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Presumptions of Constitutionality

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The chief danger of such price fixing is the damage to the consumer. Such a law might give rise to an abuse of such agreements by manufacturers and dealers ending in collusion and resulting in arbitrary price fixing. It is not necessary to pass new legislation when adequate laws are already in effect. The Federal Trade Commission and the Justice Department are authorized to police the legislation originally passed in regard to fair trade regulations.

The writers are in agreement with the Federal Trade Commission and President Roosevelt who stated at the time of the passage of the Miller-Tydings Amendment, that there was no need for such legislation, since there were already laws present on the statute books.

The reason for the law has largely disappeared because of changing economic conditions. Faced with possibility of inflation such a law is restraint on a free and competitive market. It is in the interest of the public that there be a return to the American tradition of anti-monopoly in business.

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Presumptions of Constitutionality

Precedent has shown that fate of a legislative act in many cases may well be decided by initially affording a presumption of validity or invalidity to that act when it is tested before a judicial body. While the decisions which have taken formal cognizance of this factor are numerically few, the evolution of the tenuous concept has been a moving force in the philosophy of American Constitutional law. Its application for the most part has been confined to that class of cases involving the reasonableness of the legislative act in question.[1] This is particularly true when complaining citizens believe the questioned statute imposes encroachments upon their fundamental freedom.[2] It is in these instances that the court must weigh the interests involved and ultimately uphold or strike down the legislative act. Manifestly, the initial presumption and the weight it is given may determine the result reached.

It would, therefore, seem most appropriate at this time with the Roosevelt appointed court in its descendancy, to review the three schools of thought on the subject, emphasizing the two antithetical approaches as to constitutionality of

[1] E. g. *Graves v. Minnesota,* 272 U. S. 423 (1926); *Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365 (1926).
[2] *Stromberg v. California,* 283 U. S. 359, 369-370 (1931); *Lovell v. City of Griffin,* 303 U. S. 444, 452 (1938).

all legislation and unconstitutionality of legislative acts which invade areas of political liberty [3] or place purported rational restrictions on racial equality.[4]

At the outset from the failure of the Court to concern itself with the application of presumptions in the majority of decisions, it may be assumed that there is a school of thought which advocates that no presumption attaches to a statute as to validity or invalidity. This view finds basis in the rationale implicit in the statements of the Court, which prescribe a duty upon the Court to protect rights secured by the Supreme Law of the Land against impairment or destruction by legislation,[5] and its response by testing the statute entirely on the basis of the case as it stands on its merits. An example of this type of reasoning where the Court considered the constitutionality of a statute devoid of any extraneous factors is found in *The Employers' Liability Cases*.[6] There the Court stated:

> . . . in testing the constitutionality of the act, we must confine ourselves to the power to pass it and may not consider evils which it is supposed will arise from the execution of the laws whether they be real or imaginary.[7]

The possible theory underlying such an approach to judicial review of statutory enactments is that some justices while not desiring to favor a real presumption of validity, and not wanting to go to the other extreme of presuming invalidity feel that the doctrine of separation of powers will be best preserved by adherence to this view. This is clearly an analytical approach, and in its limited sense is not without merit.

The second school of thought on the subject advocates a genuine presumption of validity of legislative acts and requires a pronounced forbearance on the part of the judiciary in exercising its power of review unless the act clearly invades an area of freedom which is constitutionally protected from impingement. The outstanding proponents for this *judicial restraint* as the doctrine is more popularly known, have been Mr. Justice Holmes and Mr. Justice Frankfurter. The basic tenet which has been responsible for the adoption of this view is that the legislative and not the judicial branch of the government is the most competent and qualified to establish regulations and restrictions which are to control the social compact. In short, if any reasonable doubt exists as to the validity of the statute, that doubt must be resolved in favor of the statute's constitutionality. The funda-

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[3] Political liberty in its broadest sense, comprehends both property rights and rights of substantive due process. Here is especially meant the liberties guaranteed under the First Amendment. Representative of this approach is the opinion of Mr. Justice Rutledge, speaking for the Court in *Thomas v. Collins*, 323 U. S. 516 (1945) at pages 539-540.

[4] "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unjust hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374 (1886); *Ah Kow v. Nunan*, 5 Sawy. 552 (1879).

[5] *Smyth v. Ames*, 169 U. S. 466 (1898); *Carter v. Carter Coal* Co., 298 U. S. 238, 296 (1936).

[6] 207 U. S. 463 (1908).

