

THE CITIZEN AS LITIGANT IN PUBLIC
ACTIONS: THE NON-HOHFELDIAN
OR IDEOLOGICAL PLAINTIFF *

LOUIS L. JAFFE †

Despite certain relevant facts and modern developments, it is still holy writ that the citizen *qua* citizen is not a proper party plaintiff in a lawsuit testing questions of constitutionality. Indeed, it is argued that this is simply an illustration of a basic general proposition concerning the proper function of the judiciary. This function is defined initially in terms of the constitutional grant of jurisdiction to certain "cases, in law and equity," and certain "controversies." From the very beginning, the Supreme Court has held that its jurisdiction is limited to these "cases" and "controversies." A similar doctrine prevails in most of the states regardless of the precise form of the constitutional definition of the judicial power. Thus, unless the state constitution specifically provides for advisory opinions, the courts hold that they are without power to give them.

The crucial question, then, is whether it is a necessary element of a case that there be a plaintiff who proffers for judicial determination a question concerning his own legal status. It may be something of an analytic task to say what is meant by "a question concerning" the plaintiff's legal status. One can fall back on Hohfeldian terminology.¹ In those terms the meaning would be that the plaintiff is seeking a determination that he has a right, a privilege, an immunity or a power. Might we be permitted to characterize this plaintiff as a Hohfeldian or ideological plaintiff?

Perhaps those who demand a Hohfeldian plaintiff would be prepared to relax the requirement to include plaintiffs who claim that the defendant's action damages them in some appreciable fashion as distinguished from its effect on persons in general or in large, indeterminate groups. It has been suggested that the problem posed by such

* There is presently pending in the Supreme Court the case of *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y.), *prob. juris. noted*, 389 U.S. 895 (1967), raising the question whether plaintiffs, as citizens and as taxpayers, have standing to challenge federal appropriations alleged to constitute an establishment of religion contrary to the first amendment. See also 36 U.S.L.W. 3361-63 (Mar. 18, 1968) (summary of oral argument in the case).

† Byrne Professor of Administrative Law, Harvard University. A.B. 1925, Johns Hopkins University. LL.B. 1928, S.J.D. 1932, Harvard University.

¹ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

a plaintiff is not a true problem because allowing him to complain is equivalent to recognizing that he does have a legally protected interest. In other words, in such cases the question is not whether the plaintiff has standing, but whether he has a right. This may indeed be so in a particular case; but I would maintain that recognition of standing is not necessarily equivalent to recognition of a right. This, I think, is demonstrable in the case of the so-called taxpayer suit.² I do not believe that the taxpayer can qualify even in an extended sense as a Hohfeldian plaintiff. I do not speak of a suit by a taxpayer to enjoin the collection of a tax, which clearly would satisfy the classical plaintiff requirement, but of a suit to enjoin an expenditure. To justify this suit in classical terms it is argued that, if the plaintiff wins, his tax bill will be reduced. But the argument has no formal validity: the plaintiff's tax liability is not adjudicated in such a suit. Nor can it be justified on the "realistic" ground that, because success will reduce his tax bill, the taxpayer's interest is at least analogous to that of the ordinary plaintiff. The allegedly illegal act may involve a large expenditure of money and the plaintiff may be, as Professor Davis points out,³ a Gargantuan taxpayer of the order of magnitude of General Motors. But very few courts require that either the proposed expenditure or its effect on the plaintiff's tax bill be of any consequence whatever. Thus, an Ohio taxpayer may attack the constitutionality of a proposed method of adopting an amendment to the Constitution.⁴ His supposed interest is the effect on his tax liability of printing the proposal on a ballot. If a personal stake is a *significant* element of a case, clearly this remote, virtually hypothetical monetary involvement cannot supply that element. Thus the taxpayer suit must be accounted for if it is to be justified as one form of citizen action.

