Notre Dame Law Review

Volume 27 | Issue 1 Article 5

10-1-1951

Notes

Andrew V. Giorgi

Donald John Tufts

Robert A. Layden

NOTES

Labor Law

UNIONIZATION OF MUNICIPAL POLICE FORCES

The past two or three decades have witnessed a remarkable growth of organized labor in this country. This period has not been without its difficulties as labor has attempted to organize various classes of municipal employees, including police forces. The current attempt to unionize the police force of New York City by the United Transport Workers, CIO,[1] has again focused national attention on this problem. An examination of decisions rendered by the highest appellate tribunals of many of our states manifests an almost unanimous judicial opposition to the unionization of policemen.[2] These courts also sanction the dismissal of police officers who refuse to relinquish membership in labor unions. Despite this apparent judicial unanimity in the state courts, there has been no determination of the issue by the Supreme Court of the United States, even though in practically every instance appeal has been made to various individual protective clauses of the Constitution.[3] The judicial opposition to police labor organizations has not prevented the State, County, and Municipal Workers, AFL, from organizing the police departments of sixty-two American cities, among them Baltimore and Los Angeles.[4] In addition there are many writers on the subject who disagree with the judicial reasoning.[5] Consequently there is merit in analyzing the question whether municipal policemen have the right to organize and join labor unions.

---

1 N. Y. Times, Aug. 9, 1951, p. 1, col. 1.

2 Perez v. Board of Police Com'rs of City of Los Angeles, 78 Cal. App. (2d) 638, 178 P. (2d) 537 (1947); State Lodge of Michigan, Fraternal Order of Police v. Detroit, 318 Mich. 182, 27 N.W. (2d) 612 (1947); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310 (1943); City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319 (1946); King v. Priest, 357 Mo. 68, 206 S.W. (2d) 547 (1947); Goodwin v. Oklahoma City, 199 Okla. 26, 182 P. (2d) 762 (1947); C.I.O. v. City of Dallas, 198 S.W. (2d) 143 (Tex. Civ. App. 1946); Carter v. Thompson, 164 Va. 312, 180 S.E. 410 (1935).

3 Hickman v. City of Mobile, ...Ala...., 53 So. (2d) 752 (1951) (freedom of speech and right to assemble peacefully); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310 (1943) (right of an individual to control his private life); King v. Priest, 357 Mo. 68, 206 S.W. (2d) 547 (1947) (freedom of speech and rights under the Due Process Clause); Goodwin v. Oklahoma, 199 Okla. 26, 182 P. (2d) 762 (1947) (rights under the Equal Protection Clause).

4 N. Y. Times, Aug. 5, 1951, § 1, p. 1, col. 3.

5 SPERO, GOVERNMENT AS EMPLOYER (1948); ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES (1940); Comment, UNION LABOR AND THE MUNICIPAL EMPLOYER, 45 ILL. L. REV. 364 (1950); [1947] WIS. L. REV. 693.

I.

The attempts by municipal police officers to organize into unions have been made in comparatively recent times; the first was in 1918 and involved the police force of Cincinnati, Ohio.[6] When the policemen met to discuss plans for obtaining a pay increase, the chief of police detailed three plain-clothes officers to determine the nature of the meeting. When the investigators were forcibly ejected from the assembly the chief of police suspended the chairman of the meeting and three others.

Meanwhile, an AFL organization was attempting to form a union. This was accomplished when the policemen, who had met to consider their plight, formed a union affiliated with the Cincinnati Central Labor Council. The policemen also decided not to return to work until the suspended members were reinstated and the strike which followed immediately continued for three days until a compromise solution was found. Taking the advice of the mayor of Cincinnati, who had stated that unions were for laborers, but not for policemen, they abandoned their union, forming a welfare association in its stead. At all times during the strike, the policemen maintained that they unionized and were striking only because they wanted their brother officers reinstated. When this purpose was satisfactorily accomplished they voluntarily abandoned the union and the strike.

The following year in Boston another police strike occurred.[7] The conditions which led to this strike arose from the policemen's demand the previous year for better working conditions and higher wages necessitated by increasing prices. After the Boston police commissioner refused to meet with the policemen's benefit association, which was their representative, they decided to form a union chartered under the AFL. Since this had not yet been forbidden them, the union was formed and received a charter from the AFL. The police commissioner then issued an order forbidding membership in a union, and several weeks later suspended nineteen officers for violating it. Confused accusations and replies were heard until Mayor Peters of Boston issued a statement that: [8]

> The issue between the commissioner and the policemen is clear-cut. It is a question of whether the policemen have a right to form a union and become affiliated with the American Federation of Labor. . . .

From then on the economic issue which had given rise to the problem became a secondary matter and the right to organize was considered of primary importance.

---

[6] ZISKIND, *op. cit. supra* note 5, at 35.

[7] Authority for the Boston police strike discussion was obtained from the following sources: COOLIDGE, THE AUTOBIOGRAPHY OF CALVIN COOLIDGE 127-34 (1929); RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 106-7 (1946); SPERO, *op. cit. supra* note 5, at 252-81; ZISKIND, *op. cit. supra* note 5, at 39-51.

[8] As quoted in SPERO, *op. cit. supra* note 5, at 260.

Talk of a strike on the part of the policemen led the mayor to form a citizens' committee which conducted an investigation and submitted a report to him. The committee suggested that the police surrender their AFL charter but maintain their union as an independent organization. The mayor submitted the plan to the police commissioner who disregarded it even though it was apparently agreeable to the policemen. When the commissioner formally dismissed the suspended officers, the policemen called a strike to demonstrate their loyalty to the dismissed officers. The strike continued until the local militia and volunteer policemen restored law and order to the city. The striking policemen were dismissed and replacements hired on the terms which the police force had originally requested.

This affiliation of the Boston police union with the AFL manifested a reversal of the old policy of the parent union to refuse charters to police forces which organized unions and applied for affiliation. As a result of this policy reversal the federation received more applications for charters than ever before in the same span of time.

Immediately following the strike, the publication of the famed statement of Calvin Coolidge, then Governor of Massachusetts, that [9] "There is no right to strike against the public safety by any body, any time, any where," aroused public opinion which in turn caused the collapse of the entire police union movement.

It must be remembered that the issue in the Boston episode, as shown by Mayor Peters' statement, was the right to organize, not the issue of the policemen's right to strike. At all times both the policemen and the AFL contended that they did not want to strike, deplored the necessity of striking, but were forced by the police commissioner's actions to do so. Using as its foundation the power of public opinion, Coolidge's statement has become so firmly entrenched in our legal thinking as to have the dignity of a legal maxim. Consequently, today when municipal police officers are reviving the police union movement to avoid the economic distress resulting from a fixed income, opponents resort to the statement even though the true issue is whether policemen have a right to join unions, not whether they have a right to strike.

II.

The right of man to organize has long been recognized. As de Tocqueville stated: [10]

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow

---

9 COOLIDGE, *op. cit. supra* note 7, at 134.

10 As quoted in SPERO, *op. cit. supra* note 5, at ix.

> creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

While this right to organize was considered fundamental from the earliest times, its application to certain classes, especially workingmen, was slow in coming.[11]

In the early days of the American labor movement, the courts of this country, by applying the criminal conspiracy doctrine to attempts by workingmen to organize trade unions, made unionization impossible.[12] In 1842 the Massachusetts Supreme Court, in *Commonwealth v. Hunt*,[13] circumvented the criminal conspiracy doctrine which had denied labor the right to organize, and since then, this right has not been seriously questioned. In the years after *Commonwealth v. Hunt* a trend toward a more positive viewpoint developed. In *NLRB v. Jones & Laughlin Steel Corp.*,[14] one of the cases which determined the constitutionality of the National Labor Relations Act, the Supreme Court stated that the right to organize was a fundamental right. A later Supreme Court case [15] determined that this right is a fundamental one which exists independent of the National Labor Relations Act.