[7] *Ibid.* p. 492.

mental assumption is that the statute was enacted by the legislature after a careful discernment of the problem to be corrected, and that their judgment was exercised in a both sagacious and constitutionally sound manner.

Mr. Justice Frankfurter in his dissenting opinion in the second *Flag Salute case* [8] vehemently attacked the majority for failing to utilize restraint. In his desire to admonish those who overruled a previous Supreme Court holding on the same question [9] he unequivocally reiterated the principle which he would follow:

> . . . the comprehensive judicial duty of this court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in the legislatures they have exercised a judgment for which reasonable justification can be offered.

During the late 1930's and throughout the majority of the 40's a recrudescence of the Bill of Rights resulted in a similar revitalization of the Fourteenth Amendment.[10] As a consequence of this liberal interpretation, and the newly found freedom derived therefrom, a completely new approach to the subject of presumptions and their relation to a statute's constitutionality was synthesized. The staunchest advocates of judicial protection for these preferred rights of the individual were the late Justices Murphy and Rutledge. Justices Black and Douglas, though not quite as zealous in their belief, agreed in substance with the premises of the late Justices. Their theory, as one author has suggested,[11] was a different appreciation of the "Constitutional Philosophy" of Mr. Justice Holmes. In effect the view has been taken that the "clear and present danger" doctrine, and the general attitude toward civil liberties implicit in it, requires that the ordinary presumption of validity be reversed when statutes affecting these liberties are before the court.[12] The opposite view represented by the second school as expounded today by Mr. Justice Frankfurter, admits of no such subdivision and maintains the protection of civil liberties resides with the legislature and utimately with the people. This Holmesian view attempts to be completely objective in an effort to attain maximum justice.[13]

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[8] *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 646, 649 (1943).

[9] *Minersville School District v. Gobitis,* 310 U. S. 586 (1940).

[10] E. g. *Herndon v. Lowry,* 310 U. S. 242 (1937); *Marsh v. Alabama,* 326 U. S. 501 (1946); *Tucker v. State of Texas,* 326 U. S. 517 (1946).

[11] Barnett, *Mr. Justice Murphy, Civil Liberties and the Holmes Tradition,* 32 Corn. L. Q. 177 (1946).

[12] This theory would also find justification in the canon of statutory construction which would require a rigid interpretation of any statute which is penal in that it involves impairment of life, liberty, or property. This doctrine apparently would have greater significance in England, however, where constitutional restrictions on impairment of liberty are not enumerated. See Roscoe Pound, *Common Law and Legislation,* 21 Harv. L. Rev. 383, 386 (1908); See also Livingston Hall, *Strict or Liberal Construction of Penal Statutes,* 48 Harv. L. Rev. 748, 756-68 (1935).

[13] Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938).

Regardless of which of the aforementioned conclusions is accepted, it is nevertheless, inescapable that the root of this new theory lies in the "clear and present danger" test as first authored by Mr. Justice Holmes in the *Schenck* case.[14] He reaffirmed his view in his dissent in *Gitlow v. New York* [15] six years later, wherein the majority opinion announced the "bad tendency test". In 1927, however, Mr. Justice Brandeis expressed in a concurring opinion, in which Justice Holmes joined, his faith in the original doctrine.

> . . . no danger flowing from speech can be clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . . Only an emergency can justify repression.[16]

The "dangerous or bad tendency" doctrine remained as the accepted standard, however, until 1937 when the Fourteenth Amendment was given broader construction. A this time while the "clear and present danger" rule was not readopted, a serious encroachment was made upon the old test. The net result was that a more or less neutral position was reached with no presumption at all being allowed. In *DeJonge v. Oregon,*[17] the Court struck down the Oregon Criminal Syndicalism Act and held that mere membership in the Communist Party or attendance at one of its meetings was not an abuse of the rights of free speech and assembly. The legislature's right to proscribe abuses of rights was here recognized, but the rights themselves could not be curtailed. That same year, the Court in overruling a conviction of a Negro Communist under the Georgia Sedition Law held that "the power of the state to abridge freedom of speech and assembly is the exception rather than the rule." [18] The Court flatly rejected the "dangerous tendency" test which characterized the *Gitlow* [19] decision. Mr. Justice Roberts in speaking for the majority showed that the Holmes view was now acceptable in his reference to the exercise of the state power to curb free speech and assembly.

> [It] must find its justification in a reasonable apprehension of dangers to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state.