Is a Hohfeldian plaintiff a necessary requisite of a case? I would contend that whether the analysis proceeds in terms of history, logic or policy the answer is "no." I would grant that the central function of the courts is the determination of the individual's claim to "just" treatment. Where the citizen is demanding his legally prescribed due in the form of money, property or the specific performance of an act, or where he is resisting claims upon his property or his person, it is a fundamental tenet of our legal system that there should be a tribunal which will provide a disinterested determination of his claim. Neither

² I have canvassed in detail the whole subject of taxpayer and citizen actions in L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 459-501 (1965) [hereinafter cited as JAFFE]. This chapter is a revision of Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

³ Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386-91 (1955).

⁴ *Hawke v. Smith*, 253 U.S. 221 (1920).

the executive nor the legislature is as dependable as the judiciary in making such determinations and, if necessary, we should exclude other functions which might impair the judiciary's performance of this role. Indeed, if we had to choose just one function for the judiciary we should choose the administration of justice in this sense.

But it has not been true in the past, and it is even less true now, that Anglo-American courts have been thus restricted by any requirement of a Hohfeldian plaintiff. The prerogative court jurisdiction of King's Bench—prohibition, certiorari, mandamus—could be set in motion by a stranger to the official action, the legality of which it was the office of the writ to test.⁵ What I have called the citizen's mandamus has been widely used in many, though not all, states as a means of testing the validity—constitutional and statutory—of official action. The taxpayer's action, which does not satisfy the requirements of a Hohfeldian plaintiff, has (in one form or another) been rationalized in nearly all of the states, sometimes by common law decision, sometimes by statute. And, as far as I know, none of these statutes has been held invalid as imposing non-judicial functions on the courts.

Of particular importance in the posture of federal law is the line of authority inaugurated by *FCC v. Sanders Brothers Radio Station*.⁶ In *Sanders*, the Court construed a typical statutory provision allowing an appeal by any "person aggrieved or whose interests are adversely affected" by a decision of the administrative agency.⁷ An existing radio broadcasting licensee attacked the grant of a radio license which offered new competition. The Court insisted that the licensee had no legally protected interest under the statute, no interest in being free from competition.⁸ Yet it was held to be a proper party under the statute.⁹ It was, in the phrase of Judge Jerome Frank in *Associated Industries, Inc. v. Ickes*,¹⁰ a "private Attorney General." Two years later, Justices Douglas and Murphy, dissenting in *Scripps-Howard Radio, Inc. v. FCC*,¹¹ argued that if the Communications Act is read as not creating a substantive right in the appellant, the appeal by a so-called "person aggrieved" does not satisfy the constitutional requirement of a case or controversy. In the face of this argument the Court squarely held (per Frankfurter, J., a stout defender of the case or

⁵ See JAFFE 462-75. For a recent example, see *Mariano v. Building Inspector*, 233 N.E.2d 903 (Mass. Sup. Ct. 1968).

⁶ 309 U.S. 470 (1940).

⁷ See, e.g., Communications Act, 47 U.S.C. § 402(b) (6) (1964).

⁸ 309 U.S. at 473, 475.

⁹ *Id.* at 477.

¹⁰ 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943).

¹¹ 316 U.S. 4, 18 (1942) (Douglas & Murphy, JJ., dissenting).

controversy requirement) that "these private litigants have standing only as representatives of the public interest."¹²

Only recently has the large and basic significance of *Sanders* begun to appear. It can be argued that *Sanders* does not depart from the requirement of the Hohfeldian plaintiff because the decision to give a plaintiff standing is logically equivalent to giving him a substantive right to be free from illegal competition. But it would be difficult to analyze in such terms the recent case of *Scenic Hudson Preservation Conference v. FPC*.¹³ In this case a conservation society was held to have standing to attack an order of the Federal Power Commission allowing the location of a power storage plant on Storm King Mountain. One can, no doubt, frame a logical sentence to the effect that this is equivalent to a holding that persons and groups of persons interested in conservation have a "right" that due weight be given to conservation in decisions under a statute which mandates a concern for conservation. But this is no different from stating that any citizen can bring an action to enforce a law in which he is interested, because to allow him to bring suit is equivalent to recognizing that he has a "right" to have the law enforced. This obviously renders meaningless the supposed requirement of a Hohfeldian plaintiff, and is another way of saying that such a plaintiff is not necessary to constitute a case or controversy. The traditional requirement is one that distinguishes the particular plaintiff from the generality of citizens, taxpayers, and so forth, and is required precisely because the argument maintains that the administration of justice is not designed to vindicate the interest of the fungible citizen in the enforcement of the law. This plaintiff, it would be said, must seek his relief from the *political process* where he, along with those who feel as he does, will be represented by elected officials.