Thus our courts have finally come to an acceptance of the principle that workingmen have the right to organize for their mutual benefit and assistance. As was said in *City of Springfield v. Clouse*: [16]

> Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions.

The right to organize, while generally held applicable to laborers in private employment, was nonetheless denied for a great number of years to those publicly employed.[17] Later when the rule which barred

---

11 Illustrative of the struggle for recognition fought by groups of workingmen are the following cases: People v. Fisher, 14 Wend. 9 (N. Y. 1835); Quinn v. Leathem, [1901] A. C. 495; Taff Vale Ry. v. Amalgamated Society of Railway Servants, [1901] A. C. 426; Rex v. Journeymen-Taylors of Cambridge, 8 Mod. 10, 88 Eng. Rep. 9 (K. B. 1721).

12 People v. Fisher, 14 Wend. 9 (N. Y. 1835). See P-H LABOR COURSE, ¶ 1023 (1950).

13 45 Mass. (4 Metc.) 111 (1842).

14 301 U. S. 1, 33, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

15 Amalgamated Utility Workers (C.I.O.) v. Consolidated Edison Co. of New York, 309 U. S. 261, 60 S. Ct. 561, 84 L. Ed. 738 (1940).

16 356 Mo. 1239, 206 S.W. (2d) 539, 542 (1947).

17 People v. Chicago, 278 Ill. 318, 116 N.E. 158 (1917); McAuliffe v. Mayor, Etc., of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (where policemen were denied the right to become members of a political committee).

public or municipal employees from organizing underwent a transition, there evolved the rule that municipal employees had the right to organize and affiliate with unions for their mutual benefit in the absence of a specific prohibition.[18] The decision in *City of Springfield v. Clouse,* resulted in further modification of the rule for it recognized that municipal employees possessed a *right* to organize even though they do not possess the usual incidents of union organizations, as for example, the right of collective bargaining.

While municipal workers now have the right to form unions, policemen, usually regarded as being apart from other municipal employees, have not been accorded a similar right.[19] This nebulous distinction or discrimination is also applied to firemen.[20] A clear pronouncement of the distinction was made in *Carter v. Thompson*: [21]

> Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained.

Some courts have gone further and have likened the policeman to a soldier under arms.[22]

Using the distinction between police and firemen and other municipal employees as the basis, the courts have been reluctant to apply to police forces the rule that municipal employees may organize. Thus the courts follow the old rule and recognize that policemen have the right to organize in the absence of express prohibition. Evidence of this rule is the fact that police unions, affiliated with the AFL, do exist in many of our cities.[23] Usually the municipal authorities are more apt to prohibit police unions, and at the same time allow unions of firemen. This is true in New York City where the firemen were permitted to unionize while the policemen were denied a union.[24] The prohibition sometimes takes the form of a municipal ordinance,[25] but

---

18 Hagan v. Picard, 171 Misc. 475, 12 N.Y.S. (2d) 873 (Sup. Ct. 1939).

19 Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310, 311-2 (1943).

20 McNatt v. Lawther, 223 S.W. 503, 505-6 (Tex. Civ. App. 1920); Carter v. Thompson, 164 Va. 312, 180 S.E. 410, 412 (1935).

21 164 Va. 312, 180 S.E. 410, 412 (1935).

22 Coane v. Geary, 298 Ill. App. 199, 18 N.E. (2d) 719 (1939); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310 (1943).

23 N. Y. Times, Aug. 5, 1951, § 1, p. 1, col. 3.

24 N. Y. Times, Aug. 9, 1951, p. 14, col. 3: "When it was called to Mr. Monaghan's attention yesterday that members of the Fire Department belong to the Uniformed Firemen's Association, A.F.L., he replied that there was 'no comparison' because 'the Police Department deals with and directs human beings, and the Fire Department deals with physical fact.' "

25 Hickman v. City of Mobile,....Ala....., 53 So. (2d) 752 (1951); C.I.O. v. City of Dallas, 198 S.W. (2d) 143 (Tex. Civ. App. 1946).

more frequently is manifested in an order from the police commissioner.[26] The prohibition need not be in effect at the time or prior to the attempted organization, though generally the prohibition follows the attempt to organize or the actual organization, as in the Boston incident. In *Hickman v. City of Mobile*,[27] an ordinance which prohibited police membership in unions after a certain date, and which provided for dismissal of all policemen who had not dissolved their union affiliations by that date, was unconstitutional in that it was ex post facto. Despite this determination the court held that the city could validly prohibit union membership by police and firemen.

The general rule might be said to be that the municipality may, either through the city council or the police commissioner, validly prohibit policemen from organizing or affiliating with labor unions, and that the prohibition may be announced either before or after the attempt to organize.[28] In the absence of any prohibition the right to organize is apparently recognized, but remains a perilous right, since it is subject to suspension by express prohibition.

The reasons for this rule vary. When municipal employees in general were attempting to organize the argument was advanced that a municipality could not contract with labor unions.[29] This contention was based on the grounds that such contracts would conflict with the Equal Protection and Due Process Clauses of the Federal Constitution and with state and local laws.[30] Though this argument, standing by itself, has never been given much weight judicially, and while no court of last resort has determined the validity of this type of contract,[31] nonetheless, it is sometimes advanced to thwart police unionization.

Usually the contention that a municipality cannot contract with a labor union representing municipal employees is coupled with the reasoning that a municipality cannot collectively bargain with itself.[32] This contention has also been offered against attempted police unions.

---

26 Perez v. Board of Police Com'rs of City of Los Angeles, 78 Cal. App. (2d) 638, 178 P. (2d) 537 (1947); Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310 (1943); City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319 (1946); King v. Priest, 357 Mo. 68, 206 S.W. (2d) 547 (1947).

27 ....Ala...., 53 So. (2d) 752 (1951).

28 See note 26 *supra*.

29 RHYNE, Report No. 76 of the National Institute of Municipal Law Officers on the POWER OF MUNICIPALITIES TO ENTER INTO LABOR UNION CONTRACTS — A SURVEY OF LAW AND EXPERIENCE. But see C.I.O. General Counsel Memorandum as set out in Appendix, RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 541-3 (1946).

30 *Ibid.*

31 RHYNE, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW 33 (1946).

32 Miami Water Works Local No. 654 v. Miami, 157 Fla. 445, 26 So. (2d) 194, 197 (1946).

It is sometimes maintained that the wages, hours and working conditions of municipal employees, including policemen, are established by law, either state or local, and that since changes can only be had by altering the laws, collective bargaining is impossible.[33]

Another facet of this argument, based largely on statutory interpretation, is that it would be an unlawful delegation of power for a municipality to contract and bargain collectively with a labor union.[34] Generally the question whether the municipality has the power to enter into a collective bargaining agreement with a union is a matter of legislative intent.

This reasoning as applied to police unions should have no great effect. While collective bargaining is an ordinary incident of union organization, it is not essential. Also, municipal employees have the right to seek changes in laws or regulations affecting working conditions either by petition to the legislature, or in the form of hearings conducted by appropriate agencies.[35] If policemen may appear individually before commissions which determine hours, wages and working conditions, can it be argued that their delegated representative, a union, has not the right to come before the same commission and present the policemen's case?

In addition to the argument that a municipality cannot collectively bargain with labor unions, there are other more forceful reasons which have been applied in upholding prohibitions against police unions. The first of these is usually referred to as the "dual loyalty" problem.[36] It is generally stated that a policeman cannot serve two masters, that his entire allegiance must be to the public whom he has sworn to serve. It is contended that when a policeman joins a union he takes upon himself a second allegiance, to the union, which conflicts with the first.