Though this decision does not unequivocally reverse the usual presumption of validity with respect to acts of the state legislatures, it does demand of the court a more exacting scrutiny of the "appropriate relation to the safety of the state." [20]

The following year Mr. Justice Stone made apparent for the first time the Court's solicitude for this rising jurisprudential theory in his controversial [21]

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[14] *Schenck v. United States,* 249 U. S. 49 (1919).
[15] 268 U. S. 652 (1925).
[16] *Whitney v. California,* 274 U. S. 357, 377 (1927).
[17] 299 U. S. 353 (1937).
[18] *Herndon v. Lowry,* 301 U. S. 242, 258 (1937).
[19] See note 15 *supra.*
[20] See note 18 *supra.*
[21] See Frankfurter concurring in *Kovacs v. Cooper,* 336 U. S. 77, 89 (1949).

yet celebrated note 4 to the *Carolene Products Company* case.[22] While the usual presumption of validity was sustained in connection with the question of an economic regulation, his opinion pointed out that he considered "liberty of mind" cases as being an exception to the general rule.

> 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 within the Fourteenth.[23]

With this note as the cornerstone of their authority Mr. Justice Murphy and Mr. Justice Rutledge with the intermittent support of Justices Black and Douglas, plunged headlong into their development of a reverse presumption of invalidity in the field of statutory infringement of civil liberties.

The first indication of the shift in the judicial application of this new doctrine was given in *Schneider v. State*.[24] The Court said:

> In every case, therefore, where legislative abridgment of the rights of freedom of speech and of press is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercises of rights so vital to the maintenance of democratic institutions. And so as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulations of the free enjoyment of the rights.[25]

Thus the state was placed in the position of having to prove the reasonableness and necessity of the means selected. This burden of proof was again placed upon the state authorities when Mr. Justice Murphy in *Thornhill v. Alabama* [26] cited the *Carolene note* [27] and declared that the courts must "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in testing a regulation which would abridge a fundamental freedom.

The net effect was a reestablishment of the "clear and present danger" doctrine as the test to be applied in this class of case. In *Bridges v. California* [28] the Court briefly summarizes and evaluates the concept and its new application.

> 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.[29]

The approval of the Court of this statement of the doctrine was manifested in *Pennekamp v. Florida* [30] and again in *Board of Education v. Barnette* [31] where

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[22] *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).
[23] *Ibid.*
[24] 308 U. S. 147 (1939).
[25] *Ibid*, p. 161.
[26] 310 U. S. 88 (1940).
[27] See note 22 *supra.*
[28] 314 U. S. 252 (1942).
[29] *Ibid*, p. 263.
[30] 328 U. S. 321, 334 (1946).
[31] 319 U. S. 624 (1943).

Mr. Justice Jackson clearly distinguished the degrees of protection which must be afforded to the basic freedoms as opposed to other substantive rights. While the preferred freedoms may only be restricted in the event of some grave and immediate danger to public interest, other legislation may be upheld on a mere showing of a "rational basis" for it.[32]

By this time the stage had been made ready for an innovation in the law. The buried footnote in the *Carolene Products* [33] case had indicated that the theory of presumed constitutionality was not invincible. Prior to the revolution, however, the *First Flag Salute case* [34] was decided. It presented a stumbling block in the path of the onrushing tide which had to be swept aside. There Mr. Justice Frankfurter supported by the entire court with the exception of Chief Justice Stone promulgated the "reasonable basis" rule. This regression proved to be ephemeral, and in 1941 the disintegration of the previously heavily corroborated doctrine began. The first break came in the *Milk Wagon Driver's case*[35] when Justices Black and Douglas broke from the majority and declared the right to picket even in a "context of violence" was a constitutionally protected freedom of expression which could not be proscribed on the ground that the State had a "reasonable basis" for doing so. In 1942, after religious tracts hawkers had refused to pay a new discriminatory peddler's tax,[36] Justices Stone, Douglas, and Murphy in the minority opinion [37] claimed exemption on grounds of religious freedom and announced their abandonment of their previous position in the *First Flag case*.[38] Shortly thereafter, in *Murdock v. Pennsylvania*,[39] Justice Rutledge joined forces and the former minority became the majority. In that case vendors of religious literature were given tax immunity for the privilege of distributing their pamphlets. Though the tax was to be equally imposed on all asking permission, the Court held that freedom of religion and freedom of press was available to all, not only to those who could pay their way.[40] A few weeks later the belief that refusal to salute the flag was a guaranteed liberty was vindicated.[14] A genuine foundation had been set making it possible for the doctrine to attain full reality in what is now Mr. Justice Rutledge's most noted opinion.[42] In striking down a regulation which made it necessary to obtain an organizer's card before being permitted to solicit membership for unions, the stamp of established doctrine was placed on the principle that the guaranties of

