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Constitutional Law -- Supreme Court Judgement of State Statute is Unconstitutional on its Face

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NOTES

Constitutional Law

SUPREME COURT JUDGMENT OF STATE STATUTE AS UNCONSTITUTIONAL ON ITS FACE

Introduction

Desire to know and understand the basis upon which the judiciary decides the constitutionality of statutes poses an intriguing problem in analysis and synthesis, for an exhaustive study of it would involve a passage from the strict school of canons of interpretation to the hopelessly loose school of "corn flakes and judicial disposition." Though many might frown upon a study which at one end, at least, trails off into sheer speculation, nevertheless it is of obvious importance to legislators, lawyers, and clients of lawyers to know what grounds the courts will move upon when a litigant has challenged the constitutional validity of a statute. The task is surely not an impossible one, for in human affairs there is a consistency that leads us to expect to find a more or less constant method of proceeding when the problem of statutory constitutionality has arisen.

In order to deal most effectively with this problem, the study of it in this Note is limited to a "key situation," the determination by the United States Supreme Court of the constitutionality of a state statute. Superficially, the solution here might appear to be a simple one: on the one hand, there is the state law which may be read on its face to determine its meaning and scope, and on the other hand there is the federal constitution to which the statute may then be compared to see if it violates any of the constitutional provisions. Yet, at this point, one must ask whether the Supreme Court should simply judge the state statute on its face. Two other possibilities appear: the state act's validity may be determined in the light of an interpretation of the statute by the state supreme court, or in the light of the acts of the litigant to whom the statute has been applied. It is the purpose of this Note to determine whether the Supreme Court makes use of these other two possibilities, and if so, in what cases the Court will make use of them rather than judge the state act on its face alone.

It should be noticed — if one thinks of the decision of a statute's constitutionality as a two-step process: (1) determination of the

scope and meaning of the act, (2) determination whether the act as thus construed violates the Constitution — that the problem to be treated here concerns construction of the act preparatory to seeing whether or not it then violates a provision of the Constitution.

Construction of the Statute by the State Supreme Court

Where the supreme court of a state has interpreted the meaning of a state law, the United States Supreme Court will consider itself bound by the state's decision as to the scope and requirements of the act,[1] even though the Court might think the state interpretation incorrect.[2] This general rule and the reason for it were succinctly stated by Chief Justice John Marshall in *Elmendorf v. Taylor*:[3]

> This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government.

It makes no difference that the face of the statute does not reveal the meaning attached to it by the state court, for, "the construction becomes part of the statute as much as though it were found in appropriate words in its text."[4] Indeed, by virtue of the state court's interpretation, a state act that might otherwise be struck down as being too vague and indefinite can be saved.[5]

This deference to the state court's interpretation is so pronounced that the Supreme Court will follow inconsistent gyrations of that interpretation. Thus it will overrule its own adjudication which had been based upon construction of a state statute

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[1] Poulos v. New Hampshire, 345 U.S. 395 (1953); United States v. BURNISON, 339 U.S. 87 (1950); 11 AM. JUR., *Constitutional Law* § 102 (1937).

[2] See Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32-33 (1924). There was no question of constitutionality of the state act here, but the conclusiveness of the state court's interpretation in the constitutionality cases seems to be but one application of a more general rule that the Supreme Court considers the state court's interpretation of a state act as authoritative in all types of litigation.

[3] 23 U.S. (10 Wheat.) 67, 70 (1825).

[4] Georgia Ry. & Elec. Co. v. Decatur, 295 U.S. 165, 170 (1935). *Accord:* Poulos v. New Hampshire, 345 U.S. 395 (1953), at 402: "This state interpretation is as though written into the ordinance itself."

[5] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

made in conformity to the decision of the state supreme court on the statute's meaning, so as to conform to a different construction afterward adopted by the state.[6] And in some cases the Court has ruled that it will not decide the validity of a state act in advance of a state court interpretation of the meaning and requirements of the act;[7] it will wait for the state court to adopt a construction of the statute rather than to assume in advance that a construction will be adopted which will render the act unconstitutional. Consequently the case will be remanded to the district court with directions to hold in abeyance pending construction of the statute by the state courts. The reason for this is that the state court's decision will be conclusive, and a determination by the Supreme Court in advance of that decision would simply be guess work as to what the state court will say. In *Railroad Comm'n v. Pullman Co.*,[8] the Court stated, ". . . no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination." In *Spector Motor Co. v. McLaughlin*,[9] the Court also gave as a basis for the "wait and see" policy it adopted, the maxim of avoiding decision of constitutional questions as much as possible.