The problem of dual loyalty is not new in labor law for it has had a limited application to plant watchmen.[37] The plant watchman is hired specifically to guard the property of his employer, to whom he owes his first allegiance. It had been said that when trouble arose between union and employer a plant watchman who belonged to a

33 City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W. (2d) 539, 547 (1947).

34 Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A. (2d) 745, 747 (1946); see 10 McQUILLIN, MUNICIPAL CORPORATIONS § 29.07 (3d ed. 1950).

35 SPERO, *op. cit. supra* note 5, at 58-9.

36 Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310, 312 (1943) (Police and fire departments were said to be in a class apart for their members owe to the public their undivided allegiance); City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319, 324 (1946); Carter v. Thompson, 164 Va. 312, 180 S.E. 410, 412 (1935).

37 NLRB v. Jones & Laughlin Steel Corp., 331 U. S. 416, 423-4, 67 S. Ct. 1274, 91 L. Ed. 1575 (1947).

labor organization might put his allegiance to it above his duty to his employer, to the jeopardy of the latter's property and rights. The same example is used in applying the dual loyalty argument against the right of police to organize.[38] The National Labor Relations Act has provided a patently satisfactory solution by permitting watchmen to form their own independent union, while denying them the right to affiliate with any other union.[39] No reason has been advanced why this solution could not be applied to the similar problem in police unionization.

A corollary to the dual loyalty reasoning, the most effective argument of all, is that police unions are a menace to the public safety.[40] It is the belief of many people that unions and strikes are practically synonymous terms. There are a greater number who believe that unionization at least foments strikes. This is apparently a recurring malignancy growing out of the Boston police strike. A strike is not the only method available for policemen to obtain their economic demands.[41] And on the other hand, contrary to the prevailing conception, the right to strike is not confined to labor unions. Strikes can occur even where there is no union for a strike is merely a joint act which requires a lawful purpose and a lawful manner of execution.[42] In this country we have had police strikes where there were no police unions. The first of these, for higher wages, occurred in Ithaca, New York in 1889,[43] and another took place in Rockland, Massachusetts in 1920. It is not to be intimated that the right to organize is not extremely beneficial in exercising the right to strike, for as Ziskind has written: [44]

> Although many government strikes have sprung spontaneously from unorganized workers, the right to organize has always been essential to the progress of the strike as well as to the preservation of its gains. The right to organize has been exercised or assumed some time or other in the course of practically every strike.

Even admitting that strikes can occur without an organization, the problem as related to police unions does not appear to be imposing.

---

38 RHYNE, Report No. 129 of the National Institute of Municipal Law Officers, LABOR UNIONS AND MUNICIPAL EMPLOYE LAW—*A Supplementary Report* 14.

39 61 STAT. 143 (1947), 29 U.S.C. § 159 (b) (3) (Supp. 1951).

40 City of Jackson v. McLeod, 199 Miss. 676, 24 So. (2d) 319, 324 (1946).

41 Chicago Herald American, Nov. 7, 1951, § 1, p. 1, col. 3 (Chicago policemen threatened to quit in a body if they did not receive a pay raise by a certain date); Chicago Sun Times, Nov. 12, 1951, § 1, p. 4, col. 4 (The number of traffic tickets issued by the police department of Yonkers, New York, jumped from seventy-four tickets daily to over a thousand tickets the day after a municipal election in which a referendum proposing a pay raise for the members of the police department had been defeated).

42 ZISKIND, *op. cit. supra* note 5, at 232.

43 *Id.* at 33-52.

44 *Id.* at 240-1.

The AFL, when it reversed its position and determined to charter police unions, flatly rejected the policy allowing these unions to strike.[45] Consequently it required every police union which applied for a charter to have a no-strike clause in its constitution. Even in the Boston police strike, both the AFL and the police local announced that they were opposed to police strikes and that only because of the unreasonableness of the police commissioner did they do so.[46] The argument that the right of police to organize should be denied because the right is co-existent with the right to strike is not valid, as the police in general do not demand a right to strike as an incident to the right to organize.

In addition to this self-denial by the police unions of the right to strike, some states have enacted statutes which prohibit any governmental employee from striking.[47] The New York act, passed in 1947, declares strikes by public employees to be illegal.[48] Under such an act police unionism should create no threat of strikes.

One final argument which has been raised against police unionism is that unionization tends to break down departmental discipline.[49] No specific examples have been cited, but rather it appears as a generalization used to give greater force to those decisions which uphold the validity of prohibitions upon attempts by policemen to organize and affiliate with labor unions.

Conclusion

The right of policemen to organize is generally recognized in the absence of prohibition, but where the prohibition exists the courts uphold its validity. While municipal employees in general are now recognized as having the right to organize, policemen are not allowed the benefits of this rule, where there is an express prohibition denying them the right to organize. When the courts were upholding prohibitions on the right of all public employees to organize, some of the reasons given were that the municipality could not contract with labor unions, nor bargain collectively with them. These reasons are still given a rather limited, implied application by courts in enforcing a prohibition against a police union. In order to lay a stronger foundation for up-

45 N. Y. Times, Aug. 3, 1951, p. 1, col. 2.

46 ZISKIND, *op. cit. supra* note 5, at 46-7.

47 *See, e.g.* MICH. STAT. ANN. § 17.455 (2) (1950); TEX. STAT., REV. CIV. art. 5154c (1948).

48 N. Y. Civil Service Law § 22-a (2): "No person holding a position by appointment or employment in the government of the state of New York, or in the government of the several cities, . . . or in any other branch of the public service, hereinafter called a 'public employee' shall strike."

49 King v. Priest, 357 Mo. 68, 206 S.W. (2d) 547, 554 (1947).

holding prohibitions on police union organizations, the problem of dual loyalty, and the danger that the union might strike were given as additional reasons.

Contrasted with this is the view that the right to organize is fundamental and valuable to all classes of employees. The question is whether this right can properly be denied to members of municipal police forces. Admittedly, the right *can* be denied, but it should be so nullified only where the reasons are forceful and compelling. Are the reasons given for denying the right to policemen sufficiently forceful and compelling? The right to organize exists independent of the right to bargain collectively and sign a contract, as was shown in the *City of Springfield* case. The danger of strike has been answered by the police union movement itself through no-strike pledges. If these pledges are unsuccessful the danger could be eliminated by statute. The dual loyalty argument can be answered by requiring independent unions as in the plant watchmen situation.

It is the opinion of the writers that the archaic and inapplicable repercussions of the Boston police strike should not be permitted to crystallize any real distinction between policemen and other municipal employees as far as the right to organize is concerned. The same rule should apply to both.

Andrew V. Giorgi

Donald John Tufts

Taxation

Gift Tax: The Annual Exclusion and Future Interests

Many persons seek to escape the almost oppressive burden of the federal estate tax by giving their property away during life, suffering only the gentle — by comparison — gift tax. A question that might be asked today by an individual seeking to transfer part of his estate to his minor children is: "How may a person make a gift of a present interest in property that will have the effect of a future interest?" The result desired is to make a gift of property that will vest presently but will be secure from whimsical squandering until the recipient has reached an age of responsibility as there is a reasonable reluctance to place large sums of money or valuable property in the hands of youth without restrictions. The gift in trust has been one of the most popular methods of creating an effective restriction, but the usual gift in trust is a gift of a "future interest" which Congress has seen fit to penalize.

A study will be made here of the various concepts of future interests developed by the Bureau of Internal Revenue and the courts over the past ten years in connection with tax liability on gifts.

Legislative History

In determining the tax liability for gifts made in any single year, $3000 is excluded from the amount given each donee.[1] But an exception is made if the donee receives a gift of a future interest: the exclusion is not allowed and the total amount of the gift is taxed.

