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NOTES

Constitutional Law

DELEGATION AND SEPARABILITY ASPECTS OF THE HOUSING AND RENT ACT OF 1949*

Recent court decisions interpreting the Housing and Rent Act of 1949,[1] present an interesting conflict on the issue of the Act's constitutionality, specifically as respects Congress' power to delegate its legislative authority. A federal district court in Illinois recently held,

*A decision by the Supreme Court on the issue of the constitutionality of the Housing and Rent Act of 1949 appeared imminent as this note was being prepared and set in print. The present note has been prepared with a view toward presenting various issues which might arise in determining the validity either of the instant Act or any similar pieces of legislation subsequently enacted; i.e., while discussion of the issues has been specifically related to the provisions of the rent Act, the issues so presented are merely applied to, and not limited by, the provisions of that particular Act.

1 Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949). This Act amends the 1947 Act, 61 STAT. 196 (1947), as amended, 50 U.S.C. App. § 1891 *et seq.* (Supp. 1949).

in *Woods v. Shoreline Cooperative Apartments, Inc., et al.*,[2] that the Act is an unconstitutional delegation of the legislative power of Congress insofar as the "local option" provisions [3] are concerned, and that these provisions are not separable from the remaining portions of the Act, despite the presence therein of a standard separability clause.[4] Thus the entire Act was, under the reasoning of the court, wholly unconstitutional. Squarely opposed to the holding in the *Shoreline* case is the subsequent decision handed down by a federal district court in California, in *United States v. Emery et al.*[5] This case upheld the "local option" provisions as a valid delegation of congressional power to the states and local communities. In a third case, *United States v. Resch*,[6] a federal district judge in Kentucky has stated that the "local option" provisions are valid, and that even if any of them were declared invalid, they would be separable from the rest of the Act. These decisions serve to point up some of the rather novel aspects of the problem of the permissible limits of Congress' delegation of its legislative power as raised by the recent rent control Act.

The scope of this note will be restricted to: a brief examination of the history of rent control legislation in the United States; the problem of delegation of congressional legislative power to the states and local communities under the Housing and Rent Act of 1949; the operation of the separability clause which is included in the Act. It will be assumed that the war powers, from which derive the congressional authority to pass any sort of rent control legislation, may still be validly exercised.[7]

It would be well at the outset to clarify the sense in which the term "delegation of legislative power" will be used. This phrase has been utilized by some courts to denote unconstitutionality per se,[8] while in other courts a delegation in itself is not conclusive of un-

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2 84 F. Supp. 660 (N. D. Ill. 1949).

3 Note 1 *supra*, at § 204 (j) (1), (2), (3) of the Act as amended.

4 Note 1 *supra*, at § 303 of the Act as amended.

5 85 F. Supp. 354 (S. D. Calif. 1949).

6 85 F. Supp. 389 (W. D. Ky. 1949). A fourth "test" suit was recently begun in Chicago before a special three-judge court. N. Y. Times, Sept. 13, 1949, p. 31, col. 1. Early interest in the progress of this case has dwindled since the Supreme Court has agreed to hear the *Shoreline* case in the near future. See 18 L. W. 3118 (1949).

7 Both the *Shoreline* and *Emery* cases proceeded on this assumption.

8 Early cases which seem to proceed upon this theory include: The Brig Aurora, 7 Cranch 382, 3 L. Ed. 379 (U. S. 1813); Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892); United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); Locke's Appeal, 72 Pa. 491 (1873); *cf.* more recent cases, where conferring of regulatory power was held to be a mere limitation by Congress of its own power. United States v. Rock Royal Cooperative, Inc., et al., 307 U. S. 553, 59 S. Ct. 993, 83 L. Ed. 1446 (1939) and Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939).

constitutionality, but merely presents the further and more important question of whether such delegation is "valid" or "invalid." [9] The tendency of courts today is to recognize, realistically, that many of the broad powers delegated by Congress are, to some extent at least, legislative in nature.[10] In accordance with this trend, the use of the term "delegation of legislative power," for the purposes of this note, will not of itself indicate an unconstitutional delegation, but will merely raise the further question of the validity of such delegation.

I.

Although the broad issue upon which the problems arising under the Act turn—namely, the issue of delegation of legislative power—reaches down into the roots of American constitutional history,[11] comprehensive federal rent control legislation was unknown in the United States until the recent war. The only federal act of general application in the first World War was the Soldiers' and Sailors' Civil Relief Act of 1918,[12] which merely protected families of service men from eviction and distress during their period of service, if rentals were not more than fifty dollars per month. Congress also passed a rent control act of a more comprehensive nature for the District of Columbia, which provided, with certain exceptions, that no judgments of eviction should issue for the duration of the war where tenants held under leases of one month or longer.[13] Five states passed rent control acts during the first World War,[14] but general housing conditions apparently did not warrant widespread legislation.

With the advent of the second World War, Congress, under the authority of its war powers, passed the Emergency Price Control Act of 1942,[15] which provided, inter alia, for the establishment, at the

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9 As long ago as 1916, Elihu Root stated that, as the result of the creation of various administrative boards, "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." Root, *Public Service By The Bar*, 2 A.B.A.J. 736, 749 (1916). See an excellent and realistic discussion of delegation, in which the court construes *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928), as recognizing a permissible area of delegation of legislative powers. State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928). See also Jaffe, *An Essay on Delegation of Legislative Power: II*, 42 COL. L. REV. 561 (1947); Cousens, *The Delegation of Federal Legislative Power to Executive Officials*, 33 MICH. L. REV. 512 (1934).

10 Authorities cited note 9 *supra*.

11 See, e.g., the early cases cited note 8 *supra*.

12 40 STAT. 440 (1918).

13 *Id.* at 443, § 300 (1).

14 See 51 HARV. L. REV. 427, 497 (1942), citing DRELLICH AND EMERY, RENT CONTROL IN WAR AND PEACE 16-20 (1939); see also, as to state rent control during and after the first World War, 95 Cong. Rec. 2956 (Mar. 22, 1949).

15 56 STAT. 23 (1942).

discretion of the Price Administrator, of controls over rental housing units in defense rental areas.[16] The broad powers given to the Administrator under this Act reflected the well-founded fear of the economic repercussions of the war. The purpose of the Act, as set forth in Section 1 (a), was, in part, "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering . . . and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. . . ." In 1944, the Act, as amended,[17] was amended to allow the Administrator to decontrol rental units in areas where he found that there were adequate rental facilities, or where for other reasons rent control was no longer necessary.[18] In 1946, a Congressional change of policy was declared: ". . . that unnecessary or unduly prolonged controls over prices and rents and use of subsidies would be inconsistent with a return to . . . a peacetime economy." [19] In 1947, the duty of administering rent controls passed from the Office of Price Administration to the Office of the Housing Expediter, under the terms of the Housing and Rent Act of 1947.[20] The reason for the shift, of course, was the prospective expiration of the Emergency Price Control Act, and the realization by Congress, at the same time, of the continued need for federal rent controls. Congress, in this new Act, affirmed the policy of the 1946 price control legislation, and further stated that it was the congressional purpose "to terminate at the earliest practicable date, all Federal restrictions on rents on housing accommodations." [21]

Under the 1947 Act, the Housing Expediter was given substantially the same discretionary powers [22] to decontrol defense rental areas as had been given the Price Administrator under the earlier price control acts. However, the Expediter was directed to set up local advisory boards consisting of persons who were "representative citizens of the area," to be appointed by the Expediter from recommendations made by the respective Governors of the states. These local boards could make recommendations to the Expediter for decontrol of defense rental areas or portions thereof, subject to the approval of the Expediter. The action of the Expediter in approving or disapproving of these recommendations was not entirely discretionary, however. It was provided that: [23]

16 *Id.* at 24, § 2 (a).

17 56 STAT. 23 (1942), as amended, 57 STAT. 566 (1943).

18 56 STAT. 23 (1942), as amended, 58 STAT. 633 (1944).

19 56 STAT. 23 (1942), as amended, 60 STAT. 664 (1946).

20 61 STAT. 196 (1947), as amended, 50 U. S. C. App. 1891 *et seq.* (Supp. 1949), Pub. L. No. 31, 81st Cong., 1st Sess. (Mar. 29, 1949).

21 *Id.* at § 201 (a) of the 1947 Act. It is interesting to note that this section remained unchanged in the 1948 and 1949 amendments to the original Act.

22 *Id.* at § 204.

23 *Id.* at § 204 (e) (3).

> Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendations into effect.

The meaning of this section was clarified in the 1948 amendment of the Act, which provided that a recommendation should be deemed "appropriately substantiated and in accordance with applicable law and regulations" if the local board: held a public hearing; gave proper notice of the place, date and purpose of the hearing; filed a copy of the recommendation with the Governor; kept a record of the proceedings and sent a copy thereof, along with its findings and recommendations, to the Expediter; and if the record contained adequate and substantial evidence to support the findings and recommendations of the local board.[24]

It was with this background of federal rent control legislation, and during the difficult transitional period between the war and the prospective return to a stabilized, normal economy that Congress, after extended committee and floor hearings and debates, passed the Housing and Rent Act of 1949. Included in this Act, in addition to the extension of many of the provisions of the previous rent acts, were the unique and presently controverted provisions for ending federal rent control at the option of state and local governing units.[25]

Congressional dissatisfaction with the progress of decontrol [26] under the previous rent control acts, which had vested virtually all decontrol powers in the Housing Expediter, coupled with the desire to end all federal rent controls at the earliest possible time,[27] led to the inclusion of the "local option" provisions in the 1949 Act. Consideration of these provisions will involve an examination of two fundamental problems. (1) Do the provisions giving the states and local governing units an opportunity to end federal rent control amount to a delegation of congressional legislative power; or are these provisions merely a limitation by Congress on the operation of its own law? (2) If any of the provisions do amount to a delegation, is the delegation valid, or is it an unconstitutional abdication by Congress of its legislative prerogatives?

II.

Section 204 (j) (1) of the Housing and Rent Act provides:

> Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establishment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent

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24 *Id.* at § 204 (e) (4) of the 1947 Act, as amended, 50 U. S. C. App. § 1894 (Supp. 1949).

25 See note 3 *supra.*

26 See, e.g., 95 Cong. Rec. 2521-6 (Mar. 15, 1949); 95 Cong. Rec. 2362-3 (Mar. 11, 1949).

27 See note 21 *supra.*

> control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

Under this subsection, it would seem that Congress has merely given the states an opportunity, in lieu of federal rent control, to enact their own laws on the same subject matter. The power under which the states would enact rent control laws, is, of course, derived from their inherent police power, and not from the war powers. That the states, in the exercise of their police power, can enact valid rent control laws has been affirmed by the Supreme Court in *Marcus Brown Holding Company v. Feldman*[28] and *Edgar A. Levy Company v. Siegel.*[29] The subsection of the Housing and Rent Act presently under discussion does not specifically direct the states to take action to terminate rent control; furthermore, such action, if taken, need not have any reference to the emergency war powers, even though as a practical matter the need for rent control at this time obviously derives from the economic aftermath of the war, whether so stated or not. In any event, these provisions for decontrol seem proper in view of the fact that the states have power to pass rent control laws independently of the war effort, so long as Congress agrees, as it appears to have done under this subsection, that its own law, which can be based only on the war powers, shall not take precedence.

The provisions of this subsection are not strictly analogous either to state home rule or state "local option" laws, since the powers of the various state subdivisions in those instances are derived only from the states, while the power of the state is, in the matter of rent control, coexistent with, and not derived from federal power.

It should be noted that if the states, under this subsection of the Act, were authorized to exercise a continuing power to administer the *federal* law, this would of course amount to a delegation, valid or invalid, of congressional legislative power. But it might well be argued that this section, as it stands, is not a delegation of *any* congressional power, since, as has been pointed out, the states likewise have the power, though on a different basis, to enact rent control legislation, and since, by providing the states with the opportunity to provide their own controls, Congress has merely put a voluntary

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28 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877 (1921). Despite this case, the Illinois district court in the *Shoreline* case thought the existence of such power doubtful. 84 F. Supp. 660, 662 (N. D. Ill. 1949).

29 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922).

limitation on the operation and applicability of its own Act. Under this view, it does not become necessary to discuss, in this subsection, the question whether sufficient standards are laid down by Congress to guide the states—a question which would only arise if the subsection were construed to be a delegation of congressional legislative power to the states.[30] Under the concurrent powers theory which has been developed, it would not be the proper concern of Congress to tell the states how to exercise their own legislative powers. Likewise, it is not necessary to consider whether the absence of concurrent powers would conclusively establish that the provisions of this subsection involve delegation rather than congressional limitation. However, it seems pertinent to point out that, in addition to the concurrent powers theory, the constitutionality of this subsection might be upheld on the authority of *United States v. Rock Royal Cooperative, Inc., et al.*[31] and *Currin v. Wallace*,[32] in which individuals were given the power to determine whether an order issued under a congressional act was to apply to them. This power was held to be only a limitation by Congress on the operation of its own act, and not a delegation. These cases may be distinguishable on their facts from the situation presented under the rent Act, and the concurrent state powers theory would seem to be a sounder basis upon which to argue the constitutionality of this subsection of the Act. The *Rock Royal* and *Currin* cases are discussed further under subsection (j) (3) of the Act.

The only remaining issue as to this subsection, then, is whether it is separable from any other section of the Act which might be declared unconstitutional.[33]

Section 204 (j) (2) provides:

> If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

It would seem that the same reasoning as was applied to subsection 204 (j) (1) might likewise be applied here. Since the states (insofar as their laws do not conflict with federal laws on the same subject matter) can enact rent control laws,[34] and since Congress can validly limit the operation of its own law,[35] Congress has, under this sub-

30 The question of standards is discussed *infra*.
31 307 U. S. 553, 59 S. Ct. 993, 83 L. Ed. 1446 (1939).
32 306 U. S. 1, 59 S. Ct. 379, 55 L. Ed. 563 (1939).
33 The question of separability is discussed *infra*, under section III.
34 See notes 28 and 29 *supra*.
35 See, e.g., the *Rock Royal* and *Currin* cases, cited notes 31 and 32 *supra*.

section, merely placed a limitation on its own act by allowing the states to determine, under their own police powers, that *no* rent control is necessary. It would not seem to be an important distinction that one state law would continue rent control under a system of its own, while another would abolish it completely, since what Congress has done in both subsections 204 (j) (1) and 204 (j) (2) is to give the states a green light to legislate on the subject as they deem desirable.

A further question might arise, however, with respect to the role of the Governor of a state under this subsection. Is it within the *discretion* of the Governor to determine whether the state law is adequate and to refuse to advise the Housing Expediter as prescribed by this subsection if the Governor should feel that the law which the legislature has passed is inadequate? [36] If the Governor does have such discretion, then it would appear that the power to determine whether the federal law should continue to apply is not derived from concurrent legislative power alone, but rather is an attempt by Congress to delegate its power to a state executive officer. It is not clear that discretion is granted to the Governor under the wording of this section, however, and the problem of delegation to local officers is more squarely presented under section 204 (j) (3).

Section 204 (j) (3) provides:

> The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose *in accordance with applicable local law* and based upon a finding by such governing body reached as a result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter; *And provided further,* That where the major portion of a defense-rental area has been decontroled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. (Emphasis partially supplied.)