However, it must be noticed that these cases[10] involving the "wait and see" rule are all suits in equity, and as the Court emphasized in *Railroad Comm'n v. Pullman Co.*,[11] equity is an appeal to the discretion of the chancellor. Thus, the "wait and see" rule is premised upon the discretion inherent in equity, and cannot be said to be an absolute rule.[12]

To the general rule of finality of a state's interpretation of the scope and requirements of its acts, three exceptions are sometimes stated. First, mere characterization of the nature of a state law by a state court, as distinguished from a decision concerning the meaning of the act, is not conclusive at all upon the United States

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6 Green v. Neal, 31 U.S. (6 Pet.) 188 (1832).

7 Albertson v. Millard, 345 U.S. 242 (1953); Shipman v. DuPre, 339 U.S. 321 (1950); AFL v. Watson, 327 U.S. 582 (1946).

8 312 U.S. 496, 499 (1941).

9 323 U.S. 101, 105 (1944).

10 See note 7 *supra*.

11 312 U.S. at 500.

12 For a case in which the weight of circumstances swung the discretion of equity the other way, see Kentucky v. Indiana, 281 U.S. 163 (1930). Note, however, that the question here was one of authorization under the state act, not validity of the act. Also, and more importantly, there was involved here impairment of a contract obligation by a state. The importance of this will be seen below. For a case not in equity where the "wait and see" policy was rejected, see Propper v. Clark, 337 U.S. 472 (1949).

Supreme Court.[13] This exception is most frequently employed in tax cases.

Secondly, several early cases contain dictum to the effect that the state court's interpretation is not binding on the Supreme Court when there is a "federal question" involved.[14] What constitutes a "federal question" is not entirely clear, for all these cases except one[15] held that no federal question existed, and hence the state court's interpretation controlled. If a "federal question" arose simply because the Court had to decide the validity of a state act under the federal constitution, then the rule giving the state court primacy in deciding the meaning of state acts would be reduced to naught, for the exception would swallow the rule. It seems clear, however, that the "federal question" must arise in

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13 Macallen Co. v. Massachusetts, 279 U.S. 620 (1929). See also, Gregg Dyeing Co. v. Query, 286 U.S. 472, 478 (1932).

14 Illinois Cent. R.R. v. Illinois, 163 U.S. 142, 152-153 (1896) (dictum); Gormley v. Clark, 134 U.S. 338, 348 (1890) (dictum); Norton v. Shelby County, 118 U.S. 425 (1886) (dictum).

15 The case in which the Supreme Court actually found a "federal question," Scott v. McNeal, 154 U.S. 34 (1894), turned upon this issue: did the local law mean that letters of administration could be issued upon the estate of a temporarily missing, but not deceased person? Though the state court said "yes," the Supreme Court ruled to the contrary, and went on to say that the act would violate due process if the state's interpretation were adopted. In answer to the plea that the state's decision was conclusive, the Supreme Court held, at 154 U.S. 45:

> "Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute . . . of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State. . . . In every such case, this court must decide for itself the true construction of the statute."

In effect the Court seems to say that a federal question is raised whenever the validity of a statute is attacked on the ground that it violates the federal constitution, and in such cases the state court's construction of the meaning of the statute is not conclusive on the Supreme Court. This decision reveals a momentary misunderstanding of the general rule of finality of the state court's construction: that rule has nothing to do with whether the statute as construed violates the Constitution. It is confined to the actual construction of the statute. In *Scott v. McNeal, supra,* the Court failed to distinguish between the question of the meaning of the statute where the state's decision should be determinative, and the question of constitutionality of the statute as thus construed, an area where the Supreme Court is, of course, the final judge.

determining the meaning of the state act, and has no reference to deciding the constitutionality of the statute after its meaning is decided. For instance, in *Illinois Cent. R.R. v. Illinois*,[16] the Court held that no federal question existed and hence the state court's construction of the act was binding on the Supreme Court; it then found that the statute violated the Constitution. Perhaps the "federal question" exception finally means little more than a re-emphasis that just as the state's construction of state acts is final, for similar reasons the Supreme Court controls the final determination of the meaning of federal acts.