According to the report of the congressional committee, the $3000 exclusion was provided [2]

> . . . to obviate the necessity of keeping an account of and reporting numerous small gifts, and . . . to fix the amount sufficiently large to cover in most cases wedding and Christmas gifts and occasional gifts of relatively small amounts.

But the committee did not choose to obviate the necessity of accounting for and reporting small gifts of future interests. The reason was [3] ". . . the apprehended difficulty, in many instances, in determining the number of eventual donees and the values of their respective gifts." This reasoning could have limited application to deny numerous exclusions where there is an unknown number of donees, or where it is actually impossible to compute the value of a gift; but it seems unwarranted to allow *no* exclusions. If a gift has been made, of necessity there must be at least one donee. Nevertheless, the reasoning fails to explain why the exclusion is denied when there is no difficulty in determining either the number of eventual donees or the value of their gifts, or when there is only one donee, with no possibility of there being more, who receives a definite sum.[4]

---

1 INT. REV. CODE § 1003 (b) (3).

2 H. R. REP. No. 708, 72d Cong., 1st Sess. 29 (1932), II CUM. BULL. 457, 478 (1939); SEN. REP. No. 665, 72d Cong., 1st Sess. 41 (1932), II CUM. BULL. 496, 525-6 (1939).

3 *Ibid.*

4 Several simple examples will point up the type of situations the committee may have had in mind when it recommended the provision. X gives $3000 to each of six children, to be held in trust until they reach a certain age. Before that time three die, the remaining three taking equal shares upon termination of the trust. The result is: three gifts receive six exclusions unless the exclusions are denied. The number of eventual donees here may be one or as many as six; the value of their gifts may be $3000 or $18,000. However, there will be at least one gift for which, it is submitted, one exclusion should be allowed. Where a trustee may or may not apply income, or may apply it to whomsoever he chooses, in his discretion, it is impossible to compute the actuarial value of each donee's share. Dependent on how the trustee distributes, several donees may receive nothing and one donee may receive a large sum. Likewise, valuation is impossible if after-born children may share in a fund with present donees. In these situations, also, no more than one exclusion should be allowed.

Regardless of the invalidity of the reasons for the strange provision, the exclusion was denied as to gifts of future interests in the 1932 Revenue Act.[5] After several amendments,[6] the present provision of the Internal Revenue Code provides: [7]

> In the case of gifts (other than gifts of future interests in property) . . . the first $3,000 of such gifts . . . shall not . . . be included in the total amount of gifts. . . .

Early Interpretation

It must be understood at the outset that the concept of "future interests" where the gift tax is involved is not necessarily the same as a future interest in the laws of property and conveyancing. The courts, in tax cases, do not look to the definitions in the various state statutes [8] or to the common law,[9] but are concerned only with the interest of the donee.[10] The question is: is there a postponement of enjoyment of specific rights, powers or privileges? [11] Or it might be put: when does enjoyment begin? [12] If enjoyment begins sometime after completion of the gift, rather than immediately upon completion, the gift is of a future interest.[13]

The Regulations state: [14]

> "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in

---

5 Revenue Act of 1932, § 504 (b), 47 STAT. 247 (1932).

6 The Revenue Act of 1938, § 505 (b), 52 STAT. 565 (1938), enlarged the exclusion until the Revenue Act of 1942, § 454, 56 STAT. 953 (1942), reinstated the original clause. .

7 INT. REV. CODE § 1003 (b) (3).

8 United States v. Pelzer, 312 U.S. 399, 403, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

9 Wisotzkey v. Commissioner, 144 F. (2d) 632, 636 (3d Cir. 1944).

10 *Ibid.*

11 Howe v. United States, 142 F. (2d) 310 (7th Cir.), *cert. denied,* 324 U.S. 841, 65 S. Ct. 585, 89 L. Ed. 1403 (1944), *rehearing denied,* 324 U.S. 886, 65 S. Ct. 682, 89 L. Ed. 1435 (1945); Wisotzkey v. Commissioner, 144 F. (2d) 632 (3d Cir. 1944); Commissioner v. Lowden, 131 F. (2d) 127 (7th Cir. 1942); Commissioner v. Glos (Gloss), 123 F. (2d) 548 (7th Cir. 1941).

12 Commissioner v. Sharp, 153 F. (2d) 163, 164 (9th Cir. 1946).

13 Hessenbruch v. Commissioner, 178 F. (2d) 785 (3d Cir. 1950). Donee was 20 years and 9 months old and would have absolute right to the trust income when he reached 21. The three month period during which his right was contingent was considered substantial.

14 26 CODE FED. REGS. § 86.11 (1949).

> the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. . . .

Before 1941 no great difficulty was experienced in making gifts in trust, or otherwise, of present interests. While it was held that a gift was of a future interest if enjoyment depended upon survivorship,[15] there were decisions granting the exclusion on the ground that no difficulty was met in determining the number of eventual donees,[16] no intervening life estate was created,[17] the donor had divested himself of full title,[18] and the trustee was the donee, causing enjoyment to be immediate.[19] Typical of the liberal interpretation is the decision in *Rheinstrom v. Commissioner,* [20] where a gift in trust provided for accumulation until a future time. The court admitted that enjoyment was conditional, but held that it was to commence at once and was for the sole and immediate benefit of the donees.

The year of great change was 1941. Virtually all of the earlier interpretations were ignored; only the theory that a future interest existed if enjoyment was dependent upon survivorship remained. In brief, it was held that a gift in trust was a gift to the beneficiary, not to the trust or trustee,[21] the interest transferred by the donor was not to be considered,[22] a gift could be of a future interest whether vested or contingent,[23] and whether or not the number of eventual donees and their respective gifts were fixed and determined.[24]

---

15 Commissioner v. Gardner, 127 F. (2d) 929 (7th Cir. 1942); David L. Loew, 42 B.T.A. 17 (1940); Edith Pulitzer Moore, 40 B.T.A. 1019 (1939).

16 Commissioner v. Krebs, 90 F. (2d) 880 (3d. Cir. 1937); Noyes v. Hassett, 20 F. Supp. 31 (D. Mass. 1937); Charles W. Deeds, 37 B.T.A. 293 (1938).

17 *Ibid.*

18 Commissioner v. Wells, 88 F. (2d) 339 (7th Cir. 1937); Noyes v. Hassett, 20 F. Supp. 31 (D. Mass. 1937); Edwin Goodman, 41 B.T.A. 472 (1940); Edwin B. Cox, 38 B.T.A. 865 (1938).

19 Commissioner v. Krebs, 90 F. (2d) 880 (3rd Cir. 1937); Seymour H. Knox, 36 B.T.A. 630 (1937).

20 105 F. (2d) 642 (8th Cir. 1939). See also, Mary duPont Faulkner, 41 B.T.A. 875 (1940), where a gift to an unborn child was held to be a gift of a present interest.

21 Helvering v. Hutchings, 312 U.S. 393, 61 S. Ct. 653, 85 L. Ed. 909 (1941).

22 Commissioner v. Glos (Gloss), 123 F. (2d) 548 (7th Cir. 1941). See Commissioner v. Gardner, 127 F. (2d) 929, 930 (7th Cir. 1942), where Commissioner v. Wells, 88 F. (2d) 339 (7th Cir. 1937) (see note 18, *supra*), is considered overruled by United States v. Pelzer, 312 U.S. 399, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

23 United States v. Pelzer, 312 U.S. 399, 61 S. Ct. 659, 85 L. Ed. 913 (1941); Commissioner v. Taylor, 122 F. (2d) 714 (4th Cir. 1941); Welch v. Paine, 120 F. (2d) 141 (1st Cir. 1941).