The provisions of this subsection clearly place the process of decontrol outside the realm of concurrent state legislative power. Thus the general problem of the delegation of congressional legislative power is inescapably presented. The argument might be advanced that the power of the local governing units to determine, under this subsection, whether the federal law is to continue to apply is merely, as in subsections (j) (1) and (j) (2), a voluntary limitation by Congress on the operation of its own Act. But a distinction may be drawn, in that in the latter instances a concurrent power already existed in the

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[36] That the Senate Committee on Banking and Currency, to which the Housing and Rent Act of 1949 was referred, considered this language to vest discretion in the Governor, see section on State Action, SEN. REP. No. 127, 81st Cong., 1st Sess. (1949).

states, and Congress had merely indicated its readiness to step out of the way of the exercise of that power. But, as pointed out, no such concurrent power exists in local governing units. The *Rock Royal* and *Currin* cases involved situations somewhat analogous to the "local option" provisions of subsection (j) (3), and might seem, at first, to be authority for the proposition that the latter is a limitation by Congress on the application of its own Act. The *Rock Royal* case involved the constitutionality of the Agricultural Marketing Agreement Act,[37] under which the Secretary of Agriculture had authority to promulgate orders designed to carry out the stated policy of the Act. Such orders were only to go into effect when two-thirds of the producers of a particular commodity, in the locality involved, approved them. The Court, in upholding the Act, concerned itself mainly with the sufficiency of standards which had been set down for the guidance of the Secretary in formulating such orders. The problem of delegation of congressional authority to the local producers was passed over lightly. Under similar facts in the *Currin* case, in which the constitutionality of the Tobacco Inspection Act[38] was in issue, the validity of submitting an order of the Secretary of Agriculture which affected a given locality to a referendum of the local producers affected thereby was specifically upheld. The Court was of the opinion that Congress had merely placed a restriction on its own law by with-holding its operation where more than one-third of the tobacco growers opposed the order. These cases would seem to indicate, since the power of individuals to determine the application of an administrative order was held not to amount to a delegation, that the existence or non-existence of concurrent power is not a conclusive test of whether a delegation or a mere limitation is involved. In any event, there seem to be other considerations which would distinguish those cases from the situation involved under subsection (j) (3) of the Housing and Rent Act. The right to determine whether an entire congressional act is to apply is certainly a broader power than is sanctioned under either the *Rock Royal* or the *Currin* case, although it might be argued that the difference is one of degree and not of kind. Furthermore, it may be suggested that in the *Rock Royal* and *Currin* cases, the Court found it necessary to avoid acknowledging that the power given to the producers constituted a delegation of any sort if the acts involved were to be sustained. That power of some sort was given is obvious; but the Court looked at the obverse side of the coin—at the fact that the giving of power to prevent the orders from taking effect was a voluntary limitation by Congress on its own laws. It would seem that both a limitation and a delegation of power were present under these acts. Inasmuch as the power given was to approve or disapprove administrative orders

[37] 50 STAT. 246 (1937), as amended, 7 U.S.C. § 601 (Supp. 1948).
[38] 49 STAT. 731 (1935), as amended, 7 U.S.C. § 501 (1946).

only, it could be termed only a quasi-legislative power, though the fact that such orders, once effective, had the force of law makes this appear to be a hairline distinction. Considered as legislative power, the delegation would seem to be of doubtful validity because of the lack of standards for the guidance of the producers in exercising this power. Thus the difficulty of upholding acts otherwise beneficial if the fact of delegation were recognized may have had something to do with the terminology adopted by the Court in the *Rock Royal* and *Currin* cases.

In the earlier case of *Carter v. Carter Coal Company, et al.*,[39] where an affirmative and broader power devolved upon individuals—the power to set wages and hours for the coal industry—the giving of such power to individuals was denounced by the Court as an unconstitutional delegation of legislative power. The fact that the power granted under the *Rock Royal* and *Currin* cases was only negative, and affected only executive orders, may justify considering it as a delegation of merely quasi-legislative powers, or, assuming that there were sufficient standards, as a permissible delegation of legislative power; but where such a power is conferred by Congress on others, it is difficult to see how it can be said that there is no delegation of any sort.

Assuming for purposes of discussion that the power to determine the applicability of federal rent controls under the Housing and Rent Act of 1949 *is* a delegation, valid or invalid, we come to the question whether under the Act congressional power can properly be delegated to local governing units of the states. The problem here is rather novel, since the question usually arises in connection with the delegation of federal power to other branches of the Federal Government. Local boards operating within the states under a federal authority and administering a federal law have been sustained when members of such boards have had no organic affiliation with local governing units, e.g., local rent control and O.P.A. offices.[40] However, the powers exercised by these local units were sustained on the theory that there was no invalid delegation by Congress of its legislative power; since local governing units were not involved in the local administration of these laws, the question which is now presented under subsection (j) (3) did not arise. Even if, under this subsection, there were deemed to be no delegation of congressional legislative power which would be improper if made to a federal board operating under a federal authority, it would seem that the delegation of *any* congressional authority to local governing units offends the concept of the division of powers under our consti-

39 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

40 Woods v. Miller, 333 U. S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1948); Bowles v. Willingham, 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944); Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 892 (1944).

tutional system of government. There have been instances, under federal statutes, in which local officers have been appointed to serve concurrently in similar federal positions. But the exercise of such federal and state powers remained at all times separate and distinct, and any action under the federal authority in these cases was purely ministerial and admitted of no power to vary the federal law in any respect. At least one prominent writer has compiled examples of such instances and has stated:[41]

> Apparently there has been no federal or state legislation *expressly* designating the administrative officers of the one government as agents of the other. Indeed, such "blanket" appointments would, in some cases, meet constitutional difficulties . . . But much cooperation between the Union and the states has been effected by the executive appointment, with or without express authority of law, of state officers as federal officers and federal officers as state officers. Thus the state foresters become federal foresters, the local health authorities federal "epidemicologists," the state employment officers federal employment directors, sheriffs deputy marshals, state prohibition officers federal prohibition officers; and other such appointments are made where the federal and state governments perform corresponding functions. (Emphasis supplied.)

Under the Selective Draft Act for the first World War, the President was given authority to create draft boards "to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision" [42] and, in addition, "to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States. . . ." [43] The validity of this Act was challenged on various grounds, among which was the contention that it involved an unconstitutional delegation of federal authority to state officials. The Supreme Court, in upholding the constitutionality of the Act, stated that this objection was "too wanting in merit to require further notice." [44] The fact that these appointments would not necessitate an overlapping of federal and state functions would seem to have been a significant factor in the decision of this case, along with the existence of a national emergency.

Can it be said that in subsection (j) (3) of the Housing and Rent Act, as in the examples just cited, Congress is merely for the sake of convenience utilizing a body which already exists, at the same time considering it as federally, and not locally constituted for this particular purpose? This could hardly be the case, since the Act specifies that the body shall conform to *local law* in carrying out its functions under the Act. It was clearly Congress' purpose to shift the

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41 Barnett, *Cooperation Between the Federal and State Governments*, 17 NAT. MUNIC. REV. 283, 287 (1928).

42 40 STAT. 79 (1917).

43 *Id.* at 80, § 6.

44 Arver v. United States, 245 U. S. 366, 389, 38 S. Ct. 159, 62 L. Ed. 349 (1918).

legislative burden to the Governors and local officials in this section of the Act, and to let them, acting as local officials primarily, terminate federal rent control when they thought it desirable. Hence the failure to give this power to the already existing local rent boards. Congress sought to give the localities authority to act on their own, apart from the federally constituted Housing Expediter and rent boards, so that if they were dissatisfied with the speed of decontrol by the federal officers, they could, in their capacity as local officers, take the matter into their own hands.[45] It is submitted that the spirit and letter alike of our federal system of government inveigh against such a delegation of federal authority to the political subdivisions of the states.

To state that it makes no real difference whether a local unit is created originally by the state—that the above argument upholds form over substance—is to argue that there is no real division of powers, if such statement is made where, as here, a local unit as such exercises federal powers. In this case it is also to overlook certain facts leading to the enactment of subsection (j) (3). The Congressional Record reveals that some Senators, at least, had grave doubts as to the constitutionality of this subsection. Senator Pepper commented:[46]

> It seems to me that there is very questionable authority for the Government of the United States to delegate to a subordinate political subdivision what amounts, for all practical purposes, to the exercise of legislative authority. We have gone far enough, it seems to me, in authorizing any State to enact a law setting up its own rent-control system covering the whole State, and, upon the facts being certified by the governor, eliminating that State from the area of Federal control . . . But, Mr. President, the Congress of the United States cannot properly delegate legislative authority. I think Congress should meet the issue squarely. We should either legislate upon rent control or get out of the field and leave it to the local authorities to legislate. If the municipalities want rent control, we should leave it up to them and to the States to provide it, if the Federal Government abandons the field. But this is a curious kind of arrangement, when we legislate, and we do not legislate, on rent control.

Arguments supporting the constitutionality of the subsection were also made in the Senate,[47] and the fact that the bill as passed included this subsection would seem to indicate that a majority of the Congress either considered the subsection to be constitutional or did not consider the problem.

There is an analogy which may be cited as favoring the validity of subsection (j) (3) (aside from the question of sufficiency of stand-

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45 See, e.g., 95 Cong. Rec. 2981, 3404 (Mar. 22, 1949) (Senators McClellan and Fulton favoring the proposal); 95 Cong. Rec. 2984-5 (Mar. 22, 1949) (Senators Pepper and Humphrey recognizing the purpose, but opposing the proposal).

46 95 Cong. Rec. 2984 (Mar. 22, 1949); see also argument of Sen. Sparkman, 95 Cong. Rec. 2875-6 (Mar. 21, 1949).

47 95 Cong. Rec. 2956 (Mar. 22, 1949); 95 Cong. Rec. 2879-80 (Mar. 21, 1949).

ards, discussed *infra*): the long-established practice of allowing cases involving federal statutes to be litigated in the state courts.[48] But some distinction may be found in the constitutional provision that the laws of Congress shall be binding on all the states;[49] since this is true, it seems only logical to allow the state courts to enforce such laws directly. But in point of fact, no convincing justification for this practice seems to exist; it has been declared to exist simply on the basis of respect for long custom and usage [50]—a sort of judicial prescriptive right. No such habit or usage exists with regard to the federal legislative branch; the state legislatures are nowhere directed to enact local laws similar to those passed in similar matters by Congress. In a converse situation, an attempt by a state legislature to let Congress and federal administrative boards create regulations for the state was overthrown, rather indignantly, in *Darweger v. Staats*.[51] And it would seem that Congress, on its part, can hardly allow the local governments to decide on the applicability of its laws without at least facing the charge of abdication of its legislative powers.

Another possible approach to the question of the constitutionality of subsection (j) (3) is from the direction of the sufficiency of the standards laid down by Congress for guidance of the local units. Pertinent here is the fact that the Illinois district court, in deciding the case of *Woods v. Shoreline Cooperative Apartments, Inc., et al.*,[52] held the entire "local option" section [53] unconstitutional on the ground that there were insufficient standards set out for the guidance of the state and local units. The court, in its opinion, stated:[54]

> It will be noted on reading the local option provisions of this Act that no standards are set up either for the determination of basic facts or rules for guidance of the States, municipalities, or other political subdivisions, in determining whether or not they shall remain under rent control. As far as Congress is concerned it has attempted to leave the matter entirely open to arbitrary determination by each State or other subdivision to decide for itself whether or not it wants rent control, and this entirely without rules or guide posts of any kind as to whether or not such rent control may be necessary in connection with the prosecution of the war effort.

Opposed to this view is the subsequent statement in *United States v. Emery et al.*,[55] by a federal district court in California:

> When the Congress authorized cities to recommend decontrol after hearings, the delegation of power in that respect was no greater than that given to the advisory committees under the Agricultural Act.

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48 See Note, 24 ORE. L. REV. 148 (1945).
49 U. S. CONST., Art. 6. cl. 2.
50 Barnett, *Delegation of Federal Jurisdiction*, 43 AM. L. REV. 852, 866 (1909).
51 267 N. Y. 290, 196 N. E. 61 (1935).
52 See note 2 *supra*.
53 See note 3 *supra*.
54 See note 2 *supra*, at 662.
55 See note 5 *supra*, at 355.

Before attempting to evaluate the standards laid down in the Act, it would be well briefly to examine the various tests for sufficiency of standards which have been developed by the courts.[56] Early decisions did not refer to sufficiency of standards as a test of constitutionality, possibly because they considered that any delegation of congressional power was invalid. This view was based upon the traditional concept, as expressed by Locke, that "The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others" [57] — and upon the maxim *delegata potestas non potest delegari.*[58]

The courts in early decisions adopted various refinements of reasoning to uphold what today would, in most cases, realistically be termed a delegation, valid or invalid. In *The Brig Aurora,*[59] an act of Congress which made the continued application of an embargo dependent upon the President's determination of whether Great Britain and France had ceased to violate the neutral commerce of the United States, was upheld against the contention that it involved a delegation of legislative power. The Supreme Court's answer was not direct. Ignoring the discretionary power delegated, the Court merely stated that Congress could exercise its discretion in continuing its laws either conditionally or expressly. A later case upholding a somewhat similar conferring of power on the President was *Field v. Clark.*[60] That case involved a congressional act giving the President discretionary power to suspend import duties. The Court decided that there was no delegation of legislative power, but merely a conferring of authority and discretion to determine when the contingency on which he was directed to take such action had occurred. In *United States v. Grimaud,*[61] an act of Congress had given the Secretary of Agriculture power to regulate the use of national forests, and provided that violation of his regulations was punishable as a crime. It was objected that only Congress could declare what actions should be criminal; but the Supreme Court, after first affirming a lower court decision holding the act un-

56 Extensive examination of standards as a test of the constitutionality of delegation can be found in Jaffe, *An Essay on Delegation of Legislative Power: II,* 47 COL. L. REV. 561 (1947); Cousens, *The Delegation of Federal Legislative Power to Executive Officials,* 33 MICH. L. REV. 512 (1934); Sternberg, *Delegation of Legislative Authority,* 11 NOTRE DAME LAWYER 109 (1936). See also Notes, 20 N. Y. U. L. Q. REV. 347 (1945); 24 CALIF. L. REV. 184 (1935); 7 MISS. L. J. 411 (1935).

57 LOCKE, TREATISE OF CIVIL GOVERNMENT 95 (Sherman's ed. 1937).

58 A dim view is taken of the maxim's worth in Duff and Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law,* 14 CORN. L. Q. 168, 195 (1929), where the authors opine that the maxim, "kept alive by discussion and dicta in the earlier cases, rises as a ghost to hamper the efficient and proper distribution of the functions of government."

59 7 Cranch 382, 3 L. Ed. 379 (U. S. 1813).

60 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892).

61 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911).

constitutional,[62] reversed itself and unanimously held that the act involved only a delegation of administrative authority, and not of legislative power. The Court admitted that "it is difficult to define the line which separates legislative power to make laws from administrative regulations." [63] Professor Jaffe, in discussing this admission, comments, "Difficult indeed! Impossible, if what is meant is a difference in kind." [64] These cases are cited here to illustrate that the courts for many years, in considering problems similar to those presented in the rent control Act, would not construe them as presenting instances of legislative delegation. Adequate study has been made elsewhere of the gradual recognition, not yet universal, that constitutionality does not turn on the question whether there has been a delegation of legislative power, but rather whether such delegation is, in a given case, valid or invalid.[65] With the adoption of this latter view, implicitly or explicitly, sufficiency of standards has become a prime test in the determination of the constitutionality of delegation of Congress' legislative power. Early expressions of what may be called the standards test were made by Chief Justice Taft in *Mahler v. Eby* [66] and *J. W. Hampton, Jr. v. United States.*[67] In the *Mahler* case, it was stated that a historical understanding of certain words used by Congress in delegating authority may give them "the quality of a recognized standard." [68] In the *Hampton* case, where the President was given power to adjust tariff rates, a definite test was stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." [69]

That very broad powers may be delegated where standards are deemed sufficiently definite is attested by the existence and scope of operation of such governmental agencies as the National Labor Relations Board, the Securities and Exchange Commission, the Federal Power Commission, the Federal Communications Commission and the Interstate Commerce Commission, to name but a few. An examination of a few World War II cases involving the broad delegation of Congress' war powers will serve as concrete examples of what the Supreme Court has recently approved as sufficiently definite standards. In *Yakus v. United States,*[70] involving the constitutionality of price controls under

62 216 U. S. 614, 30 S. Ct. 576, 54 L. Ed. 639 (1910).

63 See note 61 *supra,* 220 U. S. at 517.

64 Jaffe, *supra* note 56, at 567.

65 E.g., Jaffe, *supra* note 56, see also State *ex rel.* Wisconsin Inspection Bureau et al. v. Whitman, 196 Wis. 472, 220 N. W. 929, 937-42 (1928).

66 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1924).

67 276 U. S. 394, 45 S. Ct. 348, 72 L. Ed. 624 (1928).

68 See note 66 *supra,* 264 U. S. at 40.

69 See note 67 *supra,* 276 U. S. at 409.

70 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

the Emergency Price Control Act of 1942, the Court summarized the standards laid down to guide the Price Administrator in the following manner: "that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period. . . ." [71] These standards were upheld by the Court as sufficiently definite. In *Bowles v. Willingham*,[72] in which the rent control section of the Emergency Price Control Act was challenged, a similar standard by which administrative action was to be guided was upheld. The Court in this decision stated:[73]

> Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority . . . Whether a particular grant of authority to an officer or agency is wise or unwise, raise questions which are none of our concern.

Finally, under the Housing and Rent Act of 1947, the Supreme Court upheld the constitutionality of the delegation of authority to the Housing Expediter, in the case of *Woods v. Miller*,[74] saying: [75]

> Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways. The powers thus delegated are far less extensive than those sustained in Bowles v. Willingham . . . Nor is there here a grant of unbridled discretion. The standards prescribed pass muster under our decisions.