Furthermore, the Court, until *Doremus v. Board of Education*,¹⁴ had taken appellate jurisdiction of taxpayer¹⁵ and citizen mandamus¹⁶ cases properly instituted in the state courts. This clearly assumes that they are cases and controversies. Mr. Justice Jackson in *Doremus* distinguished *Everson v. Board of Education*¹⁷ on the ground that in the latter case the plaintiff "showed a measurable appropriation or disbursement of school-district funds."¹⁸ It was apparent, he stated,

¹² 316 U.S. at 14.

¹³ 354 F.2d 608 (2d Cir. 1965).

¹⁴ 342 U.S. 429 (1952).

¹⁵ See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cochran v. Board of Educ.*, 281 U.S. 370 (1930); *Hawke v. Smith*, 253 U.S. 221 (1920); *Crampton v. Zabriskie*, 101 U.S. 601 (1879).

¹⁶ See, e.g., *Koenig v. Flynn*, 285 U.S. 375 (1932).

¹⁷ 330 U.S. 1 (1947).

¹⁸ 342 U.S. at 434.

that what was sought to be litigated in *Everson* was not a "direct dollars-and-cents injury" but "a religious difference."¹⁹ But in *Hawke v. Smith*²⁰ a state taxpayer sought successfully to test whether a proposed method of ratifying amendments to the Constitution was consistent with the procedure provided by article V. The only cost involved was the printing of the proposal on the ballot. In *Koenig v. Flynn*²¹ a citizen of New York was permitted to raise the constitutionality of a joint resolution of the state legislature establishing voting districts, despite the fact that there was no allegation of any monetary interest or concern. It seems not even to have occurred to the Justices that their jurisdiction was questionable. Furthermore, *Doremus* completely overlooked *Sanders* and its progeny of "private litigants" who "have standing only as representatives of the public interest."²² Clearly it is too late to contend that a non-Hohfeldian plaintiff offends the case or controversy requirement.

What has been said so far goes to the proposition that the courts of this country, including the Supreme Court, have taken jurisdiction of proceedings initiated by non-Hohfeldian plaintiffs. The question remains whether this line of authority should be encouraged. Are these cases consistent with the functions of the case or controversy requirement?

The usual justification for the requirement runs in terms of the necessary conditions for the rational exercise of the judicial power. The court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution. It is argued that unless the plaintiff is a person whose legal position will be affected by the court's judgment, he cannot be relied on to present a serious, thorough, and complete argument. I do not know whether there is any way of finding out whether non-Hohfeldian plaintiffs are less zealous than Hohfeldian ones. My own recourse is to my understanding of human nature, which tells me that there is no predictable difference between the two. If it were thought that self-aggrandizement is a more dependable motive than ideological interest, I would point out that it usually requires a financial outlay to undertake a lawsuit, so that once launched on the lawsuit the ideological plaintiff has, at least, committed a sum of money and so, in some

¹⁹ *Id.*

²⁰ 253 U.S. 221 (1920). *Cochran v. Board of Educ.*, 281 U.S. 370 (1930), is also a state taxpayer case.

²¹ 285 U.S. 375 (1932).

²² *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 1, 14 (1942).

sense, has a financial investment to protect. But the very fact of investing money in a lawsuit from which one is to acquire no further monetary profit argues, to my mind, a quite exceptional kind of interest, and one peculiarly indicative of a desire to say all that can be said in the support of one's contention. From this I would conclude that, insofar as the argument for a traditional plaintiff runs in terms of the need for effective advocacy, the argument is not persuasive.