24 Welch v. Paine, 120 F. (2d) 141 (1st Cir. 1941). Commissioner v. Glos (Gloss), 123 F. (2d) 548, 550 (7th Cir. 1941): ". . . Congress did not limit the term to any specified category of future interests. It included all." The court

Tax Concept of Future Interests

After deciding that a gift in trust was a gift to the beneficiary,[25] the Supreme Court set out to guide aright the divergent wanderings of the lower courts. In *United States v. Pelzer*,[26] gifts in trust were executed with provision for income to be accumulated until the beneficiaries reached a certain age; the gifts were, under Alabama law, of present interests. The Court emphasized that local laws were to be ignored in this question and gave judicial sanction to the definition in the Treasury Regulations.[27] The gifts, it was said, were postponed until the happening of a future uncertain event (reaching a specific age) and this made the number of donees and the value of their gifts difficult to ascertain.[28]

In *Ryerson v. United States*,[29] two trusts were considered. In one, there were gifts of separate equal shares of the corpus of the trust to each of two trustees, and the trust provided that they could reach their shares by a simple joint request that the trust be terminated. The Court held that since enjoyment was dependent upon a contingency that might never occur, that is, the donees might never agree to join in the request for termination, the interests were future. In the other trust, it was held that enjoyment was dependent upon survivorship and was a gift of a future interest.

In the same year, 1941, the concept of future interests, begun by the Supreme Court, was amplified in the Court of Appeals for the First Circuit.[30] It was held, and the court cited the *Restatement of Property*,[31] that the question of whether the property was vested in the donee was of no concern. The *Pelzer* and *Ryerson* cases were distinguished because, as the court said, those cases involved interests which were future under any definition of the term; [32] while in the case in question, each beneficiary received a whole beneficial interest, no preceding beneficial interest was given to another person, and if a beneficiary should die before reaching twenty-one, the property devolved through his estate. It was admitted that the interest might be

---

pointed out that the difficulty in determining the number of donees was only one reason for denying the exclusion. However, the court gave no other reasons for it.

25 Helvering v. Hutchings, 312 U.S. 393, 61 S. Ct. 653, 85 L. Ed. 909 (1941).

26 312 U.S. 399, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

27 26 CODE FED. REGS. § 86.11 (1949).

28 United States v. Pelzer, 312 U.S. 399, 404, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

29 312 U.S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941).

30 Welch v. Paine, 120 F. (2d) 141 (1st Cir. 1941).

31 RESTATEMENT, PROPERTY § 153 (1936).

32 But in the *Pelzer* case the gifts, as defined by Alabama statutes and the case law of that state, were considered to be gifts of present interests. United States v. Pelzer, 312 U.S. 399, 402, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

defined as a present interest, but the court chose to follow the definition set forth in the Regulations and held the interest to be future.

The Supreme Court heard two cases on the subject in 1945. In *Fondren v. Commissioner*,[33] the interests of the donees were vested. The trustee was to accumulate the income until the beneficiaries were 35 years old, applying it to the use of the beneficiaries, if necessary, for their support, education or maintenance, and the corpus could be used if the trustee thought it necessary. There was also a spendthrift provision. Enjoyment was held to be contingent on a future uncertain event; a barrier of time was imposed between execution and enjoyment and the exclusion was denied.

In *Commissioner v. Disston*,[34] the trustee was to accumulate income until the minor beneficiaries came of age, although he could apply income to their benefit where necessary for education, support, or comfort. The gift was held to be one of a future interest since there was no indication that a steady flow of a portion of the income would be necessary. The lower court [35] had held the interest to be present on the grounds that there was no difficulty in ascertaining the number of donees nor the value of their gifts and that the restriction on the gifts was merely one that would have been imposed by law, if it had not been provided for in the trust instrument.[36]

The Supreme Court, after these two brief forays into the field, in 1941 and 1945, laid the matter aside. If it thought that the matter was settled, the extensive litigation on the point [37] labels the thought presumptive. It is settled that a gift is of a future interest if it is limited to commence in use, enjoyment, or possession at a future time rather than immediately upon completion of the gift. But the rule means nothing unless what is meant by "use, possession and enjoyment" is explained. The Bureau, apparently, had "physical" in mind when it interpreted the words.[38] Shortly after the *Fondren* and *Disston* decisions, the Court cited both for the proposition that "enjoyment" was not a term of art, but one that connotes a *substantial present economic benefit*, rather than a technical vesting of title.[39] Certainly

33 324 U. S. 18, 65 S. Ct. 499, 89 L. Ed. 668 (1945).

34 325 U. S. 442, 65 S. Ct. 1328, 89 L. Ed. 1720 (1945).

35 Disston v. Commissioner, 144 F. (2d) 115 (3d Cir. 1944).

36 *Id.* at 118.

37 "The cases involving this exception to the gift tax exemption are many and constantly growing." United States v. Knell, 149 F. (2d) 331, 332 (7th Cir. 1945).

38 Kieckhefer v. Commissioner, 189 F. (2d) 118 (7th Cir. 1951). It was there stated at 121: "Without expressly so stating, the Commissioner's position appears to be that the words in the Treasury Regulation . . . mean that the beneficiary must have the actual, physical use, possession or enjoyment of the property. . . ."

39 Commissioner v. Estate of Holmes, 326 U. S. 480, 486, 66 S. Ct. 257, 90 L. Ed. 228 (1946).

the Court would not deny the possibility of a gift of a future interest being of present *economic* benefit.[40] Perhaps the speaker for the Court, when explaining terms to the nation, "should explain his explanations."[41]

Gifts in Trust

The annual exclusion was denied to all gifts made in trust after 1938.[42] Following *Helvering v. Hutchings*,[43] the exclusion was restored [44] unless the gift in trust was of a future interest.

The broad rule has developed that a future interest is given whenever enjoyment, use or possession is dependent upon a contingency. If the donee must survive the donor for enjoyment or must live until some future certain or uncertain time, numerous cases define his interest as future.[45] Attempts have been made to avoid this rule by providing that if the donee-beneficiary dies before he reaches the specified age, the property devolves through his estate. This, standing alone, has been ineffective, the interest still being regarded as a future interest.[46] It would seem, then, that any trust providing that the donee take possession when he reaches a certain age would be a gift of a future interest. This result is also reached if enjoyment is dependent upon

---

40 In Ryerson v. United States, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941), the trust could be terminated by joint action of the trustees, at which time the corpus would be distributed to the trustees. Can it be said that they had no present, economic benefit? See also, the example suggested in Welch v. Paine, 120 F. (2d) 141, 142 (1st Cir. 1941): A gives land to B for life, remainder to C in fee. Certainly C's enjoyment is postponed and he has only a future interest, but he also has a substantial, present economic benefit.

41 Byron, *Don Juan*, Dedication, stanza 2, lines 7-8.

42 Revenue Act of 1938, § 505, 52 STAT. 565 (1938); INT. REV. CODE § 1003 (b) (1).

43 312 U. S. 393, 61 S. Ct. 653, 85 L. Ed. 909 (1941). Before the statute denying the exclusion to gifts in trust, it was possible for a donor to make gifts to numerous trusts for the benefit of one beneficiary. Because the trusts were considered the donees, the donor received numerous exclusions (one for each trust), although in fact there was only one gift to one beneficiary. See McBrier v. Commissioner, 108 F. (2d) 967 (3d Cir. 1939); Welch v. Davidson, 102 F. (2d) 100, 103 (1st Cir. 1939); Edwin B. Cox, 38 B.T.A. 865 (1938). After the *Hutchings* ruling, that the beneficiary was the donee, there was no longer any necessity for the statutory provision.