There is, however, a limit to the generality of standards which Congress may prescribe, beyond which it may not go without the attempted delegation being struck down. Under the provisions of the National Industrial Recovery Act, section 9(c),[76] the President was authorized to prohibit transportation in interstate commerce of petroleum in excess of amounts permitted under state laws or regulations. The Act did not define the cirmustances and conditions under which the President was to allow or prohibit such transportation. An introductory section of the Act declared that there was a national emergency and that it was the policy of Congress to eliminate unfair competition and to conserve natural resources. In *Panama Refining Company v. Ryan*,[77] section 9(c) was held to be an unconstitutional delegation of power. The Court stated, "If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function." [78]

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71 321 U. S. at 427.
72 321 U. S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944).
73 321 U. S. at 515.
74 333 U. S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1948).
75 333 U. S. at 144-5.
76 48 STAT. 200 (1933).
77 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).
78 293 U. S. at 430.

In *A. L. A. Schechter Poultry Corporation et al. v. United States*,[79] certain other provisions of the N.I.R.A. were declared to be an unconstitutional delegation because of lack of sufficient standards. The Court construed these provisions as authorizing the President to approve or prescribe through codes of fair competition, prohibitions which the President and the formulators of such codes deemed wise and beneficial measures for governing trades and industries, so as to bring about industrial recovery and rehabilitation. The Court, in striking down these provisions, said: [80]

> But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation of trade or industry.

Finally, in the case of *Carter v. Carter Coal Company*,[81] the Bituminous Coal Conservation Act [82] was struck down, as an unconstitutional delegation of legislative power. The Act provided, in part, that a majority of the producers and miners were to be allowed to fix maximum hours and minimum wages. The Court did not discuss standards, but its holding would seem to imply that it could find no sufficient standards in the Act, and it termed the delegation "clearly arbitrary." [83]

With these cases in mind, the question may be considered whether, under subsection 204 (j) (3) of the Housing and Rent Act of 1949, there are sufficient standards set forth by which the delegation to the local governmental units could be sustained. This subsection, it will be recalled, allows local governing units to hold public hearings and adopt, under local laws, resolutions that there no longer exists such a rental housing shortage as to require rent control in the particular city, town or village. Furthermore, such resolutions are only to be effective if approved by the Governor. Does the failure of Congress to suggest to the Governor and the local bodies, as it did suggest to the Housing Expediter,[84] reasons upon which to base their determination of whether rent control has become unnecessary, cause the subsection to be invalid for lack of standards? The Illinois district court, in deciding the *Shoreline* case,[85] could find no standards whatever in this subsection, stating: [86]

> No standard is laid down as to what is or what is not a shortage of rental housing accommodations, nor is there any provision as to the procedure for or findings at a public hearing or how that public hearing is to reach any conclusion upon the question of whether or not rent control is no longer necessary or desirable.

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79 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 570 (1935).
80 295 U. S. at 537-8.
81 See note 39 *supra*.
82 49 STAT. 991 (1935).
83 See note 39 *supra*, 298 U. S. at 311.
84 See note 18 *supra*.
85 See note 2 *supra*.
86 See note 2 *supra*, at 663.

It is interesting to note, on the other hand, that the California district court, in upholding the constitutionality of the Act, made no mention of the question of standards.

It seems clear that no definite line can be drawn between what constitutes sufficient standards and what standards are insufficient. There is a broad twilight zone within which it is impossible to predict the outcome of the question of sufficiency of standards in advance of judicial determination. Perhaps the ultimate test as to sufficiency is contained in the decision of the relatively early case of *Buttfield v. Stranahan,*[87] where the Court concluded that "Congress legislated on the subject as far as was reasonably practicable." [88] In any event, it is suggested by an examination of the cases that the ultimate resolution of the problem may lie in the facts and circumstances of the individual case. It has been said that a doctrine limiting delegation ". . . is intelligible only in terms of the degree of delegation which the judiciary regards as appropriate in the circumstances." [89]

III.

Should one or more of the "local option" provisions of the Housing and Rent Act be held unconstitutional, the question will remain whether the separability clause can be given effect, so as to uphold the remaining parts of the Act. The separability clause states: [90]

> If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act, and the applicability of such provisions to other persons or circumstances, shall not be affected thereby.

It is generally accepted that there are two basic tests which must be satisfied if the parts of an act are to be considered separable. First, it must appear from an examination of legislative intent that the statute was intended to be separable; secondly, the act must be capable, as a practical matter, of effecive operation without the severed portion.[91] Where no separability clause is included, the presumption is that the statute was intended to be indivisible; the inclusion of a separability clause has the effect of reversing this presumption.[92] It might seem at first blush that the inclusion of a separability clause should be conclusive as to congressional intent. However, indiscriminate use of the separability clause has weakened its evidentiary effect. It has been suggested, as a remedy for this situation, that such clauses set out spe-

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87 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1904).

88 192 U. S. at 496.

89 Jaffe, note 56 *supra,* at 581.

90 See note 4 *supra.*

91 SUTHERLAND, STATUTORY CONSTRUCTION § 2403 (3d ed. 1943).

92 Williams v. Standard Oil Company, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287 (1929); Carter v. Carter Coal Company, *supra* note 39.

cifically the portions of an act which are intended to be separable,[93] and this procedure has been adopted in at least one instance.[94]

There would seem to be little argument but that the Housing and Rent Act could operate effectively if the "local option" provisions were severed from the remaining portion of the Act, since the remainder would be substantially the same as the original 1947 Act and its 1948 amendment. Consequently, the important remaining question is whether an examination of the Act's legislative history reveals congressional intent that the Act be separable. In refusing to give effect to the separability clause, the Illinois district court stated in the *Shoreline* case: [95]

> . . . it is entirely clear from all the sources available, including the debates in Congress, that the Act could never have passed without the local option provisions. They were the means principally relied upon as a way of returning the Government to the States and subdivisions immediately. Without these provisions there would be no way of decontrolling an area except through the powers given the administrator, and it is entirely clear from the local option provisions themselves that Congress did not consider those administrative means as adequate for accomplishing its declared purpose . . . It is my opinion that the unconstitutional portions of this Act, if considered with its preamble, greatly outweigh all of the other provisions for decontrol.

An examination of the legislative history of the Act, and of its preamble, does not seem to preclude the possibility for a conclusion as to congressional intent opposite to that arrived at by the Illinois court. The preamble does, indeed, as mentioned by the Illinois district court, state the congressional policy that federal rent control should end at the earliest practicable date. However, it should not be overlooked that the preamble also states that ". . . it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense rental areas." [96] Furthermore, the preamble is the same one which appeared in the original 1947 Act, and thus would not seem to have any particular significance with respect to the "local option" provisions of the recent Act.

The Illinois district court felt constrained, under the authority of the *Carter Coal Company* case, to hold that the Housing and Rent Act was not separable. However, the *Carter Coal Company* case was decided largely on the basis that the provisions of the Act there in question were not separable because of their basic interdependence. Since, as pointed out above, the separability of the Housing and Rent Act, from the point of view of its possibilities for practical and effective operation after separation, does not seem to be much in question, the *Carter Coal*

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93 Stern, *Separability and Separability Clauses*, 51 HARV. L. REV. 76, 125 (1937).

94 Connally Hot Oil Act, 49 STAT. 30, 15 U. S. C. § 715c (1946).

95 See note 2 *supra*, at 666.

96 See note 21 *supra*.

Company case would not seem to be controlling authority; the separability question in regard to the recent rent control Act is largely one of congressional intent.

A great deal of the Senate and House debate on the proposed Act did revolve about the "local option" provisions, and this would seem to indicate that great importance was attached to these parts of the Act.[97] However, it seems quite natural that a major addition to an existing law should be debated at length, and that the provisions which had been in force under the previous Act should receive comparatively less attention. Also, the continued power of decontrol in the Housing Expediter would seem to indicate that Congress intended the two systems of decontrol to operate side by side.[98] In addition, there was considerable evidence in committee reports and in congressional debate of recognition of the fact that continued controls at the national level were necessary in many areas.[99]

Ultimately, it must be said that, just as in the question of sufficiency of standards, there exists considerable judicial leeway in determining the issue of separability. At least one prominent writer has concluded, after an examination of the cases involving separability, that ". . . the Court is free to decide each case the way it pleases without having its discretion fettered by any restraining doctrine," [100] and further that ". . . in important cases judicial decisions on separability often reflect the attitude of the judges towards the merits of the particular statute. . . ." [101]

Conclusions

The problem of delegation of legislative authority under the Housing and Rent Act, and the effect to be given the separability clause, will not be facilely resolved. An attempt has been made herein to suggest some of the possible avenues of approach in determining whether all or part of the Act should be upheld. The effects on the national economy of a general and instantaneous removal of rent controls would seem to be an important policy consideration in arriving at a solution to these problems, [102] in view of the still prevalent shortage of rental housing units.[103]

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97 See generally issues of Cong. Rec. cited in notes 45-47 *supra*.

98 95 Cong. Rec. 2521-3 (Mar. 15, 1949); 95 Cong. Rec. 2982 (Mar. 22, 1949); 95 Cong. Rec. 3404 (Mar. 29, 1949).

99 SEN. REP. No. 127, 81st Cong., 1st Sess. (1949) (introductory portion); 95 Cong. Rec. 2871, 2873, 2876, 2884, 2891 (Mar. 21, 1949).

100 Stern, note 93 *supra*, at 111.

101 Stern, note 93 *supra*, at 114.

102 A letter from the Housing Expediter, Tighe E. Woods, informed the writers that, as of October 12, 1949, a number of properly approved decontrol resolutions had been received pursuant to the "local option" provisions of the Act, as follows: section 204 (j) (1), one; section 204 (j) (2), two; section 204 (j) (3), 184. From these figures it would not appear that there has been any wholesale

The purely legal implications, especially the problem of delegation, and the various considerations arising in its determination, provide a fertile, if somewhat involved, ground upon which to speculate. Determination of the validity of the Act in question, involving as it does the added feature of delegation to state and local authorities instead of to federally constituted administrative agents, will be of importance far beyond the question of rent control's continued existence. The influence of the decision made by the Supreme Court in this case will be felt in any congressional consideration of the advisability of utilizing the state and local government in future pieces of legislation. Also, the Court may resolve some of the confusion which now surrounds the use of terminology in the question of delegation, the uncertainty as to what constitutes sufficient standards, and the effect of a standard separability clause.

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E. A. Steffen, Jr.

Constitutional Law

The Terminiello Case: An Extension or an Abuse of the Clear and Present Danger Concept?

To find the starting point for the recognition of the right of free speech in American constitutional history would be a difficult if not an impossible task. This right was accepted by political philosophers as a principle of constitutional government long before the United States was founded; yet, never was it given the breadth of importance which the early American colonists imported to it. Philosophically speaking, freedom of speech arises from the very nature of man, and although some would deny this, that principle remains immutably true. Its ramifications are so complex as to defy the possibility of proper legislative restraint, yet these natural rights require some limitation in their individual exercise, for liberty is not license. In a study of the theories of this dilemma the following will be discussed: the recent case of *Terminiello v. City of Chicago*;[1] the rationale of Mr. Justice Jackson's dissent in that case; the historical development of freedom of speech; and the modern Court and free speech. In the past, the

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move toward decontrol, especially at the state level. This would seem to be evidence of the fact that the continued need for rent control in many localities is widely recognized, and that there is a general unwillingness to risk the economic repercussions which might be caused by ending rent controls.

103 See note 99 *supra*.

1 ....U. S....., 69 S. Ct. 894 (1949).

attitude of the Court toward this right has been one of vacillation and has resulted in confusion. Recent cases indicate that the dilemma is yet to be resolved.

I.

In the latest decision involving free speech, the United States Supreme Court, in the *Terminiello* case, reversed the conviction of Arthur Terminiello, a Catholic priest then under suspension by his Bishop, for causing a breach of the peace. The breach was occasioned by an impassioned address given by Terminiello before a meeting arranged by Gerald L. K. Smith. There was a capacity crowd of many hundreds inside the auditorium in Chicago where the address was delivered, while outside the auditorium there was a larger crowd protesting the meeting. Many policemen were assigned to maintain order, but they were unable to prevent rock throwing, fights and disturbances. Terminiello vehemently criticized various political and racial groups during his address. After the meeting, he was charged with disorderly conduct in violation of a Chicago ordinance.[2] In the trial court, a jury found him guilty of the charge and imposed a fine of $100. Terminiello took a direct appeal to the state supreme court. The cause was transferred to a state appellate court, which affirmed the decision of the trial court.[3] The Illinois Supreme Court allowed a petition for leave to appeal and, by a unanimous decision, affirmed the conviction upon the theory that Terminiello's remarks were "fighting words," and thus passed beyond the reasonable limits of free speech and constituted an abuse of the right, and that therefore his conviction and punishment did not constitute an abridgement of constitutional guarantees nor present a constitutional question for decision by the court.[4] The argument of Terminiello before the state courts was that the ordinance as applied to his conduct violated his right to free speech under the Federal Constitution. The United States Supreme Court allowed certiorari and, in a five-to-four opinion, reversed the conviction. The majority opinion stated that it was unnecessary to decide whether the personal insults and abuse which Terminiello hurled to the eager audience constituted "fighting words," although that was the theory of the case below and the argument before the Supreme Court. Rather, the case was decided upon the preliminary question of the constitutionality of the Chicago ordinance as construed by the trial court.

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2 "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense." REV. CODE § 1 (1) Ch. 193, City of Chicago (1939).

3 332 Ill. App. 17, 74 N. E. (2d) 45 (1947).

4 396 Ill. 41, 71 N. E. (2d) 2 (1947); 400 Ill. 23, 79 N. E. (2d) 39 (1948).

The trial court had instructed the jury that a "breach of peace" consisted of "any misbehavior which violates the public peace and decorum" and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." [5] The Court said that this construction by the trial court as to what constituted a breach was as much a part of the ordinance as if it had been written into the ordinance by amendment, and was binding upon the Court. The Court reiterated the value of free discussion in our democratic system, and concluded that the ordinance as construed was an invasion of the province of free discussion, in that it would prohibit some of the most important functions of free speech; e.g., to invite dispute, bring about a condition of unrest, or stir the public to anger. Justice Douglas, writing the majority opinion, then applied the test of clear and present danger, saying:[6]

> That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Despite the failure of Terminiello to object to the instruction given by the trial court, Justice Douglas declared that the constitutionality of the ordinance as construed and applied was before the Illinois courts. In so stating, the Court relied on the authority of *Stromberg v. California* [7] and refused to "strain at technicalities." The ordinance as construed and applied was held to contain parts that were unconstitutional, and, since the verdict below was general, the conviction was reversed.

Chief Justice Vinson dissented on procedural grounds. He deplored the proposition, apparently adopted by the majority, that the state courts in affirming a conviction approve of every unnoticed and unobjected-to error which may be discovered in the record by the Supreme Court. He argued that the issue presented below and in the oral arguments before the Supreme Court was that of "fighting words." The Chief Justice stated that he would have agreed with the majority decision if the issue of the constitutionality of the ordinance as construed by the trial court's charge to the jury had been presented in proper form below and upon appeal.

Mr. Justice Frankfurter wrote a vigorous dissent based principally upon his disagreement as to the authority of the Court to make a

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5 See note 1 *supra*.

6 *Id.* at 896.

7 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).

departure from the accepted principles of review of state court decisions which had prevailed for the past 130 years. He took issue with the majority's reliance upon the *Stromberg* case as authorizing this procedural innovation, and distinguished the two cases on the facts, pointing out that the petitioner in the *Stromberg* case had made constitutional objections in proper form in the lower courts. Frankfurter asserted that no such objections were made in the *Terminiello* case. The *Stromberg* case resembled the *Terminiello* case in that the charge in each case was based on a statute or ordinance containing several provisions upon which conviction was possible. In each case, the Supreme Court held at least one of these provisions unconstitutional. In both cases, the statute or ordinance contained both valid and invalid parts. Since the verdicts in the lower courts were both general, it was impossible for the Court to assume that the conviction in either case had been upon the valid parts of the charge. Another reason for Frankfurter's dissent was his assertion that the *Terminiello* case involved a civil, not a criminal proceeding and was for that reason subject only to limited review.

II.