It is the third exception which is most important. As stated in *Coombes v. Getz*,[17] it concerns Article I, § 10 of the Constitution, the contract impairment clause:

> The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

To let the state court have final authority on such questions as whether its law established a contract, when the state is sued on the basis that a subsequent act has impaired a contract set up by the first act, would place too great a temptation before the state to serve its own purposes at the expense of hapless plaintiffs. Accordingly, were it not for this exception, ". . . the constitutional guaranty could not properly be enforced."[18]

The general rule whereby the state court's construction of the meaning of a state statute will be deemed controlling by the Supreme Court when deciding the constitutionality of that statue, and the exceptions to that rule, are definitely fixed in constitutional law. Their certainty stands in sharp contrast to the confusion that surrounds the question of judging a state law in the light of the acts of the party who attacks the constitutionality of the law.

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16 163 U.S. 142 (1896).

17 285 U.S. 434, 441 (1932), and cases cited therein. *Accord*, Phelps v. Bd. of Education, 300 U.S. 319 (1937).

18 Kentucky v. Indiana, 281 U.S. 163, 176 (1930).

Judging the Statute in the Light of the Acts of the Defendant

I. Conflict in Decisions

It is impossible to read many cases involving the constitutionality of state laws under the federal constitution without having the vague feeling that the Supreme Court is handling these cases in an inconsistent manner. The basis for this uneasiness lies in the language the Court employs in disposing of the state law cases, as the following excerpts indicate:

> We think that the ordinance is invalid on its face.[19]
>
> But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid.[20]
>
> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.[21]
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> Usually, however, the only proper approach takes into consideration both the facts of the case and the construction which the state has placed on the challenged law. . . . And in the absence of facts in the light of which the statute may be construed, we have said the proper procedure is not to pass on whether it conflicts with First Amendment rights.[22]

These quotes are indicative of the confusion to be found within the cases when seeking to ascertain whether the Supreme Court, in determining the constitutionality of a state act, judges the statute on its face or in the light of the acts of the defendant.

Though the outlines of the problem may well remain hazy, its main shape can best be seen in the Court's employment of hypothetical situations, *ie.*, situations which might arise under the statute but which are not presented in the concrete facts of the case then before the Court, as a basis for striking down the statute. On the one hand, a series of well known cases has been decided on the basis that the statutes involved were by their terms such as to make possible activity that would violate the federal constitution, without particular regard to the incongruity that the facts of the cases which actually brought the statutes before the Court were not so evidently in conflict with the Constitution. In *Saia v. New*

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19 Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

20 Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912).

21 Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

22 Kunz v. New York, 340 U.S. 290, 304 (1951) (dissent by J. Jackson).

York,[23] for example, the Court struck down a city ordinance[24] forbidding the use of loud speakers to broadcast in public places without first getting permission from the local chief of police. Explaining its decision, the Court said:[25]

> But to allow the police to bar the use of loud-speakers because their use *can* be abused is like barring radio receivers because they too make a noise . . . .
>
> *Any abuses which loud-speakers create can be controlled by narrowly drawn statutes.* When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. *The power of censorship inherent in this type of ordinance reveals its vice.* (Emphasis added.)

Notice where the emphasis lies. The Court's attention is directed to the *can be*, what could be done under the statute, and not to the *is*, what in actuality has been done under the statute in this case. As pointed out in the dissent, the facts of *Saia v. New York* reveal that there very probably was an abuse of the right of free speech by the defendant.

The Court in *Wuchter v. Pizzutti*,[26] ruled unconstitutional on due process grounds a New Jersey statute which provided that all non-resident motorists, by using New Jersey roads, constituted

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[23] 334 U.S. 558 (1948). See also: De Jonge v. Oregon, 299 U.S. 353 (1937); Montana Co. v. St. Louis Mining and Milling Co., 152 U.S. 160, 169-70 (1894), the Court quoting with approval the following language from Stuart v. Palmer, 74 N.Y. 183, 188 (1878): "The constitutional validity of law is to be tested, not by what has been done under it, but what may by its authority be done."