44 Revenue Act of 1942, § 454, 56 STAT. 953 (1942); INT. REV. CODE § 1003 (b) (2).

45 Hutchings-Sealy Nat. Bank of Galveston v. Commissioner, 141 F. (2d) 422 (5th Cir. 1944); Sensenbrenner v. Commissioner, 134 F. (2d) 883 (7th Cir. 1943); Fisher v. Commissioner, 132 F. (2d) 383 (9th Cir. 1942); Commissioner v. Boeing, 123 F. (2d) 86 (9th Cir. 1941); Thomson v. Reynolds, 54 F. Supp. 409 (D. Minn. 1944); Andrew Geller, 9 T. C. 484 (1947); Alma M. Myer, 2 T. C. 291 (1943).

46 Welch v. Paine, 120 F. (2d) 141 (1st Cir. 1941); Jesse S. Phillips, 12 T. C. 216 (1949). *But cf.* Kieckhefer v. Commissioner, 189 F. (2d) 118 (7th Cir. 1951); Cannon v. Robertson, 98 F. Supp. 331 (W. D. N. C. 1951).

some future action or event.[47] A future interest exists where some discretion is placed in the trustee to accumulate or distribute, on the ground that since he will not necessarily distribute, possession and enjoyment are contingent.[48]

Restrictions on enjoyment usually make the interest a future one. As seen above, this is true where the trustee has discretion to distribute or accumulate income. A stronger case is presented when the trust provides that the trustee—"in his discretion" or "if necessary"—is to apply income to the support, maintenance, education or comfort of the beneficiary. The trust instruments, of course, invariably contain other provisions that might affect the decision; but it would probably be held that a provision of this nature would make the interest future.[49] To take advantage of the exclusion, the trust instrument should provide for the immediate application for the benefit of the donees.

It cannot be said that a spendthrift provision alone is sufficient to make the gift one of a future interest. However, this provision has been contained in numerous trusts which were declared to be future interests[50] and did not appear in any of the late cases where gifts were held to be present interests.

A trust for children in which after-born children may participate, that is, a class trust, will make valuation of the right to income impossible.[51] This may be avoided by specifically naming the donees.[52]

47 Ryerson v. United States, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941); Howe v. United States, 142 F. (2d) 310 (7th Cir. 1944); Commissioner v. Brandegee, 123 F. (2d) 58 (1st Cir. 1941); Hopkins v. Magruder, 122 F. (2d) 693 (4th Cir. 1941); Willis D. Wood, 16 T. C. No. 118, P-H 1951 TC REP. DEC. ¶ 16.118 (1951).

48 Commissioner v. Disston, 325 U. S. 442, 65 S. Ct. 1328, 89 L. Ed. 1720 (1945); Fondren v. Commissioner, 324 U. S. 18, 65 S. Ct. 499, 89 L. Ed. 668 (1945); Ryerson v. United States, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941); Hessenbruch v. Commissioner, 178 F. (2d) 785 (3d Cir. 1950); French v. Commissioner, 138 F. (2d) 254 (8th Cir. 1943); Estate of Ethel K. Childers, 10 T. C. 566 (1948); Estate of Simon Guggenheim, 1 T. C. 845 (1943). See also: Helvering v. Blair, 121 F. (2d) 945 (2d Cir. 1941). *Contra*: Smith v. Commissioner, 131 F. (2d) 254 (8th Cir. 1942); Noyes v. Hassett, 20 F. Supp. 31 (D. Mass. 1937). The latter case is considered overruled, Wizotzkey v. Commissioner, 144 F. (2d) 632, 637 (3d Cir. 1944); and Smith v. Commissioner was criticized in Fisher v. Commissioner, 132 F. (2d) 383, 386 (9th Cir. 1942).

49 Commissioner v. Disston, 325 U. S. 442, 65 S. Ct. 1328, 89 L. Ed. 1720 (1945) (education, comfort and support); Commissioner v. Taylor, 122 F. (2d) 714 (3d Cir. 1941), *cert. denied*, 314 U. S. 699, 62 S. Ct. 479, 86 L. Ed. 559 (1942) (support and education); United States v. Knell, 149 F. (2d) 331 (7th Cir. 1945); Welch v. Paine, 120 F. (2d) 141 (1st Cir. 1941) (support, maintenance or education); Estate of Frank M. Gould, P-H 1947 TC MEM. DEC. ¶ 47,176 (1947).

50 Disston v. Commissioner, 325 U. S. 442, 65 S. Ct. 1328, 89 L. Ed. 1720 (1945); Fondren v. Commissioner, 324 U. S. 18, 65 S. Ct. 499, 89 L. Ed. 668 (1945); Hessenbruch v. Commissioner, 178 F. (2d) 785 (3d Cir. 1950).

51 The value of a gift of a present right to income from property is determined by using a hypothetical annuity at the rate of four percent. 26

Insurance and Other Gifts

A gift of an insurance policy seems to be an effective way of making a present disposition of property, the benefit of which will be realized in the future. The Regulations state that the term "future interests" has no reference to the contractual rights existing in a policy of life insurance though the obligation is to be discharged by payment in the future.[53] But the Regulations continue, stating that a future interest may be created by limitations contained in the instrument used to effect the gift.[54] There is no doubt that an assignment of the benefits of an insurance policy is a taxable gift if no power remains in the insured to revoke or revest the benefits in himself or his estate, even though it is conditioned upon survival by the donee-beneficiary.[55]

Under the early theory that an interest is future where enjoyment is dependent upon survivorship, it would seem that any gift of life insurance would be of a future interest. This has been held where an insurance policy was transferred in trust.[56] Insurance placed in trust is held to be a gift of a future interest for the same reason that other property placed in trust is a gift of a future interest. If enjoyment is postponed to the happening of a future event,[57] or is contingent,[58] the gift is of a future interest.

Generally the payment of premiums on insurance policies held in trust is a gift of a future interest.[59] An outright gift of an insurance policy has been held to be a gift of a future interest if the donee could neither effect a cash surrender nor borrow money against it.[60] And if postponement of enjoyment creates a future interest of the policy,

---

CODE FED. REGS. § 86.19 (f) (5) (1949). The right of an after-born child to share in income will decrease the value of the right of the other donees. A valuation at the time of the gift could only be made by computing the number of children who will be born after the gift and who will share in it. Mathematical tables have not gone that far.

52 Estate of Edward R. Kregar, 8 T.C. 1199 (1947).

53 26 CODE FED. REGS. § 86.11 (1949).

54 *Ibid.*

55 26 CODE FED. REGS. § 86.2 (a) (8) (1949).

56 Ryerson v. United States, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941); Hopkins v. Magruder, 122 F. (2d) 693 (4th Cir. 1941). See also: Commissioner v. Boeing, 123 F. (2d) 86 (9th Cir. 1941).

57 Commissioner v. Boeing, 123 F. (2d) 86 (9th Cir. 1941).

58 Ryerson v. United States, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917 (1941); Francis P. Bolton, 1 T.C. 717 (1943).

59 Joe J. Perkins, 1 T.C. 982 (1943); Frances P. Bolton, 1 T.C. 717 (1943). *Contra*: Jack L. Warner, 42 B.T.A. 954, 957 (1940), *rev'd on other grounds sub nom.* Commissioner v. Warner, 127 F. (2d) 913 (9th Cir. 1942). The payment of the premium by the primary beneficiary is not a gift. Gilbert Pleet, 17 T. C. No. 11, P-H 1951 TC REP. DEC. ¶ 17.11 (1951); Grace R. Seligmann 9 T. C. 191 (1947).

60 Joe J. Perkins, 1 T.C. 982 (1943); George B. Caudle, P-H 1945 TC MEM. DEC. ¶ 45,100 (1945).

so also may it create a future interest of the premiums paid by the donor.[61] Where policies were assigned to the donor's children, to be delivered to and held by their mother, but were restricted in that they were to be held three years before they had loan value or could be surrendered for cash, it was held that premium payments in 1935 and 1936 were gifts of future interests, but the exclusion was allowed on the 1937 payment because at that time the rights of the donees were immediately available.