In a lengthy and astute dissent, Mr. Justice Jackson lashed out at the majority, not only for their holding in the case, but for adding to the many impediments with which the states are already burdened in the exercise of their police power.[8] In addition, he deplored the Court's action in deciding the case upon a question of law not specifically pleaded in either the lower courts or upon appeal to the Supreme Court. He reprimanded the majority for their seemingly "absolutist" philosophy of free speech, citing numerous cases and circumstances wherein the Court has seriously restricted the states' power to cope with these problems locally. He went to great length to point out the vileness of Terminiello's speech, and the manner in which it was delivered, quoting excerpts from it for several pages. He inferred that the words were stimulants to an already uneasy mob which had assembled to protest the meeting. He pointed out that the hatred which merges the many minds of a crowd into the mindlessness of a mob almost invariably is supplied by speeches. A cursory glance at the epithets spewed forth by Terminiello brings to light the truthfulness of this observation. In fact, the speech was little more than a collection of thinly veiled insults of a discriminatory nature and were directed at various racial and political groups.[9]

In further support of his argument, Jackson cited the many ways in which the courts have restricted the power of the states and munici-

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8 See note 1 *supra*, 69 S. Ct. at 907.

9 *Id.* at 901-04.

palities to cope with these problems. He pointed out that the lower court had not indulged in theory; it had dealt with a riot, and with a speech that provoked a hostile mob and incited a friendly one.[10] Furthermore, it was pointed out that streets and parks maintained by the public cannot be denied to groups for the communication of ideas; cities may, however, protect their streets from activities which the law has always regarded as subject to control, such as nuisances. Picketing is largely immune from control on the ground that it involves free speech, and the state may not regulate sound trucks and loud speakers, though the Court has regarded them as an evil that may be prohibited altogether.[11] Mr. Justice Jackson recalled the classic statement of Mark Anthony in *Julius Caesar*,[12] after he had addressed the Romans: "Trouble thou art afoot, take thou what course thou wilt." The cases Mr. Justice Jackson cited as limiting the ability of the states and cities to restrict civil rights seem not to be exactly in point. Most of the cases which he cited concern not freedom of speech alone but, in addition, freedom of assembly, which although in the category of civil rights, is in itself a distinct right, being of a more positive nature and more dangerous when abused than free speech.[13] Speech alone, without assembly, cannot produce violence. It was the assembly of pickets outside the building who protested the meeting that gave the final motion to the mob madness. Terminiello's audience did not come to the meeting to protest his activities, but to hear him speak. Lawful as it may have been for the pickets to assemble outside the building to protest against this meeting, the Constitution provides only for *peaceable* assembly.[14] Their protest could have been carried out just as effectively through peaceful means as through violent disturbances, and this would have been a democratic people's answer to Terminiello. The First and Fourteenth Amendments protect the citizen only from suffering legal consequences at the hands of government authorities acting under color of the law. They do not, and cannot, protect the citizen against the social consequences of exercising his legal privilege to say what he pleases. Every citizen of the United States has the privilege of standing on a soapbox and expounding peculiar ideas if he wishes; but he need not expect the Constitution

10 *Id.* at 900.

11 *Id.* at 907.

12 SHAKESPEARE, *Julius Caesar*, Act III, sc. 2.

13 Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); Jamison v. Texas, 318 U. S. 413, 63 S. Ct. 669, 671, 87 L. Ed. 896 (1943); Douglas v. Jeanette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943); Saia v. New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1324 (1947).

14 U. S. CONST. AMEND. I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

to protect him against the unpleasant social consequences of being regarded as a peculiar person.

Mr. Justice Jackson also disputed the Court's usurpation of authority in this and similar cases involving the First and Fourteenth Amendments. He referred to the scope allowed free speech prior to 1922 and its freedom from state control; its subsequent limitation, even under Holmes and Brandeis, in *Prudential Insurance Co. v. Cheek*,[15] and the shift of dogma by the present Court in the protection of that speech. Although he does not quarrel with this shift of dogma, he asserts that the right to limit the state's attempts to restrict free speech is derived only from the Court's own assumption of power. He considers it an exercise of self-given, unappealable power. Further, he states, the terms of the Fourteenth Amendment gave no notice to the people that its adoption would strip their local governments of power to deal with such problems of local peace and order as are involved here.[16] Justice Holmes answered this question as to the inclusion of a restriction upon the power of a state within the realm of the Fourteenth Amendment in his dissent in *Gitlow v. New York*.[17] He stated there that the general principle of free speech must be taken to be included in the Fourteenth Amendment in view of the scope that has been given to the word "liberty" as there used.[18] He suggested that, in the case of the states, it may be given a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States.

Mr. Justice Jackson would not follow the majority in presuming any statute to be invalid which, upon its face, restricts civil liberties, until circumstances are shown which would justify or make obvious the necessity of such a restriction. Although not adhering to the view of Mr. Justice Frankfurter that there is a legal presumption that the legislature is the only body capable of dealing with a problem such as this, he would give a somewhat wider scope to the police powers of the state. The choice, he says, is between liberty with order on the one hand, and anarchy without either liberty or order on the other, which is a slogan, not a solution to such a complex problem as this.

Aside from this, it should be pointed out that Mr. Justice Jackson has attempted to assume a realistic attitude toward this dilemma of free speech, for in the usual case involving that concept, the party

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15 259 U. S. 530, 52 S. Ct. 516, 66 L. Ed. 1044 (1922).

16 See note 1 *supra*, 69 S. Ct. at 907.

17 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

18 U. S. CONST. AMEND. XIV. The word liberty in this amendment was held to include freedom of speech in Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); freedom of the press in Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931); peaceful assembly in DeJong v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937); free exercise of religion in Cantwell v. Connecticut, 319 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

asserting this fundamental right is offensive because of his espousal of a political philosophy utterly opposed to that of the majority. Few can exonerate themselves from this charge of intolerance. It is not easy to detest an extremist philosophy and yet insist on the right of any man to advocate it freely.

Terminiello need not have been a prophet to realize the consequences of his actions, yet it was the attitude of those who came to protest his speech that should have been restrained, it would seem, rather than Terminiello's speech. To say that, morally speaking, the speech *ought* not to have been made is to belabor the obvious, but to say that a speech of this sort should be legally prohibited might conceivably commit us to a philosophy repugnant to our form of government. In the words of Thomas Jefferson:[19]

> If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments to the safety with which error of opinion may be tolerated where reason is left free to combat it.

Certainly Mr. Justice Holmes had these words of Jefferson in mind when he stated that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate."[20] The importance of the many problems involved in the *Terminiello* case, and the confusion caused thereby, would appear to render a brief review of applicable constitutional history beneficial at this point.

III.

Early English law contained no protection for freedom of speech and the press in the sense in which we understand the right today. That is to say, there was no right to criticize the sovereign, the government or those holding public office, no matter how true the strictures might be, and no matter how proper might be the motives of the person publishing them. Legal recognition of real freedom of speech and press was not attained until well after the "Glorious Revolution" of 1688, for until that time the crown assumed the prerogative of regulating its exercise, and a breach of this regulation resulted in severe penalties.[21] This regulation was carried out by the notorious Star Chamber, often to the point of judicially inflicted torture.[22] Publications were licensed and restricted under government censorship, and it was against

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19 Jefferson's First Innaugural Address, cited in CHAFFEE, FREEDOM OF SPEECH 161 (1st ed. 1920).

20 See United States v. Schwimmer, 279 U. S. 644, 655, 49 S. Ct. 448, 73 L. Ed. 889 (1929).

21 PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (2d ed. 1936).

22 *Ibid.*

this that Milton wrote his famous *Areopagitica* in 1644.[23] The crimes of seditious libel and seditious speech were developed in all their rigor by the Star Chamber, which dispensed justice without a jury. This authority was later exercised by the Court of King's Bench, sitting with a jury; but following the precedents of the Star Chamber, little scope was allowed to the jury in deciding the case. The truth of the words was no defense. Lack of intent to stir up disorder or to induce a breach of law, or the fact that the words in question had no such tendency, were also of no consequence.[24]

The Constitution of the United States, as originally adopted, contained nothing on the subject of freedom of speech or of the press. Clauses to the effect that liberty of speech and press should be inviolably preserved or observed were proposed in the Constitutional Convention, but were deemed unnecessary, since the Constitution was considered a grant of powers to the Federal Government, and matters over which regulatory power was not granted could not be governed or restrained by it.[25] The importance of freedom of speech was recognized very early by the American colonists. Every student of American colonial history will remember the trial and acquittal of John Peter Zenger on charges of seditious libel.[26] Following Mason's Virginia Constitution of 1776, declarations of the right of free speech found their way into other state constitutions. The people's recognition of the need is shown by the failure of adoption of the Massachusetts Constitution of 1778 because of the failure to include a provision for freedom of discussion.[27] In fulfillment of the understanding upon which a number of state conventions had ratified the Federal Constitution, the Bill of Rights was submitted to the people of the states. Included therein was the First Amendment, which was adopted in 1791. It provided that, "Congress shall make no law . . . abridging the freedom of speech or of the press." [28]

The issues of free speech were raised dramatically in the period following the passage of the Alien and Sedition Laws of 1798.[29] These laws were passed by the Federalist-dominated Congress prompted by fears of the spread of foreign revolutionary doctrine, and severely punished writings defamatory of the Government. These acts were later vindicated as being "part of a general system of defense, adapted to the crisis of extraordinary difficulty and danger." [30] A majority of the

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23 JOHN MILTON, AREOPAGITICA (1st ed. 1644).

24 PLUCKNETT, *op. cit. supra*, note 21.

25 4 DEBATES ON THE FED. CONST. 571-3 (Elliot ed. 1836).

26 17 How. St. Tr. 675 (1735).

27 Landis, *Freedom of Speech and of the Press* in 3 ENCYC. SOC. SCI. 457 (1931).

28 U. S. CONST. AMEND. I.

29 Alien Act, 1 STAT. 577 (1798); Sedition Act, 1 STAT. 596 (1798).

30 2 STORY, THE CONSTITUTION § 1892 (3d ed. 1858).

state legislatures supported the position taken by Congress.[31] In theory at least, the measures were repudiated by Thomas Jefferson who, upon being elected to the presidency, pardoned all persons convicted under them. He was of the opinion that such restrictions as these should be left to the states and not to the Federal Government.[32] He based this opinion on the specific prohibitions against congressional action contained in the First Amendment. Since the Court now considers the concept of free speech to be incorporated in the Fourteenth Amendment,[33] the logical result of Jefferson's contention would be that since Congress cannot make any laws abridging freedom of speech, neither can the states; but, for the purpose of carrying out the ministerial duties of government, certain restrictions may be laid down for the protection of that function by Congress, and by the states. The Supreme Court clarified this point somewhat when it said:[34]

> . . . the First Amendment while prohibiting legislation against free speech as such, cannot have been and obviously was not, intended to give immunity for every possible use of language . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

Sound thinking on the subject of free speech is often impeded by attitudes which are the product of conditions of the past. Because our pioneer forefathers needed but little that government could provide, they could afford to insist on a high degree of freedom from control simply because they did not like to take orders. At a time and amid conditions wherein the well-being of the people demands freedom within reason, we must seek deeper for the criteria of freedom of speech than our own individual dislikes, for society today is much more complex and requires a certain amount of limitation on those freedoms for the good of all. Sweeping as is the language of these constitutional guarantees, they are not to be interpreted as absolutes. It is the purpose of this article to seek out the criteria (if such there be) for valid limitations on free speech as defined by our courts in their treatment of this problem. The scope of freedom of speech under our constitutional system is so broad that this resumé has been prepared with an eye only to the cases which have resulted in the formation of a new concept, or the novel application of such concept, in the process of testing the availability of constitutional safeguards for the type of speech involved in the particular case.

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31 *Ibid.*

32 See note 25 *supra.*

33 See note 18 *supra.*

34 Frohwerk v. United States, 249 U. S. 204, 206, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

The era of the First World War produced the Espionage Act of 1917 [35] and the Sedition Act of 1918.[36] These laws were almost on a par with the Alien and Sedition Acts of 1798, and resulted in the prosecution of nearly 2000 persons for radical utterances. The courts were handicapped in their treatment of these cases by the lack of controlling precedents. For example, Judge Learned Hand went to the writings of Milton and John Stuart Mill for principles of free speech. Judge Hand developed an objective test as to the limits of free speech which might have enabled the courts to handle the prosecutions for abuses of this right during the era of World War I with a greater degree of fairness than in fact resulted. This very capable judge placed outside the permissible limits of speech one who counsels or advises others to violate existing laws. To be beyond the scope of constitutional protection, one must have urged others that it was their duty or to their interest to resist the law. This test is very close to the common law rules applying to solicitation and attempt. Professor Chaffee, in 1920, asserted that there was no finer judicial statement of the right of free speech than these words of Judge Hand:[37]

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom. . . .

Blackstone's idea of freedom of speech [38] had been pretty well repudiated by the time of World War I,[39] but it was to be resurrected

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35 40 STAT. 217 (1917).

36 40 STAT. 553 (1918), *repealed*, 41 STAT. 1359-60 (1921).

37 Masses Publishing Co. v. Patten, 244 Fed. 535, 540 (S. D. N. Y. 1917), quoted by CHAFFEE, FREE SPEECH IN THE UNITED STATES 46 (1946). This decision was reversed by the Court of Appeals which applied the "bad tendency" test. Masses Publishing Co. v. Patten, 246 Fed. 24 (2d Cir. 1917). Compare this quotation from Judge Hand's opinion with the strikingly similar charge given to the jury by Federal District Judge Harold Medina in the recent Communist trial under the Smith Act and under which the defendants were charged with conspiring to overthrow the government by force. In that case Judge Medina in his charge to the jury stated: " . . . I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. . . . " Time, Oct. 24, 1949, p. 22.

38 4 BL. COMM. *151. "The liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published." Criticism of this test centers around its obvious incompleteness. Lewd or seditious publications are, e.g., enjoined. Also, the test would be wholly inapplicable to oral comment.

and accepted by the majority of the Court in *Near v. Minnesota.*[40] This test, although narrow and incomplete in the modern sense, does state the guarantees afforded by the First Amendment. A second interpretation of the freedom of speech clauses limits them to the protection of the "use" of utterance and not its "abuse." This test draws the line between "liberty" and "license." It was applied in *Toledo Newspaper Co. v. United States.*[41] The Blackstonian test of "no previous restraint" and the later test distinguishing between liberty and license, were abandoned in favor of the tests supplied by Justices Brandeis and Holmes, and more immediately, by the confused test adopted by the majority of the Court during the period of the Holmes-Brandeis dissents.

The majority view of the Court was a twofold one during this time. Constitutional authorities agree that the Court was not applying the test of a "clear and present danger," either in theory or in name, during this period, with the notable exception of *Schenck v. United States,*[42] in which the test was first applied. This case resulted in a conviction anyway, which may in part explain the acquiescence of the majority. For the next eighteen years, the majority ignored the "clear and present danger" test, and, it would appear, decided many cases of this type by applying the principles of "indirect causation," and "constructive intent." Under the theory of "indirect causation," words can be punished for their supposed "bad tendency," long before the probability arises that they will result in unlawful acts. The "constructive intent" theory provided that the only intent the defendant must have had was the intent to write or speak the words he did in fact write or speak. If the words had a "bad tendency," it was presumed that the consequences of the acts were intended. The Holmes-Brandeis doctrine was a "middle way" between the extreme view of the majority and the objective test of Judge Hand. In laying down the "clear and present danger" test in the *Schenck* case, Justice Holmes stated: [43] ". . . the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." He went on to explain that it was a question of proximity and degree. From the date of that case until the present time, the rule as above stated has meant many things

[39] For cases expressly repudiating the Blackstonian doctrine of free speech, see Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900); State v. Pioneer Press Co., 100 Minn. 173, 110 N.W. 867 (1907); Cowan v. Fairbrother, 118 N. C. 406, 24 S.E. 212 (1896).

[40] 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1367 (1931).

[41] 247 U. S. 402, 419, 38 S. Ct. 560, 62 L. Ed. 1186 (1918).

[42] 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

[43] 249 U. S. at 52.

to many judges. From the decision in the *Schenck* case until 1937, it was the minority view of the Court. During this period, Mr. Justice Brandeis, who was even more liberal in these cases than Holmes, insisted that the incidence of the evil apprehended by the words used must be so imminent that it might befall before there was opportunity for full discussion. This added some clarity to the test, but it remained a vague one at best. Brandeis also suggested (and it was the first time that the possibility had been advanced by any member of the Supreme Court) in *Gilbert v. Minnesota,*[44] that free speech was within the protection of the Fourteenth Amendment. Hughes and Stone, both great defenders of the right of free speech, were content in large part to decide these cases on the basis of "due process" and did not rely upon the hazy "clear and present danger" test.

The next important step taken by the Court was the acceptance of the view of Brandeis that freedom of speech was within the purview of the Fourteenth Amendment. It was not until 1925, in the *Gitlow* case, that the Court "assumed" that the right of free speech was included within that Amendment. In both the *Stromberg* and the *Near* cases, the Court expressly decided that state enactments depriving a person of the right freely to speak or publish his sentiments concerning the government and its officers are invalid under the Fourteenth Amendment. In *Herndon v. Lowry,*[45] the Court finally accepted the "clear and present danger" doctrine as its advocates had intended it.