Cases involving the constitutionality of federal laws also show that the Court has judged statutes on the basis of what they hypothetically authorize, and not upon the factual situation which has occurred under their authority. Carter v. Carter Coal Co., 298 U.S. 238 (1936); Butts v. Merchants Transp. Co., 230 U.S. 126 (1913); James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1875). As in *Carter v. Carter Coal Co., supra*, the question of separability of the parts of a statute will sometimes arise.

It should be noted that the range of hypothetical situations which may be called upon to serve as the basis of judging the act's validity is not unlimited. A speculative situation must be reasonably provided for on the face of the statute before it will be considered. Toomer v. Witsell, 334 U.S. 385, 393-94 (1948).

[24] It is well established that a city ordinance is state action, and for the purposes of determining its constitutionality, like a state statute. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).

[25] 334 U.S. at 562.

[26] 276 U.S. 13 (1928).

the Secretary of State agent for service in any suit arising out of an accident. The statutory defect was said to be in the failure of the statute to require the Secretary of State to mail a notice of suit to the non-resident motorist, or in some other way to reasonably provide for notice. Yet, it was undisputed that the defendant in fact had been given notice by personal service in Pennsylvania. Nevertheless, the Supreme Court ruled that the requirement of giving notice had to expressly appear in the statute:

> But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it.[27]

In practical effect, one may say that the case was decided on the hypothetical basis of a state of facts where no notice had been given.

To be sure, the use of a hypothetical does not necessarily mean that the actual facts of the case are not fundamental in judging the statute. The hypothetical may be used simply as an analogy to highlight the import of the actual fact situation. This seems to have been the case in *Schneider v. State*,[28] where the Court alluded to hypothetical situations. "If it [the state law] covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions."[29] Yet the Court concluded by saying, "we do hold, however, that the ordinance in question, *as applied to the petitioner's conduct*, is void . . . ."[30] (Emphasis added.)

But where the hypothetical is used as a basis for decision of the case, as it was in the *Saia* and *Wuchter* cases, then it would seem apparent that the statute is being construed simply on its face, even though the fact situation might lead one to believe that the statute, by virtue of being applied to these particular facts involved, should be differently construed. For sake of clarification of this principle, consider the *Wuchter* case. The New Jersey statute said nothing about a requisite of notice or of some procedure reasonably calculated to give notice. Yet the statute had been applied to a case in which notice was given as a matter of fact. Would it have been unreasonable for the Court to construe the statute as requiring adequate notice, in light of the facts of the case? Certainly if the highest state court of New Jersey had previously so

27 *Id.* at 24.

28 308 U.S. 147 (1939).

29 *Id.* at 163.

30 *Id.* at 165.

construed the statute, the Supreme Court would have judged it as containing such requirement.

On the other hand, the Court has refused in several cases [31] to consider hypothetical situations under the statute, limiting its construction of the statute by the particular acts of the defendant. Upholding an Iowa statute to the effect that a foreign citizen who had never been in Iowa, but who had set up an office in that state for the sale of securities and so had become amenable to suit by service upon the agent in charge of the office, the Supreme Court closed its opinion with these words:

> So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of § 11079 under different circumstances we do not consider.[32]

In an earlier case, *Yazoo & Miss. R. R. v. Jackson Vinegar Co.*, [33] a Mississippi statute providing that common carriers be penalized twenty-five dollars for failure to settle claims for lost or damaged freight within sixty days was declared constitutional. Counsel for the railroad contended that the statute might be valid as to reasonable claims, but it had to be struck down since by its terms it was not limited to reasonable claims. This argument was emphatically rejected, and the Court construed the statute in the light of the facts of the case, which involved a reasonable claim and only a reasonable claim: "But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid."[34] Thus the *Doherty* and *Jackson Vinegar* decisions certainly involve a divergence from the Court's approach to the state statutes in the *Saia* and *Wuchter* cases.

