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**HISTORY COMES CALLING: DEAN
GRISWOLD OFFERS NEW EVIDENCE
ABOUT THE JURISDICTIONAL
DEBATE SURROUNDING THE
ENACTMENT OF THE DECLARATORY
JUDGMENT ACT**

Donald L. Doernberg*
Michael B. Mushlin**

In a recent article,¹ we proposed that the Declaratory Judgment Act of 1934² was intended, contrary to the Supreme Court's long-standing interpretation,³ to enlarge the subject matter jurisdiction of the federal courts. When Congress considered the Act,⁴ jurisdictional concerns centered around whether declaratory judgments would violate the case-or-controversy clause,⁵ not whether introduction of the device would expand the federal question jurisdiction Congress already had authorized.⁶ There is, in-

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The authors wish to express their gratitude to Dean Erwin N. Griswold for his generosity in sharing his recollections and insights with them, and for permitting his contribution to this difficult area to be published.

1. Doernberg & Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529 (1989).

2. Act of June 14, 1934, ch. 512, 48 Stat. 955 (current version at 28 U.S.C. §§ 2201-02 (1982 & Supp. 1985)).

3. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

4. The Act was before Congress from 1919 to 1934. The chronology of its adoption is discussed extensively in Doernberg & Mushlin, *supra* note 1, at 547-73.

5. U.S. CONST. art. III, § 2, cl. 1.

6. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (current version at 28 U.S.C. § 1331 (1982)).

deed, substantial evidence that Congress intended to expand federal question jurisdiction to include at least two, and possibly three, case models;⁷ there is virtually no evidence supporting the contrary position taken by the Supreme Court in *Skelly Oil Co. v. Phillips Petroleum Co.*⁸ and subsequent cases.⁹ We concluded that a complaint seeking declaratory relief ought to be evaluated for jurisdictional purposes on its face,¹⁰ under the same rules as complaints seeking coercive relief. Certainly nothing in the history of the Declaratory Judgment Act suggests that a complaint seeking declaratory relief should be denied federal adjudication merely because the court would have lacked jurisdiction if the complaint instead had sought coercive relief. We therefore argued that the jurisdictional analysis prescribed by the Court in *Skelly Oil* should be abandoned, and that the Declaratory Judgment Act should be recognized as having created a cause of action and expanded federal question jurisdiction.

Dean Erwin N. Griswold¹¹ sent the following letter in response to our article.¹² It is reprinted with his permission. Our reply follows.

The February, 1989, issue of the *UCLA Law Review* came across my desk the other day, and I was much interested in see-

7. The three case models are discussed in their historical context in Doernberg & Mushlin, *supra* note 1, at 548, 562-73. In brief, the three models are:

(1) a "mirror-image" case, in which the party seeking the declaratory judgment would have been the defendant in a traditional federal-question coercive action but has not yet been sued; (2) a "federal-defense" case, in which the defendant asserts a federal defense to the plaintiff's nonfederal coercive action; and (3) a "federal-reply" case, in which both the complaint and answer would include only state claims but where the plaintiff's reply would raise a federal issue.

Id. at 548 (footnotes omitted).

8. 339 U.S. 667 (1950). The Court in *Skelly Oil* stated that Congress intended the Declaratory Judgment Act to be "procedural only," merely "enlarg[ing] the range of remedies available in the federal courts . . ." *Id.* at 671. On that premise, the Court prescribed the analytical method still used today for declaratory judgment cases, in which the jurisdictional inquiry is directed toward evaluating a hypothetical coercive complaint corresponding to the declaratory judgment complaint that was actually filed. See Doernberg & Mushlin, *supra* note 1, at 544.

9. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

10. *Skelly Oil* prescribed hypothetically redrafting declaratory judgment complaints as if they had sought coercive relief instead, and then evaluating the nonexistent coercive complaint under the tests for federal question jurisdiction. See Doernberg & Mushlin, *supra* note 1, at 544.

11. Dean of Harvard Law School, 1946-1967; Solicitor General of the United States, 1967-73. Dean Griswold is currently a member of Jones, Day, Reavis & Pogue in Washington, D.C.