IV

To the layman and to many lawyers, the decisions of the Supreme Court in civil liberty cases in the past decade must present an irresolvable paradox. In matters of freedom of speech the present members of the Court are, in a sense, following the judicial philosophy of Holmes. As the division in the Court would well indicate, they have two basically different interpretations of this philosophy. It will be remembered that it was Holmes who spent nearly a lifetime on the bench developing the doctrine of judicial restraint as to legislation. That is to say, his basic philosophy concerning matters of judicial review was that the decisions of the legislatures in these matters represented the democratic decisions of a government established on the principle of consent of the governed. Hence he felt that the Court should be very reluctant to upset such decisions. But Justice Holmes was also concerned with the social benefit to be derived from free discussion. His concept of

44 254 U. S. 325, 41 S. Ct. 125, 65 L. Ed. 287 (1920).

45 301 U. S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937). See Barnette, *Justice Murphy, Civil Liberties and the Holmes Tradition,* 32 CORN. L. Q. 177, 183 (1946). He states that the Court herein flatly rejected the "dangerous tendency" test, and that the language of Justice Roberts indicated that Holmes' view was now acceptable to the Court.

"clear and present danger" was essentially a limitation on the doctrine of judicial restraint. Interpreted in this light, his philosophy must be read as declaring that legislation in the field of freedom of speech is valid only if limited to cases of "clear and present danger." Holmes did not explicitly resolve the paradox involved in these two principles; but he did refuse to apply the doctrine of judicial restraint in these cases in its absolute form.

The positive resolution of this problem appears to have begun in 1938, when the late Chief Justice Stone, then an associate justice, in considering the question of the presumption of validity of legislation in cases of civil liberty, stated: [46]

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced with the Fourteenth.

It was the late Justice Murphy who championed the cause of expanding the scope of protection of civil liberties by the presumption against validity of legislation pertaining to these fundamental rights. In this he was joined by Justices Black, Douglas and Rutledge in many decisions. The late Justice Rutledge made an eloquent and definitive statement in *Thomas v. Collins* [47] of the protection now afforded:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.
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> For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on a firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion to permissible limitation.

The approach of the late Justice Murphy to this problem was clearly indicated by his first dissent in litigation involving civil liberties in the case of *Jones v. Opelika*.[48] He stated that the ordinary presumption

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[46] See United States v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778, 783, n. 4, 82 L. Ed. 1234 (1934).

[47] 323 U. S. 516, 529, 65 S. Ct. 315, 89 L. Ed. 430 (1945); see 20 NOTRE DAME LAWYER 336 (1945).

[48] 316 U. S. 584, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942).

of validity of legislation did not extend to statutes involving fundamental freedoms, and continued: [49]

> Liberty of conscience is too full of meaning for the individuals in this Nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of the community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of those precious rights.

These views of the late Justice Murphy were concurred in by Chief Justice Stone, and Justices Black and Douglas. The view of Mr. Justice Black as to the stringency with which the "clear and present danger" test is to be applied is illustrated by his statement in *Bridges v. California*: [50] "What finally emerges from the 'clear-and-present danger' cases . . . is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

Thus we see that the history of free speech since the *Schenck* case has been that of the fight to have the "clear and present danger" test accepted as the majority view of the Court, and then of the expansion of the concept itself with the presumption against constitutional validity of legislation dealing with the fundamental freedoms. This expansion of the concept can be seen if one will contrast the tests applied by Holmes, Stone and Hughes with those employed by the modern Court.

If Holmes agreed with the presumption against the validity of legislation in free speech cases, he did so *sub silentio*. Chief Justice Hughes, although a liberal and consistent defender of freedom of speech, decided cases of this nature on a basis of reasonableness as contained in the doctrine of due process.[51] As can be seen from the statement of Justice Rutledge in the *Thomas* case, this test of reasonableness is no longer satisfactory. Chief Justice Stone, who decided many of the early cases with which he dealt on a basis of due process, must, in view of his later decisions, be classified with that element of the Court which embraces the presumption against validity as an element of the "clear and present danger" concept.

The views of the dissenting Justices on the present Court present the other half of what is admittedly a dilemma in the Holmesian philosophy as applied to the question of free speech. Mr. Justice Frankfurter is the exponent of this school of thought. He stoutly maintains that he is a close follower of the late Justice Holmes as he applies the doctrine of judicial restraint in cases involving free speech. His views in this regard are diametrically opposed to those of other alleged followers of

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49 316 U. S. at 623.

50 314 U. S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

51 See, in particular, the majority opinion of Chief Justice Hughes in the *Stromberg* case, *supra* note 7.

Holmes who deny the applicability of the doctrine of judicial restraint in these cases. Frankfurter accuses those who refuse to apply this doctrine, of inserting their judgment in place of a democratic decision of the legislature as to the protective scope of the First Amendment. His viewpoint is based on the belief that the Court is scientifically and psychologically incapable of defining criteria for the imposition of limits to the exercise of the right of free speech, and therefore should bow to the decision of the majority.[52]

This point of view overlooks, it would seem, the fundamental nature of these rights and their relationship to the democratic process. It is apparently grounded upon an inability to see that the protection of these fundamental and constitutionally guaranteed rights is a condition precedent to the efficient operation of our democratic system. The measure of protection afforded the right of free discussion will be determinant of the degree of validity we may attach to the laws emanating from our legislative process. If the legislatures of our nation are unable to obtain the results of the thorough factual discussion which freedom of speech furnishes, then we cannot say that they have been supplied with the necessary tools of intelligent legislation. Professor Chaffee summarizes this view when he says: [53]

> . . . statutes, to be sound and effective, must be preceded by abundant printed and oral controversy. Discussion is really legislation in the soft. Hence drastic restrictions on speeches and pamphlets are comparable to rigid constitutional limitations on lawmaking . . . Liberty for the discussion which may lead to the formation of a dominant opinion belongs side by side with the liberty of lawmakers to transform this dominant opinion into the statute that is its natural outcome.

Justice Cardozo further illustrated the inconsistency of the position held by those who would apply the doctrine of judicial restraint in free speech cases when he declared: [54]

> Experimentation there may be in many things of deep concern, but not in setting boundaries to thought, for thought freely communicated is the indispensable condition of intelligent experimentation, the one test of its validity.

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52 See Minersville School District v. Gobitis, 310 U. S. 586, 597-98, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940); West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

53 CHAFFEE, *supra* note 37, at 360.

54 CARDOZO, THE PARADOXES OF LEGAL SCIENCE 105 (1928). See SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 161 (1946), wherein he also adopts this view when he says that while responsibility for government rests with the people in a democracy, we nevertheless "find ourselves under the necessity of limiting it by the proviso that self government imposed by the people must not go so far as to cut off the facilities of expression and self education so as to make it impossible for the people to continue to govern themselves. In other words, no tenable principles of political liberty will permit political liberty to decree its own execution."

The social validity of free discussion was one of the basic tenets of the reasoning of John Stuart Mill, who said. [55]

> But the peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

The quotation from Mill is fairly representative of what exponents of freedom of speech have in mind as a philosophical justification for the abuses involved in allowing freedom of discussion. Pope Leo XIII in his great encyclical *Human Liberty* lays down a more definitive view of what the right of free speech is in terms of the Natural Law. He says: [56]

> Men have a right freely and prudently to propagate throughout the State what things soever are true and honorable, so that as many as possible may possess them; but lying opinions, than which no mental plague is greater, and vices which corrupt the heart and moral life, should be diligently repressed by public authority, lest they insidiously work the ruin of the State. The excesses of an unbridled intellect, which unfailingly end in the oppression of the untutored multitude, are no less rightly controlled by the authority of the law than are the injuries inflicted by violence upon the weak.

Pope Leo's analysis of the ethical problems presented in considering the right of free speech could hardly be questioned. The common law contains many provisions, e.g., sedition and libel, which put this analysis in practical operation. That the difficulty occurs when practical application of these principles is attempted is evidenced by the inability of the Court to decide what speech falls within the permissible category. It should be remembered, however, that the failure of the courts, in many instances, to prescribe proper limitations does not relieve the individual of his duty to speak the truth.

The right of free speech is a natural right. As long as man stays within the framework of the proper exercise of this right, it is beyond the power of any man or government legitimately to restrain his speech. The Supreme Court has recognized freedom of speech as a fundamental right higher in the hierarchy of rights protected by the Constitution than those rights not specifically enumerated therein, e.g., freedom of contract.[57] Roscoe Pound had defined the interests protected by the First Amendment as follows: [58]

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55 MILL, LIBERTY 24 (Oxford Press ed. 1912).

56 Leo XIII, *Libertas Humana* 18 (Paulist Press ed. 1941).

57 See the careful classification of the provisions of the Bill of Rights into these two categories in the majority opinion of Mr. Justice Cardozo in Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

58 Quoted by Chaffee, *Free Speech in Wartime* in 2 SELECTED ESSAYS IN CONSTITUTIONAL LAW 1024, 1047 (1938).

> There is the individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.

All the members of the Court agree that freedom of speech must be protected. It is equally obvious that the members do not have the same referents for the concept of free speech. The confusion involved is explicable when one possesses an understanding of the complexity of the problems involved. A particular case may, and quite often does, present a maze of conflicting interests and rights competing for recognition and protection. Granted the philosophical proposition that there can be no conflict in ultimate principles, one is still confronted with the practical problem of defining the boundaries of basic rights in their exercise. Both elements of the Court have recognized judicial inability to draw specific limits to these rights. This appears to be the last point at which the opposing views are in substantial agreement. From this point, jurists have split into two schools of thought: the majority of the Court would say that any mistake to be made should be on the side of overprotection of these basic rights, while the minority of the Court would bow to the opinion of the popular majority as reflected by the decisions of the legislature; the majority of the Court would not exercise the doctrine of judicial restraint because they consider free discussion to be a condition precedent to efficient legislation. This distinction in judicial attitudes does not provide us with the insight necessary to understand every case involving free speech.[59] It will, however, quite often constitute an undisclosed major premise in the reasoning of the particular Justices. Although Justice Douglas did not expressly rely on the presumption against constitutional validity of legislation pertaining to civil rights in his majority opinion in the *Terminiello* case, that presumption is at least implicit in his statement of the "clear and present danger" test. He has assented to the doctrine in the past as have other members of the majority. The "presumption against validity" in civil rights cases serves as one of the most important components used by the Court as it applies the test of "clear and present danger." A realization of the importance of this presumption in the disposition of civil rights cases is basic to an understanding of the methodology utilized by the present Court. A proper understanding of this approach should cause some hesitation on the part of those who would be prone to level an accusation of judicial irresponsibility against the modern Court in its treatment of civil rights cases.

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[59] See Barnette, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition*, 32 CORN. L. Q. 177, 217 (1946), where he states: "Out of the welter of differing factual situations and varying constitutional provisions comes one central problem around which much of the difference of opinion on the Court in these civil liberties cases may be oriented. Stated briefly, it is whether the presumptive validity of legislation inherent in the revitalized doctrine of judicial self-restraint shall apply to cases involving civil liberties."

In this light, the *Termineillo* case may be considered a logical extension of the presumption against validity of legislation pertaining to civil rights. Realistically, the Court has once again recognized that the "pinch" of civil rights legislation is in its application. This being true, it was logical for them to review that application.[60] The fundamental nature of the rights involved was apparently enough authorization for the Court to overlook procedural technicalities in their attempt to afford genuine protection to these rights. They found that the charge to the jury was not consonant with the constitutional treatment to be afforded one attempting to exercise his right of free speech. The Court declared its disapproval of a conviction had by unconstitutional construction and application of an otherwise constitutional ordinance. One would feel justified in predicting that the Court would not have reversed the conviction of Terminiello if the issue had been limited to that of "fighting words." [61] In this respect, it is difficult to imagine how the speaker could have chosen more offensive, or reprehensible language. But the disgusting nature of these words did not empower the trial court to convict upon a loosely drawn charge, which was in fact violative of the accused's right of free speech under the First and Fourteenth Amendments.

Many jurists will deplore the procedural innovation, if such it was, by which the majority of the Court reversed the conviction on grounds discovered by their own search of the record. But the fair and open-minded will recognize the value of the realistic approach of the Court in attempting to solve the difficult problems presented in free speech litigation. Those concerned with the procedural variations in civil rights cases may conceivably fight to limit this liberality to civil rights cases; but, it is suggested, they should not urge that this technical excuse be used to nullify the hard-won gains of the past ten years.

The *Terminiello* case represents an amplification of the scope of the protection afforded freedom of speech under our Constitution. It adds to the positive content of the "clear and present danger" test. It will, it is hoped, serve as another judicial check on those who would resurrect the now defunct concepts of "bad tendency" and "constructive intent." These concepts have been very effectively utilized to suppress freedom of speech. They have died hard. One respectfully, and regretfully, suspects that some of the minority Justices on the present Court are still in mourning.

The survival of liberty, as we know it, depends largely upon the abiding faith of the people that liberty represents a prime value of life which must be defended against every threatened invasion. The perennial struggle for liberty will rage on, and those who would be impatient

60 Terminiello v. City of Chicago, *supra* note 1.

61 See Chaplinsky v. New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

of the abuses of the right of free speech might well heed the warning of Roscoe Pound when he states: ". . . the rights of the best men are secure only as the rights of the vilest and most abhorrent are protected." [62]

In the last analysis, it will be the decision of the people themselves that will determine the degree of freedom of speech they shall exercise. Freedom of speech will have a positive correlation to their level of intelligence, tolerance and self-restraint. The growth of that freedom under our Constitution should be a matter of pride and not of concern.

Edward G. Coleman

Francis W. Collopy

Sales

CANCELLATION OF PRE-EXISTING DEBT NOT VALUE AS TO BONA FIDE PURCHASER IN INDIANA AND MICHIGAN, CONTRARY TO STATUTORY DEFINITION

More than a decade ago, the Appellate Court of Indiana [1] and the Supreme Court of Michigan [2] held, contrary to the existing statutory law in the respective states,[3] that the cancellation of a pre-existing debt does not constitute value, when applied to the bona fide purchaser for value doctrine in the law of sales. These decisions have apparently remained unchallenged. They reflect the common law of both jurisdictions and are in harmony with the majority rule prior to the enactment of the Uniform Sales Act.[4] Directly opposing this doctrine at

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62 Quoted by CHAFFEE, *supra* note 37, at 377.

1 Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

2 Automobile Equipment Co. v. Motor Bankers' Corp. et al., 251 Mich. 220, 231 N.W. 559 (1930).

3 IND. ANN. STAT. § 58-606 (Burns 1933); MICH. STAT. ANN. § 19.316 (Henderson 1937).

4 Federal: Commercial Nat. Bank et al. v. Pirie et al., 82 Fed. 799 (8th Cir. 1897).

Alabama: Hawkins v. Damson & Abraham, 182 Ala. 83, 62 So. 15 (1913).

Arkansas: S. E. Lux, Jr., Mercantile Co. v. Jones et al., 177 Ark. 342, 6 S.W. (2d) 302 (1928); Hamilton v. Rankin, 108 Ark. 552, 158 S.W. 496 (1913); Bard v. Meiser et al., 72 Ark. 494, 82 S.W. 836 (1904).

Kansas: Harbert et al. v. Fort Smith Canning Co. et al., 134 Kan. 240, 5 P. (2d) 849 (1931); Henderson et al. v. Gibbs et al., 39 Kan. 679, 18 Pac. 926 (1888).

Maine: Hurd v. Bickford, 85 Me. 217, 27 Atl. 107 (1892).

Michigan: Schloss et al. v. Feltus, 103 Mich. 525, 61 N.W. 797 (1895).

Mississippi: Lundy et al. v. Greenville Bank & Trust Co. et al., 179 Miss. 282, 174 So. 802 (1937).

common law was a minority view which acknowledged the sufficiency of a pre-existing debt as value.[5] This minority view, created to promulgate commercial efficiency, was incorporated into the Uniform Sales Act.[6] The paradoxical appearance of the Indiana and Michigan decisions in the light of the existing statutory provisions invites analysis. Initially, however, it is essential to examine briefly the conceptions of value at common law in relation to the transitions effected by the uniform statute.

The problem usually arose in one of two situations. In one, *A* as vendor sold goods to *B*, a fraudulent vendee who received a voidable title. *B* then sold the goods to *C*, an innocent purchaser in good faith who had no knowledge of *B's* fraud. In payment for the goods, *C* discharged a pre-existing debt owed him by *B*. When *A* learned of the fraud, he attempted to avoid the sale and recover the goods from *C*. In the other situation, *B* sold goods to *A*, but *B* remained in possession. *B* later sold to *C*, who in good faith extinguished a pre-existing debt of *B's* in payment thereof. The question was: did the cancellation of an antecedent debt in these two instances satisfy the requirement of value?

