 1974); *United States v. Barnett*, 346 F.2d 991 (5th Cir. 1965); *Miller v. Carson*, 401 F. Supp. 835, 842 (M.D. Fla. 1975); *Spangler v. Pasadena City Board of Educ.*, 384 F. Supp. 846 (S.D. Calif. 1974); *Class v. Norton*, 376 F. Supp. 496 (D. Conn. 1974); *Wollfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973); *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973); *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973); *Doe v. Harder*, 310 F. Supp. 302 (D. Conn. 1970), *appeal dismissed*, 399 U.S. 902 (1970).

⁸² *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

If the courts are outraged, they successfully dissemble and mildly resort to a variety of less than draconian tactics. They importune and remonstrate. They delay. They ignore the facts and find no intent or no willfulness. They convert criminal contempt into civil. They impose coercive contempt. This is, conceptually, a second injunction with the punishment specified,⁸³ which allows the contemnor an opportunity to "purge" the contempt. Finally, they may enter a judgment of contempt without sanctions, observing that there is no sufficient reason to prosecute further.⁸⁴ All this contrasts starkly with the newspaper reporters who were punished for contempt simply because they exercised what they believed to be their constitutional rights.⁸⁵

The seeker after intelligible doctrine examines contempt opinions in vain. A single generalization emerges: courts hesitate to use contempt against government officials. The remedial question is less what the law allows than what is politic. Contempt is an extraordinary remedy. "The very amplitude of the power," the Supreme Court said, "is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper."⁸⁶ Contempt is a flexible remedy. Courts employ contempt to attain compliance, not to display retribution.⁸⁷ Finally, when dealing with refractory state and local officials, contempt may be unwise for a different reason; the blood of the martyrs, it is often observed, was the seed of the church.

A few questions arise. If coercive remedies are a matter of what is politic, should the court consider in advance whether it will be willing to impose contempt for a violation? If unwilling, should it refuse to enjoin and merely declare? If courts are unwilling to utilize contempt, are injunctions really de facto declarations? Should courts continue to enjoin but be more willing to find contempt and impose coercive sanctions? Or perhaps the courts should declare first under the least drastic means policy. Most people obey definitive statements of the law. Challenge to a decla-

⁸³ O. FISS, INJUNCTIONS 763-64 (1972).

⁸⁴ *United States v. Barnette*, 346 F.2d 991 (5th Cir. 1965).

⁸⁵ *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), 349 F. Supp. (M.D. La. 1972); 476 F.2d 373 (5th Cir. 1973), *cert. denied*, 414 U.S. 979 (1973).

⁸⁶ *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 451 (1911).

⁸⁷ *Miller v. Carson*, 401 F. Supp. 835, 842-43 (M.D. Fla. 1975).

ration might lead to an injunction; and defiance of an injunction might be, in good conscience, contempt.

CONCLUSION

Precedent, class actions, declarations, and injunctions differ; but when abstract distinctions collide with remedial practicalities, the differences become less apparent. Moreover, many of the differences are of personal style and an articulated individual preferences which cannot be redacted in a word formula. Rules cannot accommodate the infinite variety of fact combinations. In the complex and serious business of government through courts, all these devices lend remedial flexibility. This article lacks final answers to some of the basic questions posed but hopefully will provide guide for the search for a civilized yet effective remedial structure in constitutional adjudication.