Several other instances point up the conflict. It has been stated as a general rule that the constitutionality of a statute is to be de-

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[31] Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Chicago, Terre Haute & Southeastern Ry. v. Anderson, 242 U.S. 283, 288 (1916), where the Court said, "The statute has only been applied in favor of a contiguous land owner. . . . So limited we think its validity must be admitted. . . ."; Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Castillo v. McConnico, 168 U.S. 647 (1898).

This was also the basis of the dissenting opinions in Saia v. New York, 334 U.S. 558 (1948), J. Frankfurter saying at 565, "State action cannot be found hypothetically unconstitutional," and J. Jackson opening his dissent at 566 with, "Let us state some facts which the Court omits."; Near v. Minnesota, 283 U.S. 697, 725-27 (1931) (dissent).

[32] Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935).

[33] 226 U.S. 217 (1912).

[34] *Id.* at 219-20.

termined by its practical operation and effect.[35] Again, it is the substance of the act and not its form that is controlling in determining its validity.[36] And a statute valid as to one set of facts may be invalid as to another.[37] Many times the Court has concluded that a statute is constitutional or unconstitutional — not on its face — but rather as applied to the facts of the case in controversy.[38] All of these shibboleths would indicate that the Court has looked to the acts of the defendant in judging the statute.[39]

In deciding the constitutionality of criminal statutes, however, the Supreme Court has stressed that it is to be judged on its face, so that those who are subject to it will not have to guess at what is prohibited by the statute.[40] And when the facts of the case are not properly set up, as when the pleadings simply follow the language of the statute, then of course the statute can only be judged on its face.[41]

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35 Wheeling Steel Corp. v. Glander, 337 U.S. 562, 570 (1949): "We deal with the taxing plan as an entirety as we find it in operation and pass only on the constitutionality of that which the State has asserted power and purpose to do."; Mountain Timber Co. v. Washington, 243 U.S. 219, 237 (1917): "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect."

36 Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 555 (1935) [quoting Postal Tel. Cable Co. v. Adams, 155 U.S. 688, 698 (1895)]: "The substance and not the shadow determines the validity of the exercise of the power."; Gregg Dyeing Co. v. Query, 286 U.S. 472, 476 (1932): "We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State."

37 Watson v. Buck, 313 U.S. 387, 402 (1941): "A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another."; Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935): "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

38 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940: ". . . as construed and applied to the appellants. . . ."; Schneider v. State, 308 U.S. 147, 165 (1939): ". . . as applied to the petitioner's conduct. . . ."

39 *But see* Near v. Minnesota, 283 U.S. 697 (1931), and Bailey v. Alabama, 219 U.S. 219 (1911), which seem to suggest a second way of considering the facts of a case, *i.e.*, as typical of the situation arising under the statute, instead of as confined to these particular facts of this particular case.

40 Winters v. New York, 333 U.S. 507, 515 (1948); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

41 United States v. Petrillo, 332 U.S. 1 (1947) (federal act); Williams v. Mississippi, 170 U.S. 213 (1898).

II. Reality of the Conflict

At times the language of the Supreme Court which leads one to believe that the statute is judged either on its face, or with consideration of the defendant's acts, seems rather trifling. The question must inevitably arise, is the difference not mere verbalism? Opinions such as that of Justice Roberts in *Hague v. CIO*[42] would seem to lend credence to such a view, for Roberts ruled that the record disclosed the statute's effect in fact to be one of suppression of free speech, and at the same time he declared the statute void on its face. Certainly it would be rather easy to interchange by mistake the words "on its face" for "as applied" (and vice versa), or to use such language inadvertently, and it cannot be denied that in some decisions at least, such undoubtedly has been the case.

Yet the conflict noted above is not to be so easily explained in its entirety. Surely the propositions — construe the statute on its face alone, or judge it with reference to the particular facts of the case — are not one and the same. Their practical difference is sufficent to determine the outcome of the case, as pointed out above in reference to *Wuchter v. Pizzutti*. There are two other possible explanations of the conflict which also would place it on a more or less superficial level. First, perhaps the "face versus facts" dispute is simply the end result of judicial language being employed to camoflage pre-judged results with the flavor of logical analysis. Again it cannot be gainsaid that this might occasionally be the case. Secondly, perhaps one approach or the other is selected as a means to aiding the cause of certain categories of preferred cases. There is a good deal of evidence to support this view, and to understand its import, one must turn to the decisions concerning First Amendment rights.