12. Letter from Erwin N. Griswold to Donald L. Doernberg and Michael B. Mushlin (Mar. 3, 1989).

ing your article on the Declaratory Judgment Act. I have read it with much interest, and it has brought back many memories, since I was, in a remote sense, "present at the creation."

To explain this, I will set out a sort of long footnote to your article.

My third year as a student at the Harvard Law School was 1927-28. During that year, I took Professor Frankfurter's course on Federal Jurisdiction. It was a lively course, and there was much discussion of many problems. That was the year of *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927), and *Liberty Warehouse Co. v. Burley*, 276 U.S. 71 (1928), shortly followed by *Will-ing v. Chicago Auditorium Association*, 277 U.S. 274 (1928). All of these cases were the subject of extensive discussion in Professor Frankfurter's class.

One of my clear memories is that Professor Frankfurter was much concerned about "case or controversy." We dealt at length with the *Muskra*¹³ case and other matters, and the declaratory judgment problem was discussed largely in terms of case or controversy. There was no doubt of two things—first, that Professor Frankfurter was opposed to federal jurisdiction in declaratory judgment cases, and, second, that much of his opposition stemmed directly from his close relationship to Justice Brandeis.

There was, I think, substantial reason for the concern of Justice Brandeis and Professor Frankfurter, particularly in the atmosphere of the times when courts, including the Supreme Court, were very free and easy in the matter of holding statutes unconstitutional. Specifically, the opposition of Justice Brandeis was largely based on his experience with the "Advisory Opinion" practice in Massachusetts, under which the Supreme Judicial Court of Massachusetts gives opinions on the constitutional validity of a statute before it is enacted into law. Because of Advisory Opinions, many constructive changes in the law in Massachusetts had been stopped in their tracks, without any opportunity for practical experience.

Under the Advisory Opinion system, the constitutionality of a proposed statute is considered *in vacuo*. There is no actual case. There are no facts. There is no individual who has been hurt, or is being protected. There is a tendency for the court (and counsel in their argument) to hunt out the worst possible factual assumption, and to conclude that the statute, as drawn, would be invoked in such a case, leading to the result that the statute should be declared unconstitutional.

Justice Brandeis and Professor Frankfurter felt that such a question should be considered by a court only in a concrete case, based on actual facts. Then, it might be possible, in a trial, to present the factual background, to show what the statute would

13. [EDITOR'S NOTE] *Muskra v. United States*, 219 U.S. 346 (1911).

do to this particular plaintiff, and to present facts and arguments which would support the constitutionality of the statute as applied to those facts.

This is, I think, a real concern. A sort of reverse application of it can be found in the case of *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988), recently decided by the Supreme Court. There, there was an attack on the validity of an ordinance of the city of San Jose. The effort to get a decision that the ordinance violated the due process clause was unsuccessful because there was not really an actual case. There were no specific facts. There was nothing to indicate that anyone had *actually* been harmed, or even that any specific person would be harmed. There were, indeed, indications that on an actual record, with facts, there might be a question about the validity of the ordinance. (This includes not only clear and specific provisions of the ordinance or statute, but also questions of the practical or administrative construction of it. In other words, even if the statute or ordinance is subject to an interpretation which might make it unconstitutional, that question need not be faced if there is clear administrative or practical construction of the statute, keeping it within the bounds of constitutionality. (I am enclosing a copy of a page from a Review article which illustrates the point.))¹⁴

Perhaps I am unduly influenced by my first encounter with this problem, more than sixty years ago. I do think, though, that there is room to limit the "mirror image" application of declaratory judgments, at least as far as questions of constitutionality are concerned, so that the question of constitutionality will only be considered on the actual facts of a real case.

Dean Griswold's letter tends to confirm our historical conclusion¹⁵ that opposition to the declaratory judgment device arose pri-

14. [EDITOR'S NOTE] The relevant portion of the page reads as follows:

In *Pennell v. City of San Jose*, [108 S. Ct. 849 (1988)] the Court generally approved the concept of governmental regulation of rental markets. But there is an interesting invitation contained within the first few paragraphs of the majority opinion written by Chief Justice Rehnquist. The case arose in a context, according to the Chief Justice, "without any showing in a particular case as to the consequences [of the regulation's application, and] does not present a sufficiently concrete factual setting for the adjudication of the takings claim the appellants raise here."