The second argument for a restrictive definition of case and controversy is that the judicial power—particularly in the constitutional field—is inconsistent with the fundamental premises of a democratic system and has proved to be a block to effective government. Seen in this light, the case or controversy requirement is a device for limiting judicial intervention to the minimum needed for the administration of justice. Inevitably the exercise of that function involves lawmaking, and it is precisely at that point that the judicial function runs afoul, it is argued, of the premise that in a democracy laws are to be made by a representative body acting under majority rule. I do not take issue with the proposition that majority rule is at the heart of a democracy as we know and understand it. But an unqualified majoritarian theory does not suffice for our lawmaking needs. On the one hand, our practice—take for example the rules of our legislative bodies—gives formal recognition to minority interests. And on the other, we have always been aware that the effective power of minorities, sometimes in combination, sometimes operating in the vacuum of mass indifference, blocks the formation of effective majorities. In democracies, as in other forms of government, majorities are made by leaders and elites.

I contend that judges, operating within the confines of the case or controversy requirement, may help supply that leadership. This does not require that judges as a class be any better than Congressmen, Senators, executives or businessmen. It does no more than recognize that, given jurisdiction of a case, those judges who do have qualities of leadership may have the opportunity of solving a problem which other responsible lawmaking bodies have not been able to solve, often because of the obstruction of minorities or the indifference of the citizenry. And it may happen that, because of the character of the question, the judicial process is well-suited to devise a solution (though, as was true of the reapportionment problem, it may be very ill-suited). Be that as it may, the solution is, as is true of all solutions, only an experiment. If the solution is put in constitutional terms it may be at least qualified by legislation, and it may be set aside—or modified—by constitutional amendment, later judicial decision, or popular nulli-

fiction. And as is true of all acts of leadership, a judicial action may provoke, by way of reaction or reinforcement, action at the legislative level. Thus, though judicial intervention may cause popular responsibility to atrophy it may, on the contrary, energize it as we have seen in the enormous legislative movement generated by the school desegregation decision.²³

What I have said is relevant to the question whether judicial lawmaking is contrary to democratic theory. There still remains the historical argument against such judicial action. It will be said that the Supreme Court has, without constitutional warrant, defied the democratically declared will of the country. This assumes that a decision which cannot be rationally derived from constitutional texts is an abuse of power, though I know principled, law-minded persons who are prepared to accept an occasional decision—the reapportionment decision²⁴ for example—which, in their opinion, cannot be so grounded.²⁵ What one of them would call a *coup de main* may be the only workable way out of a serious impasse.

I suspect that there are very few, even among those most critical of the Court, who do not admire some aspects of its performance. This, I think, would be true of the Court's protection of the national market from discriminating state legislation. They might argue that this job could have been better done by Congress, and that had the Court not intervened Congress would have been compelled to act. Their preference would be for the more democratically achieved solution, and they might be so principled as to insist that even the not unlikely failure of Congress to act would be better than judicial tutelage. Or they might see this as an exception and argue, as Holmes did, that democracy is not too much to be trusted or insisted upon where the controversies arise out of intra-federal clashes of interest. But would there not be fairly broad support—even among the critics—for the judicial enforcement of procedural protections? Perhaps even in this area the problem is in some measure a federal one. A great deal of the jurisprudence of the Supreme Court reflects, more or less directly, a determination to impose national standards upon recalcitrant states—particularly those most embroiled in the Negro problem, though this line of decision in its later-day manifestations has been directed against the entire country. This development reflects in part the fact that the

²³ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁴ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁵ Though the striking down of specifically discriminating aspects, *see, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or irrational classifications, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962), is not difficult to rationalize in 14th and 15th amendment terms, the flat, unmodulated one-man-one-vote formula may be explicable simply as a convenient administrative solution, once given judicial intervention.

need for protection of the Negro minority is no longer confined to the states of the Confederacy. Judges such as Brandeis who preached judicial restraint did not hesitate to extend the reach of the judicial power to the protection of "fundamental rights" (a phrase not to be found in the Constitution) comprised within the term "liberty."²⁶