III. Personal Liberty Cases

In the past twenty-five years, the Supreme Court has declared several state statutes unconstitutional on the grounds of violating the freedoms of speech, press, religion, or assembly. A great many times, the statute was found to be invalid on its face.[43] These de-

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[42] 307 U.S. 496, 516 (1939).

[43] Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949) (Note that the statute was declared unconstitutional "as construed and applied," at 337 U.S. 5; nevertheless it appears from the rest of the decision that the Court shuns the actual facts of the case, and looks only to the face of the statute.); Saia v. New York, 334 U.S. 558 (1948); Winters v. New York, 333 U.S. 507 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938); De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).

cisions have spotlighted the dichotomy between the "facts" approach and the "face" approach to a statute, for Justice Jackson dissented vigorously to three of these cases;[44] in each dissent he urged that the Court look at the facts of the case when judging the statute, as he felt the facts showed a clear abuse of the First Amendment right by the defendant. Criticizing the "face of the statute" approach, Jackson pointed out that it is very easy to read a statute so as to permit some constitutional abuse, but very difficult to write one which will not be open to the same objection.[45]

Why have so many of these personal liberty cases been decided upon a "face of the statute" basis? Perhaps the answer lies in the preferred position in which First Amendment rights have been regarded by the Supreme Court. In *Saia v. New York*, the Court declared:

> Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell* case, freedom of the press in the *Griffin* case, and freedom of speech and assembly in the *Hague* case.[46]

And also:

> Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position.[47]

That the Court should hold these personal liberty rights in special esteem brings the problem into sharper focus, for correspondingly the Court would be especially jealous to strike down any statute that would endanger these liberties.

It seems apparent that an effective way to favor these rights would be to do just what the Court has done, judge the constitutionality of a First Amendment statute on its face. Jackson was very probably correct in saying that the facts of these cases show abuse of the rights, so it becomes necessary to avoid the facts if a harsh policy toward these statutes is to be carried out. This can be done by use of the "face of the statute" approach. Thus, to some

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[44] Kunz v. New York, 340 U.S. 290, 295 (1951); Terminiello v. Chicago, 337 U.S. 1, 13 (1949); Saia v. New York, 334 U.S. 558, 566 (1948).

[45] 340 U.S. at 304.

[46] 334 U.S. at 561. *Accord:* Kovacs v. Cooper, 336 U.S. 77, 106 (1949) (dissent by J. Rutledge); Thornhill v. Alabama, 310 U.S. 88, 98 (1940). *Contra, Kovacs v. Cooper, supra,* at 90-96 (concurring opinion—not too convincing).

[47] 334 U.S. at 562.

extent at least, the Supreme Court appears to choose that method which will afford greatest protection to rights considered especially important.

This conclusion is supported by the racial discrimination cases,[48] if one may assume that the Court is alert to see that racial discrimination by the state be abolished. In such cases the state law is normally fair enough on its face, and it is only when construed in the light of the facts of the case that its evil is seen. Consequently, the Supreme Court has decided, as in *Oyama v. California,* that:

> In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect.[49]

IV. Confinement of the Conflict

If the above analysis could be said to exhaust the conflict between the "face of the statute" and the "facts of the case" judgments, then from the nature of the basis for the divergence, one would not expect the conflict to be ever harmonized. Yet it appears that the problem is indicative of a greater confusion, and consequently the solution must be sought elsewhere.

Justice Brandeis, in his dissenting opinion in *Dahnke-Walker Co. v. Bondurant,*[50] made a distinction that may well go to the heart of the issue. The majority decision in *Dahnke-Walker* ruled invalid a state statute prescribing the conditions upon which foreign corporations could do business in Kentucky. To reach this decision the Court obviously construed the statute in the light of the acts and position of the party against whom the statute was asserted: the foreign corporation's only transactions in Kentucky were interstate commerce, so the act as applied was declared unconstitutional. Brandeis emphatically denied that the case involved any question of constitutionality of the statute at all, saying that the only question was of the constitutionality of its application. He pointed out that the word "apply" is used in two different senses with statutes: (1) to describe that which is within the scope of the statute — this is *construction* of the statute, (2) to refer to the making operative process for the statute — this is *application* of the construed statute. The validity of a statute, as distinguished

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48 Oyama v. California, 332 U.S. 633 (1948); United States v. Reynolds, 235 U.S. 133 (1914); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

49 332 U.S. 633, 636 (1948).