In a case which followed the *Ryerson* decision, the donor assigned all rights and privileges to his children jointly. The Tax Court held that exercise of the right of ownership required joint action by all the children and that this postponed enjoyment until the joint action was taken.[62] This was affirmed in the Court of Appeals for the Second Circuit.[63]

A gift of an annuity was held to be a gift of a future interest where the annuity payments were to begin many years in the future, and if the annuitant died the sums were to be paid to other specifically named beneficiaries.[64] Though no intervening life estate was created, there was a postponement of enjoyment and it was contingent upon survival. A future interest may be created if the donor of the annuity retains some of the rights and if the annuity contains restrictive agreements,[65] whether in contracts or in trust instruments.[66]

The conveyance of property with a life estate reserved is, of course, a gift of a future interest.[67] The fact that the corpus of a trust consisted of notes bearing no interest will not, of itself, cause a gift to be of a future interest.[68]

In a case decided since the *Fondren* and *Disston* decisions, the donor made gifts to children, turning the property over to their parents as guardians, to accumulate the income until the donees reached the age of 21. It was held that enjoyment and possession were postponed and the exclusion was not allowed.[69]

---

61 Nashville Trust Co., P-H 1943 TC MEM. DEC. ¶ 43,485 (1943).

62 Spyros P. Skouras, 14 T.C. 523 (1950).

63 Skouras v. Commissioner, 188 F. (2d) 831 (2d Cir. 1951).

64 Roberts v. Commissioner, 143 F. (2d) 657 (5th Cir.), *cert. denied,* 324 U. S. 841, 65 S. Ct. 585, 89 L. Ed. 1403 (1944). See also Elizabeth C. Morrow, 2 T.C. 210 (1943). A future interest was created because enjoyment was dependent upon survival.

65 Clara Ream, P-H 1943 TC MEM. DEC. ¶ 43,501 (1943).

66 *Id.,* ¶ 43,501 at p. 1603.

67 Rosa A. Howze, 2 T.C. 1254 (1943).

68 Commissioner v. Kempner, 126 F. (2d) 853 (5th Cir. 1942).

69 Katherine Schuhmacher, 8 T.C. 453 (1947).

Gifts to Minors

The courts have never held that it is *impossible* to execute a gift of a present interest to a minor or incompetent. However, there is reason to believe that the Bureau takes a different view.[70] Unfortunately, in the *Fondren* decision,[71] the Court refused to decide this issue since there it was only mentioned and not presented to the Court for determination. The Court merely found appealing the argument of the taxpayer that if the gift there involved did not confer immediate enjoyment, *no* gift to a minor could be a present interest.[72]

Under state laws legal disabilities are imposed on the enjoyment of property by minors and incompetents.[73] In a recent case [74] the Commissioner advanced, but did not develop, the argument that these disabilities restricted the minor-donee's immediate enjoyment, making the gifts future interests. The court rejected the argument as untenable, saying,[75] "If that view were carried to its logical conclusion, all gifts to minors would be subject to the same contention." In another recent case [76] the court said that while the Commissioner did not expressly state it, his position seemed to be that for the beneficiary to have a present interest he must have "actual, physical use, possession or enjoyment." [77] In oral argument counsel for Commissioner was asked to give an example of how a gift of a present interest could be given to a minor. He was only able to suggest that it might be accomplished by transferring to an existing guardian.[78] The court in the *Kieckhefer* case concluded that since the Bureau admitted that a gift to a minor has the same standing as a gift to an adult,[79] it will be a gift of a

---

70 See note 38 *supra.*

71 Fondren v. Commissioner, 324 U. S. 18, 65 S. Ct. 499, 89 L. Ed. 668 (1945).

72 *Id.,* 324 U. S. at 29.

73 See, for example, Cannon v. Commissioner, 98 F. Supp. 331, 333 (W.D. N.C. 1951), where the court listed disabilities applying to minors in North Carolina.

74 John E. Daniels, P-H 1951 TC MEM. DEC. ¶ 51,044 (1951).

75 *Id.,* ¶ 51,044 at p. 139.

76 Kieckhefer v. Commissioner, 189 F. (2d) 118 (7th Cir. 1951).

77 *Id.* at 121.

78 *Ibid.* The Tax Court in John W. Kieckhefer, 15 T.C. 111, 117 (1950), and in Katherine Schuhmacher, 8 T.C. 453, 463-4 (1947), has stated the necessity of there being a legally appointed guardian. Gifts made directly to parents, as guardians, will not necessarily be a gift of a present interest.

79 Kieckhefer v. Commissioner, 189 F. (2d) 118, 121 (7th Cir. 1951). It should be noted that the position of the Commissioner is somewhat inconsistent. After seeming to argue that a gift to a minor is a gift of a future interest because the minor does not have "actual possession," *ibid.,* and because of the legal disabilities imposed on minors by state law, John E. Daniels, P-H 1951 TC MEM. DEC. ¶ 51,044 (1951), the Commissioner admits that gifts "to minor beneficiaries are placed on an equality with gifts to adults." Kieckhefer v. Commissioner, *supra,* at 121.

present interest if the only restrictions are those imposed because the beneficiary cannot legally act on his own behalf.

It is possible that the Bureau is taking this extreme position in an effort to force the court to rule on it.

Present Interests

There have been some few cases since the decisions in *Fondren* and *Disston* holding gifts to be present interests despite provisions seeking to postpone or restrict enjoyment. Practically all of these decisions, of course, distinguished those two important cases.

In *Sharp v. Commissioner,*[80] the trustee was to manage and invest the trust property and was "'. . . to apply and pay over to the use and for the benefit of . . . [the donor's] son . . . the net income therefrom during his minority. . . .'" [81] It was to be paid to the donee's mother or guardian. Another provision in the instrument allowed the trustee to expend the income in a manner that he believed would help the son, the balance of income to be accumulated until the son reached majority. It was held as a matter of fact that the trustee had no right to withhold the income, that the provision to expend or accumulate was merely a precautionary measure. The donee, then, "had at once the right of enjoyment." [82] The trust provided for the immediate application of the funds for the donee's benefit and the exclusion was allowed.[83] The court distinguished the *Fondren* decision, where none of the funds could be immediately expended, and the *Disston* case, where there was no evidence that income would be presently "required."

The *Sharp* decision was followed where the trustee had to pay over the income for the needs and the best interests of the donee-beneficiary, as though the trustee were a guardian.[84] It was said that if the gifts had been made to a guardian the exemption would apply.

---

80 153 F. (2d) 163 (9th Cir. 1946).

81 *Id.* at 165.

82 *Ibid.*

83 The court distinguished the *Fondren* case, but in its decision followed dicta in that case: "Whenever provision is made for immediate application of the fund for [the minor's benefit] . . . the exemption applies." Fondren v. Commissioner, 324 U. S. 18, 29, 65 S. Ct. 499, 89 L. Ed. 668 (1945). The exclusion was not allowed where there was a provision for quarterly payments to the beneficiary if deemed necessary in the discretion of the trustee. Frances McGuire Rassas, 17 T.C. No. 19, P-H 1951 TC REP. DEC. ¶ 17.19 (1951).