Those who distrust the Supreme Court as an institution are entitled to rely heavily on the roughly thirty years of judicial nullification of social legislation between 1905 and 1937.²⁷ There were earlier decisions in *Dred Scott*,²⁸ *Hepburn v. Griswold*²⁹ (quickly and precariously atoned) and *Pollack v. Farmers' Loan & Trust Co.*,³⁰ but nothing quite equals in extent and significance the Court's quarter-century veto of welfare legislation, legislation which all of the modern democracies have found necessary for the maintenance of social welfare and political harmony. It is a heavy indictment. And a few, at least, of those same critics might believe that some of the Court's current decisions would justify further counts in the indictment. But there are probably few critics who would contend that, given our Constitution with its scheme of a federal government and the Bill of Rights, the Court's performance is on balance so bad that it would be better to do without it.

But this, it will be said, is not the alternative. It is admitted that we must have the Court to administer justice. It may in the course of performing this job do some good things, but since it does so many bad things, or is at best so undependable, we should restrict its jurisdiction to the minimum needed to perform its basic task. I would reply that the requirement of a Hohfeldian plaintiff is an arbitrary limitation which does not correlate with the potential for good or evil. The Court's power to do good may arise as well in suits brought by ideological plaintiffs; and its bad decisions may be and have been rendered in cases with traditional plaintiffs (after all, it has, almost without exception, required such plaintiffs).

It may be said that the lack of a traditional plaintiff suggests that the issue is essentially "political" rather than "legal," but I do not think that this assertion is borne out by the cases. Whether a tax or a regulation "burdens" interstate commerce is, of course, raised in a case in which some person is the object of the questioned tax or regu-

²⁶ *Whitney v. California*, 274 U.S. 357, 373 (1927) (dissenting opinion); see Jaffe, *Was Brandeis an Activist?*, 80 HARV. L. REV. 986, 991-93 (1967).

²⁷ From *Lochner v. New York*, 198 U.S. 45 (1905), to *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

²⁹ 75 U.S. (8 Wall.) 603 (1869), *overruled in Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

³⁰ 157 U.S. 429 (1895).

lation. The issue, however, is quite unlike the ordinary claim for justice according to law, either in its dimensions or in the standards applicable for its decision. There are, indeed, as many cases as one would want to demonstrate that the character of the plaintiff and his claim for justice have very little relation to the kind of issue to be decided and the fitness of the judicial process for disposition of the issue. *Myers v. United States*³¹ and *Humphrey's Executor v. United States*³² are good examples. In *Myers*, the President removed a postmaster without satisfying the statutory requirement of the consent of the Senate. The postmaster sued for his salary. The Court thereupon found it necessary to decide a great political controversy which went back to the very beginning of the republic. Could the legislature limit the removal power of the President? The true litigants here were the Congress and the President—or if you will, the Presidency. The Court invited Senator George Wharton Pepper to appear as amicus and no doubt received as much enlightenment from him as from counsel for the parties.³³

I do not say that the Supreme Court is the exclusive or the necessary forum for the decision of "issues of constitutionality." There are many such issues which it cannot, and should not, decide. One of my colleagues insists that the Court never decides whether a statute is "constitutional." It decides nothing more nor less than that a certain statute cannot serve as the authoritative premise for a decision in the case of *A v. B*. No doubt this is technically correct, however far it departs from the sense in which the Court and the country conceive the judicial function. But even if the premise be conceded, it is still undeniable that more often than not the issue before the Court will be a public controversy, the dimensions and consequences of which may be immeasurably larger than its legal effect upon the parties to the case.

It is not, I say again, the thesis of this article that the courts are general courts for the decision of constitutional issues. *Frothingham v. Mellon*³⁴ illustrates the point I would make. It is the chief authority for the proposition that the federal courts do not have jurisdiction of a taxpayer's suit; and it was at least part of the stated rationale of the

³¹ 272 U.S. 52 (1926); cf. *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) (*Jehovah's Witnesses* have standing to raise in a class action constitutionality of giving blood transfusions to children against expressed objections of parents).