50 257 U.S. 282 (1921).

from its application, is in question only when the power to enact it " . . . as it is by its terms, or is made to read by construction, is fairly open to denial and denied."[51] Carried to its logical conclusion, this position taken by Brandeis would seem to mean that only the face of the statute (or the face as amended by a state court's construction of the statute) is to be judged if the validity of the statute itself is questioned. If the application of the statute is questioned, then the particular facts of the case are to be referred to.

This analysis, based on the distinction Brandeis made, would do a great deal to eliminate the present conflict in the cases as to when the statute will be judged on its face alone. It lacks support, however, when pinpointed to concrete cases, for *Dahnke-Walker* is not the only decision in which the Court has turned to the particular facts of the case in judging the constitutionality, not of the application of the statute, but of the statute itself.[52] In its rough outlines, though, the analysis may be helpful, if only for the sake of clarity. Following the distinction it draws between construction and application, the problem area may be narrowly outlined by dividing the cases into (1) those where the statutory scope, requisites, and meaning are perfectly clear, and (2) those where they are in doubt. In the first instance the statute itself will be judged on its face alone, [53] and only when the validity of the application of the statute is in question will the Court refer to the particular facts of the case. In the second instance, the Court in some cases will construe the statute itself on its face, but in others it will judge the statute in the light of the particular facts of the case. The application of the statute will be judged just as in the first instance, with regard to the particular facts. Thus the conflict is limited to the situation where a state statute not clear as to its scope, meaning, or requisites, is challenged in itself, rather than in its application.

Conclusion

Though the conflict may be drawn into focus through this process of limitation, its solution does not become any the more im-

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51 *Id.* at 295 & n. 1, quoting from Baltimore & Potomac R.R. v. Hopkins, 130 U.S. 210, 224 (1889).

52 See, *e.g.*, Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

53 Even Justice Jackson has admitted that there are cases in which it is proper for the Court to judge the statute on its face alone. "It may happen that a statute will disclose by its very language that it is impossible of construction in a manner consistent with First Amendment rights." Kunz v. New York, 340 U.S. 290, 304 (1951) (dissent).

mediate. Whichever side of the question is taken, difficulties immediately present themselves. If a state statute is to be judged on its face, then a great many state laws will be endangered. Justice Jackson's observation in *Kunz v. New York*,[54] that it is easy to read a statute so as to allow some abuse of constitutional rights and equally difficult to write one free from such defect, is worthy of serious consideration. On the other hand, judging a statute in the light of the particular facts of the case hardly seems likely to result in much insight into congressional intent, which traditionally is what we should seek out in construing the statute. And such a practice would seem to leave the status of the act's constitutionality as susceptible to change as would be the diverse fact situations which might bring the act before the Court.

Nevertheless it seems safe to assume that First Amendment cases in the future will use a "face of the statute" approach, and the discrimination cases will continue with a "facts" approach. As to other cases, it is impossible to know. This uncertainty is echoed in the lower federal courts.[55] If there has been a construction of the statute by the state supreme court, the Court may be expected to rely upon it rather than to judge the statute on its face. Whether it will likewise construe the statute in view of the particular facts of the case rather than judge merely upon the face of the law is a question which at present only the Supreme Court can answer.

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54 See note 45 *supra*.

55 *Compare* Springfield Fire & Marine Ins. Co. v. Holmes, 32 F. Supp. 964, 985 (D. Mont. 1940), *rev'd per curiam*, 311 U.S. 606 (1940): ". . . it must be borne in mind that the facts peculiar to each case control the decision in that case," *with* Central Nat'l Bank v. McFarland, 20 F.2d 416, 418 (D. Kan. 1927): "When we come to measure the validity of an act done in the exercise of a power conferred, it is not determined by what is actually done thereunder, but what may be done."