Johnson, *Rent Control and the Theory of Efficient Regulation: Introduction: Is the Supreme Court Ready for the Question*, 54 BROOKLYN L. REV. 729, 739 (1988) (footnotes omitted).

Pennell sought a declaration in the California courts that the new San Jose ordinance violated the takings clause of the fifth amendment, U.S. CONST. amend. V, and the due process and equal protection clauses of the fourteenth amendment, U.S. CONST. amend. XIV. The Court found that the controversy was insufficiently developed to permit adjudication of the claim of violation of the takings clause, 108 S. Ct. at 856-57, but it did affirm the judgment of the California Supreme Court rejecting plaintiff's due process and equal protection claims on the merits.

15. Doernberg & Mushlin, *supra* note 1, at 554-73.

marily because of case-or-controversy concerns, not because of any inherent problem in expanding federal question jurisdiction *within* the confines of the case-or-controversy clause. We are sensitive to the problem of opinions being rendered in the absence of a genuine case or controversy. Indeed, we did not mean to suggest either that we think courts ought so to act or that Congress, in finally enacting the Declaratory Judgment Act in 1934, suggested abandoning that constitutional principle of judicial restraint to which Justices Brandeis and Frankfurter so strongly adhered. Certainly we found no evidence to suggest that Congress intended to establish a declaratory judgment system analogous to the Massachusetts Advisory Opinion system to which Dean Griswold refers.¹⁶ We do think, however, that the declaratory judgment device can encompass many cases presenting concrete disputes appropriate for judicial resolution.¹⁷

To be sure, some actions seek declaratory judgments in circumstances where dismissal on case-or-controversy grounds is appropriate,¹⁸ but that is true of cases seeking coercive relief as well.¹⁹ We merely think that each case must be examined individually to determine whether it presents, as the Court said in a different context, "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."²⁰ Thus, in many cases, like *Franchise Tax Board v. Construction Laborers Vacation Trust*,²¹ a

16. Congress was aware of and hoped to avoid the problems of that system. *Id.* at 566-68.

17. As Professor Wright has noted, "The critical question in each case is whether the facts averred under the existing circumstances present a real controversy between parties having adverse legal interests of such immediacy and reality as to warrant a declaratory judgment." C. WRIGHT, *LAW OF FEDERAL COURTS* 671 (4th ed. 1983) (footnote omitted). Jurisdictional problems aside, the Supreme Court seems to have had no difficulty in distinguishing declaratory judgment cases that do present justiciable cases or controversies from those that do not. *Compare* *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498 (1972) and *Alvater v. Freeman*, 319 U.S. 359 (1943) and *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) with *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) and *Golden v. Zwickler*, 394 U.S. 103 (1969) and *Eccles v. People's Bank*, 333 U.S. 426 (1948).

18. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103 (1969).

19. *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972).

20. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The *Baker* Court, of course, was speaking of standing rather than case or controversy, but we think the Court's sentiment is transferable in this instance.

21. 463 U.S. 1 (1983). *Franchise Tax Board* is discussed extensively in Doernberg & Mushlin, *supra* note 1, at 544-47, 578-82.

declaratory judgment action does present a concrete case and should be adjudicated.

Dean Griswold's recollection of then-Professor Frankfurter's reservations about the potential case-or-controversy problems of declaratory judgments is especially important in light of Justice Frankfurter's authorship of the Court's opinion in *Skelly Oil*.²² By the time *Skelly Oil* was written, Justice Frankfurter's views of the constitutional problems of declaratory judgments and the jurisdictional concerns that flowed from those problems apparently had changed from what they were when he taught Dean Griswold's Federal Jurisdiction class. We respectfully submit that Professor Frankfurter's understanding of jurisdictional concerns about the declaratory judgment device was more accurate and better supported by history than was Justice Frankfurter's.

22. 339 U.S. 667 (1950).