³² 295 U.S. 602 (1935) (removal of a Federal Trade Commissioner).

³³ See 272 U.S. 52, 176-77 (1926). The briefs and oral arguments are summarized in the report of the case, *id.* at 56-106. In addition, S. Doc. No. 174, 69th Cong., 2d Sess. (1926), contains the record in the case, the briefs used on reargument, and a stenographic transcript of the oral argument.

³⁴ 262 U.S. 447 (1923).

decision that such a suit is not a case or controversy. But the Court notes that the issue involved was not apt for judicial decision, that it was, to categorize it, a "political question." Thus, in the companion case of *Massachusetts v. Mellon*,³⁵ the Court also refused to take jurisdiction. That decision, of course, also rested in part on the proposition that Massachusetts was not a proper plaintiff, but one senses that it was the character of the controversy as much as the parties to it which explains the decision.

The *Frothingham* case can be used to show that the very fact that there is no conventional plaintiff to bring a suit attests the "political" character of the issue. But I do not think it proves so much. Cases, imagined or real, concerning the establishment clause offer a test of the proposition. The Court in the busing,³⁶ school prayer,³⁷ and Sunday law cases³⁸ has treated establishment issues as justiciable. Current controversy concerns payments and gifts of one sort or another to institutions owned or directed by religious authorities; the present suits are suits by taxpayers to enjoin payments. But suppose that a fiscal officer refused to make payment to an institution on the ground that to do so would violate the establishment clause, and the institution brings mandamus.³⁹ Here we would have a conventional lawsuit, at least in terms of parties plaintiff and defendant. Given the establishment decisions, it does not seem a tenable position that the issue is not of a justiciable character. The issue can be compared, for example, to one which the Court was recently asked to adjudicate,⁴⁰ the "legality" of the Vietnamese hostilities. That issue has all the characteristics which we associate with a "political question"—the indeterminate character of the putatively applicable legal principles, the difficulty of formulating rules, the factual complexities (among which would be the relevance of "classified" material), and the likely resistance of both the executive and the legislature to judicial intervention.⁴¹ The cases raising these questions did not lack conventional parties: the

³⁵ 262 U.S. 447 (1923).

³⁶ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

³⁷ *Engel v. Vitale*, 370 U.S. 421 (1962).

³⁸ *McGowan v. Maryland*, 366 U.S. 420 (1961).

³⁹ In *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 389 U.S. 1031 (1968), certain boards of education sought a declaration that certain expenditures of funds would violate the establishment clause. The New York Court of Appeals decided 4-3 in favor of constitutionality. Curiously, only one of the majority judges believed that the plaintiff school officials had standing. He and the three dissenters made a majority in favor of standing.

⁴⁰ *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967).

⁴¹ For the concept of "political question" as it functions in standing cases, see JAFFE 490.

issues were being raised by defendants whose liability to punishment could arguably be determined by their adjudication.

The burden of my argument, so far, has been that there are no compelling *constitutional* reasons for denying jurisdiction of citizen and taxpayer actions. It is almost impossible any longer to contend that a Hohfeldian plaintiff is a necessary element of a case or controversy. The Court has clearly sanctioned statutory provisions allowing actions by plaintiffs whose legal status is not in issue. There is nothing in our experience or in our understanding of human nature which shows that such plaintiffs will not be effective advocates. The inherent justiciability of the issue does not bear any necessary relation to the character of the plaintiff; conventional plaintiffs proffer issues of a broad, public, more or less "political" character, some of which the Court adjudicates and some of which it does not. To be sure, it is possible that many of the issues generated by non-Hohfeldian plaintiffs will be political, but there will be many that are not.

Granted all this, what is the case for allowing these suits? There are those, as I have said, who on balance believe that the lawmaking activities of the courts are undemocratic; and that, on balance, the results have not been good. They would restrict the courts to the least possible lawmaking consistent with the administration of justice. They would not think it a great pity that thereby an occasional "happy" decision would be lost to us. They would argue that, after all, in the case of aid to church schools we have had a highly considered democratic judgment, the judgment of substantial majorities. These majorities have not been completely blind to the constitutional issues, even if they have not totally insulated those issues from the considerations of policy and expediency. If we are insisting that there be a decision of the constitutional question cleansed of all such impurities are we not exaggerating the extent to which the constitutional issue can be thus insulated, or at least making something of a fetish of constitutional purity?

