tificate of opinion and in no sense a judicial judgment. Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then enunciated a rule that was rigorously applied until 1933: the award of execution is an essential part of every judgment passed by a court exercising judicial powers and no decision is a legal judgment without an award of execution.[162] The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments[163] and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts.[164] But, in 1927, the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was *res judicata* in a subsequent proceeding in federal court, the Court admitted that, "[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function."[165] Then, in 1933, the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state court in a declaratory proceeding.[166] Finality of judgment, however, remains the rule in determining what is judicial power, without regard to the demise of Chief Justice Taney's formulation.

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[162] Gordon v. United States, 117 U.S. 697 (1865) (published 1885). Subsequent cases accepted the doctrine that an award of execution as distinguished from finality of judgment was an essential attribute of judicial power. *See In re* Sanborn, 148 U.S. 122, 226 (1893); ICC v. Brimson, 154 U.S. 447, 483 (1894); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 457 (1899); Frasch v. Moore, 211 U.S. 1 (1908); Muskrat v. United States, 219 U.S. 346, 355, 361–362 (1911); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

[163] Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927).

[164] Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

[165] Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927).

[166] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). The decisions in *Swope* and *Wallace* removed all constitutional doubts previously shrouding a proposed federal declaratory judgment act, which was enacted in 1934, 48 Stat. 955, 28 U.S.C. §§ 2201–2202, and unanimously sustained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *Wallace* and *Haworth* were cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 120–21).