New Hampshire: Sleeper et al. v. Davis et al., 64 N. H. 59, 6 Atl. 201 (1886).

New York: Stevens v. Brennan, 79 N. Y. 254 (1879); Barnard v. Campbell, 55 N. Y. 456 (1874).

Ohio: Eaton v. Davidson, 46 Ohio St. 355, 21 N.E. 442 (1889).

Oklahoma: Knapp v. First Nat. Bank & Trust Co. of Oklahoma City et al., 154 F. (2d) 395 (10th Cir. 1946) (applying the substantive law of Oklahoma); Wails et al. v. Farrington, 27 Okla. 754, 116 Pac. 428 (1911).

Pennsylvania: Ward Lumber Co. v. American Lumber & Mfg. Co., 247 Pa. 267, 93 Atl. 470 (1915).

South Carolina: Heyward-Williams Co. v. Zeigler et al., 106 S. C. 425, 91 S.E. 298 (1917).

Texas: Duncan v. Jones, 153 S.W. (2d) 214 (Tex. Civ. App. 1941).

Utah: Belleville Works v. Sorenson & Neilson Furniture Co. et al., 16 Utah 234, 52 Pac. 282 (1898).

Washington: Woonsocket Rubber Co. v. Loewenberg et al., 17 Wash. 29, 48 Pac. 785 (1897).

[5] Federal: Pere Marquette Ry. Co. v. French & Co., 254 U. S. 538, 41 S. Ct. 195, 65 L. Ed. 391 (1920); Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842); Brooklyn City & Newton R. R. Co. v. National Bank of the Republic of New York, 102 U. S. 14, 26 L. Ed. 61 (1879).

California: Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 90 Pac. 48 (1907).

Georgia: Agee v. Rhodes, 20 Ga. App. 117, 92 S.E. 771 (1917).

Illinois: Butters v. Haughwout et al., 42 Ill. 18 (1866).

Minnesota: Horton v. Williams, 21 Minn. 187 (1875).

Mississippi: Soule, Thomas & Wentworth v. Shotwell & Fitts, 52 Miss. 236 (1876).

Missouri: Strauss, Pritz & Co. v. Hirsch & Co. et al., 63 Mo. App. 95 (1895).

Wisconsin: Shufeldt v. Pease et al., 16 Wis. 689 (1863).

[6] Uniform Sales Act § 76, 1 UNIFORM LAWS ANN. 447 (1931).

The rationale exemplified by the common law majority view stemmed from the contention that the innocent buyer had given nothing of value by cancelling a debt—that he could have been made whole again by reviving the debt. Likewise, the original vendor could be restored to his former position by the return of the property upon rescission of the contract of sale. It was, theoretically, a return to the status quo. As is true today in so many propositions, theory and actuality did not always coincide. From a realistic standpoint, could the innocent purchaser invariably be restored to his former position? Even though his legal right to collect the debt was revived, that may have been the extent of his restoration. Actually the debt, collectable at the time the goods were accepted in satisfaction thereof, might conceivably have been uncollectable due to the vendor's intervening insolvency or the secreting of assets. Certainly the need for commercial expediency and security of transactions, coupled with the fact that the innocent purchaser had changed his position in reliance on the sale, was a strong argument in favor of the common law minority view.

Courts and legal authorities were divided at common law in applying the value concept to the cancellation of a pre-existing debt in exchange for real property [7] and in the transfer of negotiable instruments.[8] Uniformity was made possible first in this latter field by a clear statement in the Uniform Negotiable Instruments Act that the cancellation of a pre-existing debt in exchange for a promissory note constitutes value.[9] Undoubtedly Professor Williston, in writing the Uniform Sales Act, was inspired by the success of the Uniform Negotiable Instruments Act and the functional approach to the problem taken by the jurisdictions advocating the minority view. When he drafted section 76 of the Uniform Sales Act, he was fully aware that it was in derogation of the majority common law view.[10] With this thought in mind, the manner in which value is defined in section 76 becomes more understandable. The words of this section are clear and unambiguous: [11]

> "Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

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7 Shirk et al. v. Thomas et al., 121 Ind. 147, 22 N.E. 976 (1889).

8 This conflict is illustrated by *Bay v. Coddington*, 5 Johns 54 (N. Y. 1821); Coddington v. Bay, 20 Johns 637 (N. Y. 1822), which decided such a holder was not a holder for value; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (U. S. 1842). *Contra:* Brooklyn City & Newton R. R. Co. v. National Bank of the Republic of New York, 102 U. S. 14, 26 L. Ed. 61 (1879).

9 Uniform Negotiable Instrument Law § 25, 5 UNIFORM LAWS ANN. 287 (1943).

10 3 WILLISTON, SALES § 620 (rev. ed. 1948); see Commissioner's Note, 1 UNIFORM LAWS ANN. 448 (1931).

11 Uniform Sales Act § 76, 1 UNIFORM LAWS ANN. 447 (1931).

Thus, since the cancellation of a pre-existing debt is valuable consideration sufficient to support a simple contract between the immediate parties, it would seem that these words alone would have been sufficient. Yet the Act goes further and emphasizes in a separate sentence that value is also given when goods or documents of title are taken either to extinguish, or as security for, an antecedent or pre-existing claim. Undoubtedly this additional explanation was to remove any doubt existing at common law and to insure uniformity of the value concept.[12]

Thirty-four states, the District of Columbia, Alaska and Hawaii have adopted the Uniform Sales Act since 1907.[13] Of these, all but two jurisdictions, Arizona and New York, accepted section 76 verbatim. Arizona statutes do not include a definition of value,[14] while New York by amendment in 1935 adopted the uniform definition of value for the first time,[15] in response to the pressing need for uniformity in commercial transactions.[16]

With two notable exceptions, namely, Indiana and Michigan, all the jurisdictions accepting the Uniform Sales Act with its definition of value apparently conform to the plain and unambiguous meaning of the statute.[17] The decisions in Indiana [18] and Michigan [19] clearly

12 In section 1 of the Uniform Sales Act, in the definition of sale, the phrase "for a consideration called a price" is used. But the word "value" is used in sections 24 and 25, pertaining to situations where the seller's title is defective, and likewise in sections 33, 36, 38, and 39, dealing with negotiation of documents of title. The "definitions" section gives the meaning of "value" but does not indicate whether "value" is synonymous with "consideration" as the term is used in section 1, except to say that "value" is any "consideration" sufficient to support a simple contract. But "value" rather than "consideration" is a part of the bona fide purchaser doctrine.

13 Alabama, 1931; Alaska, 1914; Arizona, 1907; Arkansas, 1941; California, 1931; Colorado, 1942; Connecticut, 1907; Delaware, 1933; District of Columbia, 1937; Hawaii, 1929; Idaho, 1920; Illinois, 1915; Indiana, 1929; Iowa, 1919; Kentucky, 1928; Maine, 1923; Maryland, 1910; Massachusetts, 1909; Michigan, 1913; Minnesota, 1917; Nebraska, 1921; Nevada, 1915; New Hampshire, 1923; New Jersey, 1907; New York, 1911; North Dakota, 1917; Ohio, 1909; Oregon, 1919; Pennsylvania, 1916; Rhode Island, 1908; South Dakota, 1921; Tennessee, 1919; Utah, 1917; Vermont, 1921; Washington, 1926; Wisconsin, 1912; Wyoming, 1917.

14 ARIZ. CODE ANN. § 52-583 (1939).

15 N. Y. PERS. PROP. LAW § 156 and historical note.

16 For discussion of this subject in New York State, see Kennedy, *"Value"—A Plea For Uniformity In New York Commercial Law*, 8 ST. JOHN'S L. REV. 1 (1933); Whitney, *"Value"—A Reply To Professor Kennedy*, 8 ST. JOHN'S L. REV. 285 (1934); Whitney, *Value And The Doctrine Of Bona Fide Purchase*, 7 ST. JOHN'S L. REV. 181 (1933); see Notes, 5 BROOKLYN L. REV. 97 (1935); 5 FORD. L. REV. 80 (1936).

17 For representative cases, see Blumberg v. Taggart et al., 213 Minn. 39, 5 N.W. (2d) 388 (1942); Reynolds v. Park Trust Co. et al., 245 Mass. 440, 139 N.E. 785 (1923); Wooley v. Crescent Automobile Co., 83 N. J. L. 244, 83 Atl. 876 (1912).

indicate that their courts are still defining value according to their common law concepts and in contradiction of the specific statutory language.

Ten years after the adoption of the Uniform Sales Act in Indiana,[20] the appellate court of the state, in *Smith et al. v. Autocar Sales and Service Co., et al.*,[21] held that one is not a bona fide purchaser for value of goods obtained in payment of an antecedent debt. The facts of the case are clearly within the purview of section 24 of the Uniform Act:[22]

> Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for *value*, and without notice of the seller's defect of title. (Emphasis supplied.)

The plaintiff, a wholesale truck distributor, sold a truck to a retail dealer who paid for it with a worthless check. Before the fraud was discovered, the dealer sold the truck to the defendant, who paid for it by cancelling an antecedent debt owed by the dealer to the defendant. The plaintiff in this action sought to repossess the truck from the defendant.

In the trial court, the sole issue involved was the question of the defendant's good faith, the plaintiff claiming that the defendant was not a purchaser without notice. The record is silent regarding value. No question was raised concerning its sufficiency.[23] The jury's verdict was for the plaintiff, and the defendant appealed, basing his appeal upon the proposition that the evidence was insufficient at law to sustain the finding that the defendant had knowledge of the fraud perpetrated upon the plaintiff.[24]

It should be clearly understood that on appeal neither party's argument contested the sufficiency of value in the transaction.[25] This is of paramount significance in view of the line of reasoning followed by the court:[26]

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18 Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

19 Automobile Equipment Co. v. Motor Bankers' Corp. et al., 251 Mich. 220, 231 N.W. 559 (1930).

20 The Uniform Sales Act was adopted in Indiana in 1929: IND. ANN. STAT. § 58-101 *et seq.* (Burns 1933).

21 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

22 Uniform Sales Act § 24; IND. ANN. STAT. § 58-208 (Burns 1933).

23 Transcript of Record, pp. 35-37, Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

24 Original Transcript, Appellate Court No. 15966; Appeal from the Ripley County Circuit Court to Appellate Court of Indiana; Brief for Appellants on Appeal, Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

25 Briefs for Appellant and Appellee, Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

26 See note 18 *supra*, 20 N.E. (2d) at 189.

> Without going into the sufficiency of the evidence to show knowledge, it is apparent from the record that the appellants are not bona fide purchasers of the truck for a valuable consideration. The record conclusively shows that the only consideration afforded by the appellants for the purchase of the truck in question was the credit upon their account against Potten. They gave no additional consideration for this truck and incurred no liability therefor. They accordingly are not in the position of bona fide purchasers for a valuable consideration.

Thus the appellate court determined the case upon a point of law not raised during the trial or on appeal. Certainly this was within the court's discretion. However, in the exercise of this prerogative the law was erroneously interpreted.

An examination of the court's opinion readily discloses that the decision was not predicated upon the statutory definition of value in the Indiana law, but upon three cases decided at the turn of the last century [27] and a general rule quoted from Ruling Case Law [28] and American Law Reports.[29] The court's opinion and the original transcript clearly indicate that neither the defendant nor the court took cognizance of the definition of value in the Indiana statute. Furthermore, in the defendant's petition for a rehearing before the appellate court [30] and in his petition for transfer to the supreme court,[31] this incorrect interpretation of value was not challenged. The defendant at this point categorically admitted that as a general rule the cancellation of an antecedent debt was not value.[32] But to circumvent this alleged general rule, the defendant argued for the first time in this litigation that the factual situation of the case rendered this rule inapplicable. The petitions were denied.[33] As a result, this decision stands out as a direct contradiction of the statutory law in Indiana.

In 1913, Michigan became the tenth state to enact the Uniform Sales Act. Section 76 was adopted as originally drafted.[34] The statute was in derogation of Michigan common law, for the Michigan Supreme Court had consistently refused to allow, as value, the satisfaction of a

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27 Adam, Meldrum & Anderson Co. v. Stewart et al., 157 Ind. 678, 61 N.E. 1002 (1901); Waterbury et al. v. Miller, 13 Ind. App. 197, 41 N.E. 383 (1895); Curme, Dunn & Co. et al. v. Rauh et al., 100 Ind. 247 (1885).

28 24 R.C.L., *Sales* § 602.

29 See Note, 44 A.L.R. 488 (1926).

30 Brief for Appellant in support of their Petition for Rehearing, pp. 13-14, Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. 188 (1939).

31 Petition of Appellant to Transfer from Appellate Court to Supreme Court, p. 1, Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

32 *Ibid.*

33 Smith et al. v. Autocar Sales & Service Co. et al., 107 Ind. App. 244, 20 N.E. (2d) 188 (1939).

34 MICH. STAT. ANN. § 19.316 (Henderson 1937).

pre-existing debt in exchange for the transfer of goods.[35] In the early Michigan cases, it was insisted that the law of negotiable instruments was merely an exception to this general rule, and was predicated upon a policy of promoting security and free flow of commercial paper.[36]

The common law, as applicable to sales, had been crystallized long before the adoption of the Uniform Sales Act in the pivotal case of *Schloss v. Feltus*.[37] Reflecting a trend exemplified by previous holdings, the supreme court refused to recognize the cancellation of an antecedent debt as the equivalent of value. However, Justice Montgomery, in a forceful and challenging dissent, stated:[38]

> It seems to me illogical and confusing to apply in the one case a test in determining whether one is a bona fide purchaser which does not obtain in the other . . . Certainly, if the discharge of a pre-existing debt can be said to be parting with something of value, and a new consideration, when it is paid for a promissory note, it is inconceivable how it can, on the other hand, be said not to be of value, and a new consideration, when paid for a bale of cotton.

Apparently this dissent provoked very little judicial appreciation of the reasoning involved therein, as the majority opinion was applied without question in subsequent decisions.[39]

In 1930, seventeen years after the enactment of the Uniform Sales Act, the Michigan Supreme Court was again confronted by litigants seeking a definition of the word value. The case, *Automobile Equipment Co. v. Motor Bankers' Corp.*,[40] presented a controversy clearly within the provisions of section 25 of the Uniform Act.[41] The complex facts, briefly stated, involved the sale of an automobile. The plaintiff paid for the vehicle partly in cash, partly in merchandise, and partly by cancelling a debt which the dealer owed him. Unknown to the plaintiff, this dealer had previously sold the automobile to another party, the defendant, who allowed the dealer to retain possession of the vehicle and its certificate of title. The defendant obtained possession of the car peaceably, and the plaintiff brought suit for conversion, claiming to be a bona fide purchaser for value. On appeal to the supreme court both parties made this stipulation:[42]

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35 Kops Bros. Co. v. Stephen B. Smith & Co., 137 Mich. 28, 100 N.W. 169 (1904); Schloss et al. v. Feltus, 103 Mich. 525, 61 N.W. 797 (1895).

36 See, *e.g.*, Schloss et al. v. Feltus, *supra* note 35.

37 *Ibid.*

38 61 N.W. at 799.

39 Kops Bros. Co. v. Stephen B. Smith & Co., 137 Mich. 28, 100 N.W. 168 (1904).

40 251 Mich. 220, 231 N.W. 559 (1930).

41 MICH. STAT. ANN. § 19.265 (Henderson 1937).

42 Briefs for appellant and appellee, S. Ct. Records and Briefs, Automobile Equipment Co. v. Motor Bankers' Corp. et al., 251 Mich. 220, 231 N.W. 559 (1930).

> Admitting plaintiff to have acquired title to said automobile and to be a bona fide purchaser thereof to the extent of payment made at the time of purchase, is it a bona fide purchaser to the extent of its surrender and cancellation of existing indebtedness?

In resolving this question, the supreme court followed the common law doctrine of the state, reiterating that one who receives a chattel, in satisfaction of a pre-existing debt, from a seller whose title is defeasable, is not a purchaser for value. The court's opinion is completely devoid of any reference to section 76 of the Uniform Act.[43] An examination of the plaintiff's brief discloses that his entire case is based upon section 25:[44]

> Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying *value* for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. (Emphasis supplied.)