Is it relevant that there may be a widespread desire for a judicial pronouncement? There may, for example, be a national commitment to "legality," to "constitutionality"—a feeling, as it were, for the regularity that, in the minds of many, is associated with judicial determination. In my opinion such feelings are not irrelevant to the definition of the judicial function. Our institutions, whether legislative, executive or judicial, should reflect in the long run our needs and our expectations. It cannot be maintained that since the legislative, executive and judicial functions are defined in the Constitution, popular expectations are irrelevant. The definitions are broad and imprecise and

do not preclude the almost continuous—if subtle and imperceptible—development of function which characterizes the history of constitutions. Yet I would not argue that popular expectation of the judicial role in constitutional adjudication is determinative. For the most part, the degree of expectation is not measurable and is highly variable. There are those whose usual attitude calls for judicial determination of constitutional issues, those who would welcome it at times and reject it at others (usually for personal or political reasons), and those who have never thought about it. One might conclude that the problem should be solved in terms of formal legislative action taken to demonstrate the desire of a majority for such judicial determination. The statute could be one granting jurisdiction only of the issues raised by a particular law, or it could be a statute (such as exist in many states) empowering the courts to entertain taxpayer actions.

There are important reasons for allowing citizen suits. Some of these have less application to questions of constitutionality than to questions of the legality (the *vires*) of administrative and official action. It has now become a commonplace that the individual citizen in our vast, multitudinous complexes feels excluded from government. Thus, while governmental power expands, individual participation in the exercise of power contracts. This is unfortunate because the feeling of helplessness and exclusion is itself an evil, and because the individuals and organized groups are a source of information, experience, and wisdom. It has been remarked that administrative agencies are sometimes captured by particular interests. This assertion has been, in my opinion, somewhat overdone, but there can be no question that there is danger that officials and their staffs will become attached to certain positions and to certain accommodations which narrow their vision. For these reasons procedural devices, which enable citizen groups to participate in the decision-making process and to invoke judicial controls, are very valuable. There is no better illustration of this than two recent cases. The first, already mentioned here,⁴² allowed a conservation group, heavily financed by a public spirited citizen, to put forward its position with great effectiveness. In the other, *Office of Communication of United Church of Christ v. FCC*,⁴³ the Negro churches of Jackson, Mississippi, were held to have standing as “persons aggrieved” to question the procedural regularity of an order of the Federal Communications Commission involving the obligation of a broadcasting licensee to provide local service to the Negro community of the city.

⁴² *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965). See note 13 *supra* and accompanying text.

⁴³ 359 F.2d 994 (D.C. Cir. 1966).

The judicial process as a vehicle for self-government is exemplified in these holdings. From the very beginning, both our Constitution and our practice has sought to protect the individual *qua* individual and *qua* member of a minority from the abuse of power by the majority or by government in the name of the majority, despite the fact that majority rule through representation is the central institution of our democracy. Furthermore, democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. The usual taxpayer and citizen suit is thoroughly consistent with the primacy of majority rule. The issue will be the statutory authority of the official action, and the lawsuit itself will be prescribed by statute. The conservation and broadcasting cases emerge, then, as excellent examples of the lawsuit as a form of citizen participation within a framework established by majority rule.

Where there is no statutory or common law basis for a taxpayer suit the problem itself is, in the final analysis, a constitutional one. One might distinguish between cases in which, on the one hand, the citizen or taxpayer asserting the constitutional claim, though not immediately affected, is seen as a member of a class entitled to constitutional protection and, on the other, one who is not so situated. I confess that the distinction is not as obvious as it may sound since it is arguable that all constitutional prescriptions are intended for the protection of that class of citizens which is at any one time disadvantaged by the failure to observe the constitutional requirement. Thus, the separation of powers, the distribution of powers between the states and the federal government, and procedural provisions for the exercise of power (*e.g.*, the presidential veto and methods of constitutional amendment) are meant to protect us all. But there is, I believe, a sense in which the protections of the Bill of Rights and the Civil War amendments differ from these, the clearest expression of which is the prohibition of discrimination by reason of race, color or previous condition of servitude.