84 Strekalovsky v. Delaney, 78 F. Supp. 556 (D. Mass. 1948). For a thorough analysis of the *Strekalovsky* trust and a comparison with trust instruments in other cases, see Anderson, *Gifts to Children and Incompetents,* 26 TAXES 911 (1948). See also, Cannon v. Robertson, 98 F. Supp. 331 (W.D. N.C. 1951), where the trustee was to pay over principal from time to time for the support, maintenance, education and pleasures of the donee. The trustees were to act as if

Perhaps the most important recent case is *Kieckhefer v. Commissioner*.[85] The trustee was to apply income for the education, support and maintenance of a minor-donee, making payment to the donee, parent or guardian, and to accumulate all income not needed until the beneficiary reached the age of 21. If the donee died before reaching 21, the property was to devolve through his estate, and the trust could be terminated upon the demand of a legally appointed guardian. Because the Tax Court thought it unreasonable to suppose that a six-month-old donee would make a demand on the trust or that the courts of the state would necessarily appoint a guardian, it found the gift to be of a future interest.[86] The circuit court reversed, emphasizing the provision which would permit the trust to be terminated and distributed to the beneficiary upon demand of a guardian. The provision, it said,[87] took the case out of the *Fondren* and *Disston* rules. The circuit court also stated, and it is an important addition to the "tax" concept of future interests, especially where the donee is a minor or incompetent, that if the restriction upon immediate enjoyment is imposed by the trust instrument, it is a future interest, but if it is imposed by the legal disabilities arising from state law, it is a present interest.[88]

Several other late cases have held that the trust income was a gift of a present interest on the ground that it was to be immediately applied to the use of the beneficiary.[89] Where the income from a trust is held to be a gift of a present interest, the question of whether the corpus is a gift of a present interest will only arise if the value of the right to income is less than the $3000 exclusion.[90] Since the value of the present right to receive income is determined by the use of annuity tables,[91] there must be a predictable corpus. If the trustee may apply income or accumulate it, if he may invade or exhaust the corpus, in his discretion, valuation of the present right to income is impossible.[92]

---

they were legally appointed guardians. It was held to be a gift of a present interest. The court cited the *Strekalovsky* and *Sharp* cases.

85 189 F. (2d) 118 (7th Cir. 1951).

86 John W. Kieckhefer, 15 T.C. 111 (1950).

87 Kieckhefer v. Commissioner, 189 F. (2d) 118, 119 (7th Cir. 1951).

88 *Id.* at 122. There is some indication that this distinction was made earlier in Chas. F. Roeser, 2 T.C. 298, 304 (1943).

89 Kniep v. Commissioner, 172 F. (2d) 755 (8th Cir. 1949); Jesse S. Phillips, 12 T.C. 216 (1949).

90 The gift of corpus and income is considered as one gift. If there is a present interest of income valued at $3000, the maximum exclusion allowed, the nature of the interest of the remainder of the gift is immaterial. See Sharp v. Commissioner, 153 F. (2d) 163 (9th Cir. 1946).

91 26 CODE FED. REGS. § 86.19 (f) (5) (1949).

92 As Learned Hand stated in Helvering v. Blair, 121 F. (2d) 945, 947 (1941), where the trustee had the power to apportion income among the beneficiaries as he saw fit: "In order to calculate the value of an interest subject to such a condition, we should have to have some actuarial basis for the probability that trustees who had once made . . . [an apportionment] would not disturb it."

If the trustee's authority to invade the corpus is limited to a specified maximum amount each year, the value of the right to income is determined on the assumption that the trust estate will be reduced annually to the extent of the maximum allowed.[93]

That the donor gave a minor-donee as much use, possession and enjoyment as possible under the state law has been said to be immaterial.[94] The same court also posed, but did not answer, the question: does a minor-donee have the present use and possession of property which he owns in fee, as the result of a gift, but which the state law expressly requires to be handled by a guardian? [95] Possibly, the *Kieckhefer* decision has provided the answer. An outright gift of stock to minors was a present interest, even though the dividends they received had to be endorsed by others before they could be used.[96]

Only two other late cases holding gifts to be of present interests have been found: one was based on a rather odd interpretation of the trust provisions [97] and the other decision was made, at least as far as can be determined by the report of the case, without sound reason or research.[98]

Conclusion

The Government, while it has not necessarily created a new concept of future interests, definitely has its own ideas on the subject. One reason for this is the desire for a uniform, nation-wide scheme of taxation.[99] Another possible reason is that the term "future interest" is not a stable one. What is deemed a future interest today, may well be labeled a present interest tomorrow.[100]

This reasoning applies wherever trustees may vary the amount that is in the corpus. In short, actuarial tables cannot take into consideration the whims of trustees.

93 Kniep v. Commissioner, 172 F. (2d) 755 (8th Cir. 1949); Lockard v. Commissioner, 166 F. (2d) 409 (1st Cir. 1948).

94 Ashcraft v. Allen, 90 F. Supp. 543, 545 (M. D. Ga. 1950).

95 *Ibid.*

96 John E. Daniels, P-H 1951 TC MEM. DEC. ¶ 51,044 (1951).

97 Louise McCoy, P-H 1947 TC MEM. DEC. ¶ 47,272 (1947). Income was to be applied for the benefit of the beneficiaries as deemed necessary in the discretion of the trustee. Quarterly payments were provided for. The court by deciding that income would be paid in any event apparently ignored the discretionary nature of the trust.

98 Blaugrund v. United States, 70 F. Supp. 519 (W.D. Tex. 1946). The court cited no cases and gave no reasons, merely saying: the property was for the immediate use of the beneficiaries, though possession was in the trustees.

99 United States v. Pelzer, 312 U. S. 399, 402, 61 S. Ct. 659, 85 L. Ed. 913 (1941).

100 See Simes, *Fifty Years of Future Interests,* 50 HARV. L. REV. 749, 783 (1937): "No one who has given any consideration to the tremendous changes which have taken place in this field of the law in the past fifty years would venture to predict what will happen within the next half century."

The courts have held that a gift in trust will be taxable in full, the $3000 exclusion not allowed, where the instrument of transfer provides that the income is to be applied to the use of the beneficiary if necessary, or in the discretion of the trustee, for his support, maintenance, comfort or education. The exclusion is not allowed if income is to be accumulated until a certain future time or is contingent on a future uncertain event, or where the trustee has discretion to apply or accumulate income. If distribution of the corpus is deferred, the donee has only a future interest. In short, the exclusion is denied if any restriction or limitation is created in the trust instrument which postpones the immediate right of the donee to the use, possession or enjoyment of the property.

Gifts in trust will be held to be future interests if after-born children may participate, if the trustee may apportion among several beneficiaries in his discretion, or if he can invade or exhaust the corpus, on the ground that the value of the gift is uncertain.

Gifts of insurance policies will be gifts of future interests if the power to borrow against them or to surrender for cash is restricted. Other gifts will be similarly treated if there are limitations or restrictions on the immediate use or enjoyment. A long-term, non-interest bearing note given to a donee transfers a present interest, but the result might be different if there are restrictions on its later transfer.

Some common threads run through the decisions where gifts were held to be of present interests. The trustee should have no discretion as to the application of income; no restrictions should be created by the trust instrument, the one restriction allowed being the legal one created by state law where the beneficiary is a minor. The donee should be able to demand the property, through a guardian if he is a minor. If there is no guardian, one should be provided by the trust instrument. Mandatory, periodic payments of income to the beneficiary should be prescribed. A provision that the property is to devolve through the donee's estate if he dies before the time of distribution, has apparently encouraged the courts to find the gift to be one of a present interest.

Needless to say, the primary consideration in the wording of the trust instrument is to give effect to the intent of the donor. After that is established, provisions may be incorporated in the instrument that will not destroy the intent, but will take advantage of the $3000 annual exclusion.

No reason can be given for the denial of the exclusion to all gifts of future interests. The gift tax is levied so that all transfers of property, whether they be inter vivos or by will, may be taxed. It is also for the purpose of discouraging magnanimous pre-death conveyances to avoid the estate tax. The exclusion is allowed because of the