On the basis of the aforesaid stipulation of the parties, value is the key word in this section. Upon its construction the case should have turned. In the plaintiff's brief a strong policy argument was made for a liberal interpretation of value, but ironically enough, the specific statutory definition of the term was not drawn to the court's attention. The plaintiff in its brief contended: [45]

> It would be illogical to assume that this section [§ 25] of the statute should be construed to mean that the purchaser under the circumstances therein outlined, does not acquire complete title to the goods, but only title insofar as he has paid cash . . . If such were the case, innumerable hardships would be worked on purchasers in many instances.
>
> In the case at bar, the plaintiff was diligently endeavoring to collect its past due account and, had not it purchased the car here in question and thereby cancelled its indebtedness, it would have sought other means to realize satisfaction. Having purchased the car it no longer sought to collect, and six weeks later, when the defendant Schoneman appeared as claimant to the car, the plaintiff could not collect from Community Motors, Inc.

Logically, the meaning of value as defined in section 76 should have been applied in the interpretation of section 25 to dispel any ambiguity surrounding the scope of value.[46] It would seem to be a permissible

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43 Uniform Sales Act § 76; MICH. STAT. ANN. § 19.316 (Henderson 1937).

44 Uniform Sales Act § 25; MICH. STAT. ANN. § 19.265 (Henderson 1937).

45 Brief of the Appellants, pp. 13-14, S. Ct. Records and Briefs, Automobile Equipment Co. v. Motor Bankers' Corp. et al., 251 Mich. 220, 231 N.W. 559 (1930).

46 In order to give effect to a statute, courts will sometimes transpose sentences so as to place them in their intended connection with sentences to which they relate. Detroit v. Chaffee, 70 Mich. 80, 37 N.W. 882 (1888).

presumption that the plaintiff completely overlooked this statutory definition of value and the court did not take judicial notice thereof.

The conception of value expressed in the Uniform Sales Act is a product of legislative courage in casting off artificial and unrealistic fetters restraining the free advance of commercial trade. In a like manner the laws governing negotiable instruments,[47] warehouse receipts[48] and bills of lading[49] have been disencumbered of their "rubrics of ancient ritual."

It can no longer be seriously contended that a definition of value suitable to over-the-counter transactions in an infant economy can satisfactorily be applied to a modern, ever-expanding credit economy covering past, present and future transactions. It is difficult to comprehend why the courts of Indiana and Michigan have applied this archaic conception of value in the cases discussed above. In reviewing these decisions, one may speculate that the holdings were the result either of mere oversight, or of deliberate judicial legislation caused by slavish adherence to the rigidity of stare decisis. Both states have consistently adhered to the principle that statutes in derogation of the common law are to be strictly construed.[50] However, if the statute covers the whole subject, there should be no room for any other rule, and the common law should have no function beyond that of interpreting words not otherwise provided for. In the instant cases the meaning of the word value was clearly defined in the statutes. Certainly it is reasonable to say that once the legislature has specifically given a statutory definition to a term, that definition must control the construction of the statute.[51]

The error into which the courts of Indiana and Michigan have fallen is not unprecedented. It is interesting to note that from 1914 until 1917, the Supreme Court of Alabama was in an analogous dilemma, attributable to the failure of the court to take cognizance of a statutory change effected by the enactment of the Negotiable Instruments Law.[52] The court, in finally recognizing the error of previous cases, said:[53]

> Formerly it was the law of this state—settled by the decisions of this court . . . that one who held negotiable paper taken as collateral security for a pre-existing debt was not a bona fide holder for value, and not entitled to protection against equities and defenses existing between prior parties . . . But it results from some definitions contained in the Uniform Negotiable Instruments Law, adopted in this state in 1907 . . .

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47 Uniform Negotiable Instruments Law § 25, 5 UNIFORM LAWS ANN. 287 (1943).

48 Uniform Warehouse Receipts Act § 58, 3 UNIFORM LAWS ANN. 92 (1922).

49 Uniform Bills of Lading Act § 53, 4 UNIFORM LAWS ANN. 78 (1922).

50 Sibley v. Smith et al., 2 Mich. 487 (1853); Gavin v. Shuman, 23 Ind. 32 (1864).

51 State *ex rel.* Baker v. Grange et al., 200 Ind. 506, 165 N.E. 239 (1929).

52 ALA. CODE ANN. tit. 39, § 29 (1940).

53 Vogler et al. v. Manson, 200 Ala. 351, 76 So. 117, 118 (1917).

> that our law on the point mentioned above has been changed. . . This change in the law was overlooked in Miller v. Johnson, 189 Ala. 354, 66 South. 486 [1914], and on this point the court there fell into error.

It is reasonable to predict that a similar judicial recognition of past error will occur in Indiana and Michigan when future litigation arises involving the interpretation of the term value in the Uniform Sales Act.

John L. Globensky

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Conflict of Laws

Acquisition of In Personam Jurisdiction Over Nonresident Citizens "Doing Business" Within the State.

The exercise of in personam jurisdiction over nonresident individual citizens, when based solely upon activity within the state asserting that jurisdiction, presents a constitutional question of considerable perplexity; a perplexity which, it is submitted, has not been markedly relieved by the previous attempts of the Supreme Court to deal with the matter.

It cannot be disputed that the now-elementary proposition decided in *Pennoyer v. Neff* [1] that in personam judgments rendered without personal jurisdiction are void as violative of due process, cannot today be employed effectively without an understanding of the changing concept of personal jurisdiction. As Chief Justice Stone stated in *International Shoe Co. v. State of Washington:* [2]

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him . . . But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The foregoing is dictum, and, as a statement of the present law, is not entirely accurate. The extent to which its generalities may be supported today in the case of nonresident natural persons "doing business" within a state is the subject of this paper.

Personal jurisdiction over nonresidents not personally served in suits arising out of activity within the state, when allowed, is generally justi-

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1 95 U. S. 714, 24 L. Ed. 565 (1878).

2 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

fied on the basis of consent, actual or implied. In regard to the latter, the following caveat in *Pennoyer v. Neff* is interesting: [3]

> Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process . . . and provide, upon their failure to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose. . . .

Of course, "implied consent" is no consent at all. Jurisdiction purportedly based upon a "mode of service [that] may be considered to have been assented to in advance" [4] is, in reality, jurisdiction acquired by virtue of a power to subject to jurisdiction one who has not consented to such jurisdiction.

The doctrine of implied consent was applied most easily to foreign corporations, since state power over such corporations has long been recognized as including the power to prohibit their actions entirely,[5] and thus to make consent to service a condition of admission.[6] Moreover, such consent may be implied where the foreign corporation is "doing business" to a degree sufficient to allow the fiction,[7] and it is not unreasonable to subject it to suit in that jurisdiction.[8] This, of course, can be applied with equal reason to partnerships when considered as legal entities.[9]

If, however, the power to exclude is alone relied upon to sustain the right to such jurisdiction over individuals, the rights of citizens under the Privileges and Immunities Clause comes into question. As Justice Holmes stated in *Flexner v. Farson,* in holding void a judgment obtained by service on the former agent of two nonresident partners on the basis of their "doing business" within the state: [10]

> The analogy of suits against insurance companies based upon such service is invoked. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed. . . . .

As concerns the question of the constitutionality of such state action, the foregoing is undoubtedly dictum, since the person served was not in fact the defendant's agent for any purpose at the time of the attempted

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3 95 U. S. 714, 735, 24 L. Ed. 565 (1878).

4 95 U. S. at 733.

5 Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274 (U. S. 1839).

6 Lafayette Ins. Co. v. French, 18 How. 407, 15 L. Ed. 451 (U. S. 1856).

7 People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587 (1918).

8 International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

9 Sugg v. Thornton, 132 U. S. 524, 10 S. Ct. 163, 33 L. Ed. 447 (1889).

10 248 U. S. 289, 293, 39 S. Ct. 97, 63 L. Ed. 250 (1918).

service; but, dictum or not, it has not been without force, even if it has not proved sufficient to dispose of the situation finally.

The rationale of *Flexner v. Farson,* if having the virtue of simplicity, suffers also the characteristic disadvantages of over-simplification. While it can be conceded that state power to exclude carries with it the right to set reasonable regulations for admission, it does not seem to follow that state power to regulate conduct within the state and to determine the legal consequences of such activity must depend on the power to exclude alone. Thus in *International Harvester v. Kentucky,*[11] the same Court, construing, incidentally, the same statute [12] as that later considered in *Flexner v. Farson,* refused to invalidate a judgment obtained by substituted service against a foreign corporation engaged in interstate commerce. In answering the contention that, since Kentucky had no right to exclude a corporation engaged solely in interstate commerce, it therefore had no right to subject it to such service, the Court stated:[13]

> True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state.

From the point of view of the power to exclude, it is difficult to find an essential difference between the force of the prohibition implied in the Commerce Clause and that of the individual protection afforded by the Privileges and Immunities Clause.

The explanation is, of course, that, while Kentucky could not exclude that corporation, since that would be an unreasonable burden on interstate commerce, it would not necessarily be an unreasonable burden to require that it be subject to suit. For instance, in *Davis v. Farmers' Coop. Equity Co.,*[14] jurisdiction asserted through service on the soliciting agent of a carrier not operating within the state was denied in a case brought against the carrier by a nonresident defendant on a cause of action arising outside the state because it would impose an unreasonable burden on interstate commerce, even though the state presumably could have excluded the carrier's agent and did purport to base its right to serve the agent on its right so to exclude.

The doctrine of exclusion, then, seems hardly adequate to the tasks which it is called upon to bear. While it can hardly be denied that it has served to dispose of the cases presented to the Supreme Court thus

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11 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914).

12 See International Harvester Co. v. Comm., 147 Ky. 655, 145 S. W. 393, 394 (1912); Flexner v. Farson et al., 268 Ill. 435, 109 N. E. 327 (1915).

13 234 U. S. 579, 588, 34 S. Ct. 944, 58 L. Ed. 1479 (1914).

14 262 U. S. 312, 43 S. Ct. 556, 67 L. Ed. 996 (1923).

far, and while undoubtedly others can be justified on that basis without going further, the fact nonetheless remains that as a basis of legal analysis the doctrine leaves much to be desired. Logical defense of the assertion of state power to subject nonresidents to suit in its courts would seem to require that such power be in itself somehow necessary to the protection of the state's citizens. It would also seem logical that if this can be called a reasonable exercise of the police power, no question of exclusion need arise. A state asserting such power for the protection of its citizens is not attempting to prevent the free passage of citizens of other states; neither is it discriminating against nonresidents. If the assertion of such power is unreasonable, it is void for that reason, and not because to assert it is to assert the power to exclude. Conversely, if the assertion of the power is unreasonable because it places a burden on interstate commerce or offends "traditional notions of fair play and substantial justice," it is not made reasonable because of the existence of the right to exclude.

Evidence is not wanting that the exercise of this power is necessary, at least in certain instances. In suits arising out of business activity within the state, it is at least convenient that the plaintiff be relieved of the necessity of traveling to some other state where the defendant may be found. Where the matter is a small one, and the distance great, this is not merely a convenience, but a necessity. As has been stated:[15]

> In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.

On the other hand, where the defendant is doing business in the state through agents, it does not seem unreasonable to require that he answer to suits brought against him in that jurisdiction in matters arising out of such business. The important fact in this reasoning is that it applies with equal force to individual as well as corporate defendants. While the power is more easily asserted when an incident to some other exercise of the police power, just as it is asserted more easily still when the power to exclude exists, it does not seem illogical to argue that the assertion of this power in itself is so necessary to the protection of the citizens of a state as to be a legitimate exercise of the police power. As one court stated it:[16]

> The thought is not shocking that one who comes into a state for the purpose of conducting his business in that state should be made amenable to the courts and laws of the state and answerable to its citizens for damages sustained by them which were the result of the business transacted in the state.

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15 B. & O. R. Co. v. Harris, 12 Wall. 65, 84, 20 L. Ed. 354 (U. S. 1871), quoted in Scott, *Jurisdiction over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871 (1919).

16 Sugg v. Hendrix, 142 F. (2d) 740 (5th Cir. 1944).

The extent to which the Supreme Court has been moved by that argument remains for discussion.

It might be mentioned parenthetically that, aside from the question of exclusion, no objection need arise on the basis of the Privileges and Immunities Clause, since statutes purporting to give such in personam jurisdiction, when otherwise valid, are upheld when they place nonresidents on substantially equal footing with residents in the manner of service.[17] The problem of adequacy of notice and hearing is likewise collateral, since the Court has held that "reasonable probability" of notice and adequate provision for continuances satisfy the requirements of due process.[18]

It must also be reiterated that the power here considered is that sought to be justified on the basis of the individual activity which has been frequently called "doing business" in speaking of a similar power in regard to foreign corporations. It is not contended that the doing of a single act of any type subjects a nonresident individual to personal jurisdiction,[19] or that activity within the state should subject nonresident individuals to suit in actions not arising out of business within the state; neither is the sole concern with cases involving hazardous activity, such as that considered in *Hess v. Pawloski*.[20]

In that case, Hess, a resident of Pennsylvania, was sued in the courts of Massachusetts for damages resulting from an automobile accident alleged to have been caused through his negligence. Although no attachment of his property was attempted, he was not personally served, but received substituted service pursuant to a Massachusetts statute authorizing service on the registrar in automobile accident cases involving nonresident defendants. Hess received personal notice by registered mail, and, as required by the statute, the return receipt was affixed to the writ. Hess appeared specially, and upon an affirmance of an order overruling his motion, an appeal was taken on the ground that the statute in question was, among other things, violative of due process. As the Court reasoned in affirming the Massachusetts court, automobiles are "dangerous machines" [21] and thus a legitimate subject for the exercise of the police power. There is ample precedent for regarding the use of automobiles a matter of peculiarly local concern, since the Court had earlier held in *Kane v. New Jersey* [22] that to require a

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17 Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935); Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

18 Wuchter v. Pizzutti, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446 (1928).

19 Beale cites Singh v. Rajah of Faridkot, [1894] A. C. 670, as being the only case where that proposition was seriously urged. I BEALE, CONFLICT OF LAWS § 84.1 (1935).

20 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

21 274 U. S. at 356.

22 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222 (1916).

nonresident to obtain a license to use the highways of the state was not an unreasonable burden on interstate commerce.

The Court also observed in the *Hess* case, on the authority of *Flexner v. Farson,* that: "The mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts." [23] Here, as in *Flexner v. Farson,* the statement is dictum, since the Court was concerned with the special circumstance of the use of the highways, although when taken as excluding all other circumstances, such as the nature and extent of a particular business, it will quite probably be followed.

It is perhaps well at this point to consider in some detail the case of *Henry L. Doherty & Co. v. Goodman.*[24] In that case, Doherty, a resident of New York trading under the name of Henry L. Doherty & Co., maintained an office in Iowa for the handling of his securities business there. A controversy arose concerning a sale of stock made by an agent operating out of this office, and service upon Doherty was made by service on the agent in charge of this office, who, however, had never been given authority to accept service of process. This action was in conformity with an Iowa statute [25] authorizing such service on the agent of any corporation, company or individual residing in another county in actions arising out of such agency. This is held to authorize suits against nonresidents of the state.[26] Doherty appeared specially, claiming a denial of due process. In holding that the statute was not violative of due process, the Court was careful to point out that Iowa had subjected the securities business to regulation. The importance of this is seen in the Court's treatment of *Flexner v. Farson.* While distinguishing that case on the ground that the person on whom service was made there was not in fact the agent of the defendant, the Court seemed not unmindful of Holmes' dictum grounding these cases on the right to exclude, since Justice McReynolds was quick to add: "Moreover, under the laws of Iowa, neither her citizens nor non-residents could freely engage in the business of selling securities." [27] It could hardly be stated, however, that Iowa could prohibit entirely business in securities, since that surely would be an abuse of the police power. Neither could it be said that Iowa could exclude the defendant entirely. Iowa could, however, as an aspect of the police power, regulate the securities business, as well as regulate the conduct of the defendant generally, so long as such regulation did not result in unreasonabe discrimination against nonresidents.

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23 274 U. S. 352, 355, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

24 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935).

25 IOWA CODE, Rules of Civ. Proc. § 56(g) (1946), formerly IOWA CODE § 11079 (1931).

26 Davidson v. Henry L. Doherty & Co., 214 Iowa 739, 241 N. W. 700 (1932); see Note, 91 A. L. R. 1327 (1934).

27 294 U. S. 623, 628, 55 S. Ct. 553, 79 L. Ed. 1097 (1935).

The fact that Doherty was sued in his trade name, and thus possibly as a legal, rather than a natural entity, seems not to have been the basis of the Court's decision, since an earlier Iowa case, *Davidson v. Henry L. Doherty & Co.*,[28] relied upon and quoted at length by the Court in *Henry L. Doherty & Co. v. Goodman,* founds its reasoning in favor of jurisdiction on the assumption that the defendant was protected by the Privileges and Immunities Clause as an individual citizen.