These protections do not ordinarily present any problems of the sort that we are here considering. If Jones, a Negro, is denied housing because he is a Negro or if Smith, a Jehovah's Witness, is imprisoned because he will not salute the flag, we need not further define his position to give him relief. There are, however, cases where discrimination or repression is latent, where no particular individual is as yet a demonstrable object of such unconstitutional action. It is alleged, for example, that a civil service system discriminates against Negroes otherwise eligible. It is alleged that a threat to draft individuals who

actively protest the draft discourages free speech.⁴⁴ In neither of these cases is any particular individual the object of the illegal action. But if there is to be judicial protection of the individual from the impact of these unconstitutional exercises of power, it may be that an action by a plaintiff whose credentials are something less than traditional must be allowed.

Yet none of these situations quite covers the case of the taxpayer who alleges that a payment of money to a religious school violates the establishment clause. He will never become the object of an unconstitutional exercise of power in a way such as is the Negro, the Jehovah's Witness, or the silenced draft protestor. He is nevertheless a member of a class, a group, "a minority" if you will, for whose benefit a constitutional protection or limitation has been devised. The prohibition against establishment was meant to protect non-established religions and, as now interpreted, to protect, also those without religious affiliation. We might go on to argue that an offense to such a group is an offense to the conscience of each of the persons who constitute the group because each is forced to participate in the official support of a religion. Perhaps this argument brings us around full circle to the proposition that the "taxpayer" is a traditional plaintiff in disguise, though the nature of his cause of action, to wit, the unconstitutional assault on his conscience,⁴⁵ is novel.⁴⁶

This may be the ultimate resolution of the problem. It should be clear by now that the requirement of a Hohfeldian plaintiff is a requirement no longer—if it ever was—justifiable. It has not been the

⁴⁴ Cf. *Wolff v. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967), noted in 81 HARV. L. REV. 685 (1968).

⁴⁵ The reapportionment decision, *Baker v. Carr*, 369 U.S. 186 (1962), may be a close analogue, stronger in some respects but weaker in others. The vice there of the condemned arrangements was under-representation of certain classes of voters. To bring the decision within the logical framework of the equal protection clause it was necessary to hold that *each* under-represented voter was the object of unreasonable discrimination—that his vote was improperly "diluted." Yet the plaintiff in a reapportionment suit bears little relation, analytically or functionally, to the typical plaintiff. The notion of dilution of any particular vote is as abstract and indefinable as the effect on a taxpayer of a questioned action requiring a modicum of expenditure. The effect of an unpredictable reapportionment on the plaintiff's vote is immeasurable and unknowable, and even may be adverse. The plaintiff in these cases represents one or more classes of voters defined in broad political terms—the city, the suburb, the Negro vote. No doubt the reapportionment cases are *sui generis*. For one thing, they are cases of an oppressed majority and, whatever else may be said against *Baker v. Carr*, it is difficult to condemn it either as a departure from democratic theory or a challenge to majority rule. On the other hand, the plaintiff in a reapportionment action cannot, as is true of the plaintiff in the school case, point to a specific constitutional limitation, a limitation which is, in fact, intended to protect the position of persons such as himself.

⁴⁶ In my opinion, a statute such as that hypothesized at the beginning of the paragraph does not violate the establishment clause or any other constitutional guarantee. I contend, nevertheless, that the plaintiff has standing.

purpose here to argue that the requirement of case or controversy, or the requirement that a question for judicial decision not be "political" in nature, should be overturned; but the plaintiff's Hohfeldian nature (or lack of it) has no bearing on these questions. As much if not more than at any previous period in our history, society has been recognizing the importance of the individual's conscience. Explicitly as well as implicitly, the courts should do the same.