From a discussion of the *Doherty* case, the last pronouncement of the Supreme Court, certain conclusions emerge. It must first be recognized that the dictum of *Flexner v. Farson,* regardless of its inadequacies, is far from discredited. While it can be argued that occasion to discredit it has not yet appeared, it cannot be denied that thus far the Supreme Court has been at pains to meet its requirements. Whatever the rationale of the decision, however, it seems apparent from the unmistakable air of judicial hesitancy in *Hess v. Pawloski* and the *Doherty* case that the extent to which nonresident individuals can be unwillingly subjected to in personam jurisdiction without personal service has definite limits. In each case, the matter regulated was one of peculiar concern to the residents of the state, although in the *Doherty* case the statute purporting to give jurisdiction was quite broad in its terms. It might well be inferred from the tendency to limit each case to its facts that the assumption of such jurisdiction will only be upheld when incidental to some other exercise of the police power.

Most of the subsequent cases in the federal and state courts either proceed on that theory expressly or are capable of being explained through its application. Thus in *Sugg v. Hendrix,*[29] the Circuit Court of Appeals for the Fifth Circuit held service obtained on the agent of a nonresident partnership engaged in hazardous operations sufficient to bind individual partners. In resting the claim to jurisdiction on the hazardous nature of the business, the court also made the following comment:[30]

> The inadequacy of the doctrine in Flexner v. Farson to cope with the increasing problem of practical responsibility for hazardous business conducted in absentia is apparent, and the trend is in the other direction.

The use of such service in obtaining personal jurisdiction over a pawnbroker,[31] and a person engaged in the licensed business of termite eradication,[32] has been similarly justified as an incident to the exercise of the police power.

A recent case in Arkansas,[33] in upholding substituted service on a nonresident defendant in a suit to recover damages for negligent

28 214 Iowa 739, 241 N. W. 700 (1932).
29 142 F. (2d) 740 (5th Cir. 1944).
30 *Id.* at 742.
31 L. G. Balfour Co. v. Brown, 110 S. W. (2d) 104 (Tex. Civ. App. 1937).
32 Condon et al. v. Snipes, ...Miss....., 38 So. (2d) 752 (1949).
33 Gillioz v. Kincannon, 214 S. W. (2d) 212 (Ark. 1948).

burning of grass and timber, sustained the constitutionality of a statute purporting to give personal jurisdiction over nonresident individuals engaging in any business within the state. While the language of the court was as broad as that of the statute,[34] it is perhaps well to note that Arkansas, conscious of the danger of forest fires, has subjected the burning of timber land to regulation, providing criminal penalties for negligence[35] and authorizing double recovery in civil suits.[36] On the other hand, one federal court, in denying in broad terms the validity of the same type of service on a natural person engaged in the securities business, nonetheless noted that the suit, while arising out of the business of the defendant, was not one involving a violation of the local securities law.[37]

There are, however, states where the character of the business conducted has been clearly held to be immaterial. The New York Appellate Division, in *Interchemical Corp. v. Mirabelli*,[38] upheld such service on a person engaged in the business of manufacturing clothing. As the court, after a review of the Supreme Court cases, quite frankly stated:[39]

> The Supreme Court limited its decision in the cases cited to the proposition that the police power of the state to regulate acts engaged in within the state requiring special state supervision . . . embraces the power to require submission by the actor to its jurisdiction. The New York Legislature, in its wisdom, has adopted the broad view urged by many writers that a state may require a nonresident individual to submit to reasonable provisions for substituted service to secure personal jurisdiction as a condition of voluntarily doing *any sort* of business within the state. . . . (Emphasis supplied.)

A similar result was reached in Utah,[40] over vigorous dissent, on the basis of the reasonableness and necessity of such service.

If the liberal language of Chief Justice Stone can be taken to represent the concept of personal jurisdiction presently entertained by the Supreme Court, there can be little doubt that the existence of consent, actual or implied, will not in the future be considered of controlling influence in determining the existence of state power to subject nonresidents not personally served to in personam jurisdiction. If the fiction of implied consent is to fall, it would seem that the doctrine of exclusion as the basis for determining the right to imply consent would fall with it. Even if the broader view of personal jurisdiction is not adopted,

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34 ARK. STAT. ANN. § 27-340 (1947).

35 ARK. STAT. ANN. § 41-507 (1947).

36 ARK. STAT. ANN. § 41-510 (1947).

37 Western Mut. Fire Ins. Co. v. Lamson Bros. & Co. et al., 42 F. Supp. 1007 (S. D. Ia. 1941); *see* Hensley v. Green, 36 F. Supp. 671 (W. D. S. C. 1940).

38 269 App. Div. 224, 54 N. Y. S. (2d) 522 (1945); see also, Melvin Pine & Co. v. McConnell et al., 273 App. Div. 218, 76 N. Y. S. (2d) 279 (1948).

39 269 App. Div. 224, 54 N. Y. S. (2d) 522, 526 (1945).

40 Wein v. Crockett, ...Utah...., 195 P. (2d) 222 (1948).

however, the assertion of this power over citizens seems capable of being justified when an incident to a legitimate exercise of the police power, without regard to constitutional prohibitions against exclusion. Moreover, this result seems attainable without any departure from the conclusions in *Hess v. Pawloski* and *Henry L. Doherty & Co. v. Goodman*, although concededly a shift of emphasis would be necessary. To hold that the assertion of this jurisdiction over any nonresident doing any sort of business within the territorial limits of the state is in itself a legitimate exercise of the police power would, however, seem to require the Supreme Court to go further than it has gone thus far. Whether this step will be taken must remain a matter of speculation.

John H. O'Hara

Partnership

FAMILY PARTNERSHIPS AND THE FEDERAL INCOME TAX LAW

Although one of the most troublesome taxation aspects of the family partnership has been alleviated by the passage of an act permitting the splitting of income between husband and wife,[1] there still remain the questions which arise under the parent-child partnership and its accompanying tax problems. Because of the close relationship between the partners, alleged family partnerships are closely scrutinized by the Internal Revenue Department. The determination of what constitutes a bona fide family partnership has resulted in some seemingly irreconcilable cases in which a great variety of tests or criteria have been applied. In order better to understand the tests which have been relied on in the recent decisions, an examination of the tests used at common law and more recently under the Uniform Partnership Act should be helpful.

Towards the end of the Eighteenth Century, the rule was laid down in the English case of *Grace v. Smith*,[2] that any persons who shared in the profits of a business were liable as partners therein, whether or not they intended to create a partnership. This rule, called the "profit sharing test," was extremely broad and could include innumerable business arrangements which probably would not qualify as partnerships today. Nearly a century later this broad rule, which had proved difficult to apply because of its generality, was supplemented by a new test which all but overruled the profit sharing test. In *Cox v. Hickman*,[3] the "mutual agency test" was used for the first time. This

1 Revenue Act of 1948, 62 STAT. 111 (1948), 26 U. S. C. § 12(d) (Supp. 1949).
2 2 Black. W. 998, 96 Eng. Rep. 587 (1775).
3 8 H. L. Cas. 268, 11 Eng. Rep. 431 (1860).

new test appeared from the decision to be merely an addition to the older test; but the effect, as it later developed, was to supplant the "profit sharing test." A third test was used in a case which appeared a few years after *Cox v. Hickman.* In this case, *Mollwo v. The Court of Wards,*[4] it was suggested by Sir Montague Smith that the prime factor as to the existence of a partnership was the intention of the partners. Later decisions made use of this "intention test" in conjunction with the other tests already established.[5]

That the test of "mutual agency" established in the English cases found a place in American law is evidenced by the decision in an early Michigan case [6] in which Justice Cooley, in praising the test formulated in *Cox v. Hickman,* stated:[7]

> There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

In the same decision it is stated that in general the intent of the partners should govern, except where rights of deceived third parties intervene;[8] however, if this intention is to form an association that qualifies as a partnership under the above rule, it will be treated as a partnership regardless of what the parties may call it.

The test applied by Justice Cooley was stated as follows:[9]

> . . . community of interest in some lawful commerce or business, for the conduct of which the parties eventually are principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

The rule set down in the above decision and the rule in a later Supreme Court decision of that time [10] constitute the tests applied today in most jurisdictions under the common law [11] and their elements have been codified by states adopting the Uniform Partnership Act.[12] The Uniform Partnership Act does not specifically set up tests to be applied. There is, however, nothing in the Act contrary to the

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4 L. R. 4 P. C. 419, 17 Eng. Rep. 495 (1872).

5 See, *e.g.,* James Bailey Co. v. Darling, 119 Me. 598, 111 Atl. 410 (1920).

6 Beecher v. Bush, 45 Mich. 188, 7 N.W. 785 (1881).

7 7 N.W. at 787.

8 *Id.* at 789.

9 *Ibid.*

10 Meehan v. Valentine, 145 U. S. 611, 623, 12 S. Ct. 972, 36 L. Ed. 835 (1892), where it is stated that "those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions."

11 Moore v. DuBard, 318 Mich. 578, 29 N.W. (2d) 94 (1947).

12 7 UNIFORM LAWS ANN. (1949).

tests, and after its passage in the individual states the common law rules continued in effect.[13]

Determining whether a partnership exists is primarily a matter of weighing all the facts and circumstances in a particular case. The tests are, in reality, elements to be applied in reaching a final determination as to the validity of the partnership. Before the Internal Revenue Act of 1913,[14] and the tax cases arising thereunder, the court could safely apply a broad, inclusive rule, since the largest percentage of cases involved defendants attempting to prove they were not members of a partnership. The issue in most cases was whether a party claiming not to be a partner was to be charged with a partner's unlimited liability; partnership was a trap one sought to avoid. Under such conditions, a rule which was broad enough to observe the equitable rights of both litigants was workable.

Since the enactment of the Internal Revenue Act of 1913, however, such tests have not been workable. The partnership has become a refuge for those seeking to avoid or in some cases evade payment of income taxes. Where formerly the rule had been one of inclusion, it is necessary now that it take on the aspects of a rule of exclusion. Because of this change of circumstances, the tax courts, which originally followed the partnership law of the states wherein they sat, were forced to abandon the local interpretations and attempt to establish a more restrictive set of rules. As the Government sought ways to overcome schemes for avoiding or evading taxation, new rules appeared which differed greatly from the common law rules. A subjective approach was developed in a 1940 tax case.[15] There a short term trust was created by a husband, in which his wife was named as beneficiary. He retained discretion as to the amount of income to be paid out, the power to vote the stock, and the right to handle the principal, and provided for a remainder to himself on expiration of the trust. It was held that the income diverted to the "trust" remained part of the husband's taxable income. The Supreme Court stated: [16]

> Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus . . . For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be

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13 See, *e.g.*, State Street Trust Co. v. Hall, 311 Mass. 299, 41 N.E. (2d) 30 (1942).

14 Revenue Act of 1913, 38 STAT. 116 (1913).

15 Helvering v. Clifford, 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1940).

16 309 U. S. at 334-6.

> retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain in substantially the same financial situation as before.

This Court was not applying formal tests. It was inquiring directly into the substance of the particular case before it. In a later 1940 case,[17] this theory was expanded so that under some circumstances control of the use of income may be sufficient to prevent the recognition of a partnership for tax purposes, though the income never is personally received by the taxpayer. The trend at this time was toward looking through the partnership form and taxing that member of an association or party to an agreement whom the court decided was the creator of the income.

In decisions just prior to *Commissioner v. Tower*[18] and *Commissioner v. Lusthaus,*[19] there was a growing tendency to consider contributions of income and services as prerequisites to a bona fide family partnership for tax purposes. In complying with these prerequisites, the husband or father would make a gift to the wife or child and the donee would in turn invest the gift in the business and relinquish all control over it, thus obtaining the benefit of the partnership as an income-splitting device.[20]

A similar method was used by the taxpayers in both the *Tower* and *Lusthaus* decisions, but in these cases the Supreme Court disallowed the partnership. In both these cases the Court found that the gift by the husband made no substantial change in the economic relation of the family members, and that the income produced by the wife's investment continued to be used in the business or for family purposes. In considering such a gift to be a mere transfer on paper, the Court used the following much-quoted language:[21]

> There can be no question that a wife and a husband may, under certain circumstances, become partners for tax, as for other, purposes. If she either invests capital originating with her or substantially contributes to the control and management of the business, or otherwise performs vital additional services, or does all of these things she may be a partner as contemplated by 26 U.S.C.A. 1945 ed., §§ 181, 182, 6 F.C.A. Title 26 §§ 181, 182. The Tax Court has recognized that under such circumstances the income belongs to the wife. A wife may become a general or a limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws.

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17 Helvering v. Horst, 311 U. S. 112, 61 S. Ct. 144, 85 L. Ed. 75 (1940).

18 327 U. S. 280, 66 S. Ct. 532, 90 L. Ed. 670 (1946).

19 327 U. S. 293, 66 S. Ct. 539, 90 L. Ed. 679 (1946).

20 See, *e.g.*, M. W. Smith Jr., 3 TC 894 (1944); Davis B. Thornton, 5 TC 116 (1945).

21 See note 18 *supra,* 327 U. S. at 290.

The Tax Court construed this language of the *Tower* case as setting out two distinct tests: "original contribution" and "vital services." [22] Although the Supreme Court did not lay these "tests" down as a rule of law, the Tax Court has so applied them in similar cases, with adverse results to the taxpayer.[23] In these cases the Tax Court considered this language of the *Tower* case to be broad enough to rule out all family partnerships where the wife's or child's capital originated with the husband, and seemingly refused to inquire into other surrounding facts to determine the intent of the parties making the agreement. In thus limiting its attention to the narrow "tests" which it gleaned from the *Tower* decision, the Tax Court was continuing to maintain a separate set of requisites for the existence of a partnership for tax purposes.

In the recent case of *Commissioner v. Culbertson* [24] the Tax Court had again applied the dual test of "original capital" and "vital services," which it has applied since the *Tower decision,* and ignored the intent of the parties forming the partnership. In this case, the taxpayer was a partner in the cattle business with a non-family partner; this partnership was dissolved and the taxpayer formed another with his four sons and purchased the assets of the dissolved business for $115,348. Half of this amount was paid by the sons by issuing a note to their father. This note was paid as follows: gifts from the taxpayer, $21,744; credit for overcharge, $5,930; and one half of a loan procured by the new partnership, $30,000. The loan was repaid from the proceeds derived from operation of the ranch. The oldest son was in service during part of the taxable years involved; the next oldest went directly to the army from college and rendered no service to the partnership; the younger sons worked on the ranch only in the summer.

In remanding the *Culbertson* case to the Tax Court for a determination as to which of the sons were intended as partners, the Supreme Court pointed out that in the *Tower* decision it had stated that the determination of what constitutes a family partnership for income tax purposes depends upon:[25]

> . . . whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." [citing] Drennan v. London Assurance Corp., 113 U. S. 51, 56, 5 S. Ct. 341, 28 L. Ed. 919.

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22 William O. Culbertson, P-H 1947 TC MEM. DEC. SERV. ¶ 47,168 (1947).

23 See, *e.g.,* Ed. Dubinsky Durwood, 6 TC 682 (1946); Floyd D. Akers, 6 TC 673 (1946).

24 335 U. S. 883, 69 S. Ct. 1210 (1949).

25 See note 18 *supra,* 327 U. S. at 287.

Referring to the Tax Court's application of the dual tests of "original capital" and "vital services," the Supreme Court said:[26]

> It treated as essential to membership in a family partnership for tax purposes the contribution of either "vital services" or "original capital." Use of these "tests" of partnership indicates, at best, an error in emphasis. It ignores what we said is the ultimate question for decision, namely, "whether the partnership is real within the meaning of the federal revenue laws" and makes decisive what we described as "circumstances (to be taken) into consideration" in making that determination.

The *Culbertson* decision thus completely dispels the Tax Court's theory that the capital invested must originate with the investor, and reaffirms in substance the principle announced in the *Tower* case, that there is no such thing as a partnership for tax purposes different from one for commercial purposes.

In other words, the question of what constitutes a bona fide partnership for tax or other purposes again becomes one of intent; or it might be said it is one of determining the existence of a partnership according to common law standards. This determination involves a consideration of all the facts surrounding the arrangement, and not the objective dual test applied by the Tax Court for the past three years; it involves a consideration of the capital contribution, vital services, control in management, the formal agreement and control of income. If from these facts the court can determine that there was a bona fide intent to form a partnership, it cannot rule out that possibility merely because one or more of the elements listed above is absent, for none of the criteria is a conclusive "test," as such, but is merely a guide for the court in its determination. Although a lack of one or more of these criteria may place an additional burden on the taxpayer to prove his case, it is not conclusive evidence against the existence of a bona fide partnership.

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[26] See note 24 *supra*, 69 S. Ct. at 1213.