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[32] *Ibid*, p. 639.
[33] See note 22 *supra*.
[34] See note 9 *supra*.
[35] *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 299 (1941).
[36] *Jones v. Opelika*, 316 U. S. 584, 600 (1942).
[37] *Ibid.* pp. 623-624.
[38] See note 9 *supra*.
[39] 319 U. S. 105 (1943).
[40] *Ibid.* p. 111.
[41] *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943).
[42] Rockwell, *Justice Rutledge on Civil Liberties*, 59 Yale L. Q. 27, 45 (1950).

the First Amendment occupy a preferred position in our constitutional scheme. As was stated by Mr. Justice Rutledge:

> 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 by the First Amendment—that priority gives these liberties a sanctity and a sanction not permitting dubious intrusion.[43]

The rationale of this decision is that the "clear and present danger" doctrine would be limited to only the "gravest abuses endangering paramount interests".[44] Contrary to the strict analytical approach, this criterion demands an active and critcial judicial review by the court, although in the first instance the determination of the line of restraint on free expression rests with the legislature.

The Court's recalcitrant position in refusing to permit limitations on this fundamental liberty was more firmly engendered when that liberty was regarded as being protected by the Fourteenth Amendment. This is exemplified by a number of Jehovah's Witnesses cases which referred specifically to the "preferred position" which this liberty held in American philosophy.[45]

The reverse presumption reached its highest peak in *United States v. C.I.O.*[46] in the concurring opinion of Justice Rutledge in which justices Murphy, Douglas and Black joined. In unequivocal terms the opinion stated:

> . . . that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation . . . restricts the rights of conscience, expression, and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains.[47]

A slight descendancy in this exalted position was noted in the concurring opinion of Justice Frankfurter in *Kovacs v. Cooper.*[48] His argument is based on the proposition that Mr. Justice Jackson did not in fact subscribe to the extreme application of the view in *Thomas v. Collins,*[49] and therefore the doctrine was never fully accepted by a majority of the Court. But when Justice Reed joined

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[43] *Thomas v. Collins,* 323 U. S. 516, 529-530 (1945).

[44] *Ibid.* p. 531.

[45] The phrase was apparently first used in the dissent of Chief Justice Stone to *Jones v. Opelika,* 316 U. S. 584, 600, 608 (1942). It reappears in *Murdock v. Pennsylvania,* 319 U. S. 105, 115 (1943); *Prince v. Massachusetts,* 321 U. S. 158, 164 (1944); *Follett v. McCormick,* 321 U. S. 573, 575 (1944); *Marsh v. Alabama,* 326 U. S. 501, 509 (1946); *Saia v. New York,* 334 U. S. 558, 562 (1948).

[46] 335 U. S. 106 (1948).

[47] *Ibid.* p. 140.

[48] 336 U. S. 77, 89 (1949) See also *Minersville School District v. Gobitis,* 310 U. S. 586 (1940) and Frankfurter's dissent to *West Virginia Board of Education v. Barnette,* 319 U. S. 624, 646 (1943).

[49] 323 U. S. 516 (1944); Jackson subsequently confirmed this in *Brinegar v. United States,* 338 U. S. 160, 180 (1949); cf. Cushman, *Civil Liberties in Ten Years of the Supreme Court*: 1937-1947, 42 Am. Pol. Sci. Rev. 32, 42, 43 (1948); Mosher, *Mr. Justice Rutledge's Philosophy of Civil Rights,* 24 N. Y. L. Q. Rev. 661, 667 (1949).

the solid minority of Murphy, Rutledge, Douglas and Black in a case which upheld the right to speak under circumstances which admittedly pressed the guaranty to its periphery[50] the reverse presumption once again was revitalized.

Since that momentous decision, however, the deaths of Justices and Murphy have greatly affected the application of the reverse presumption. With Justices Black and Douglas as the only ardent supporters remaining, the doctrine has fallen into disuse. At best their minority is only likely to enlist the aid of other Justices in particular instances, and the likelihood of persuading three others to join at one time seems highly improbable. An indication of the present trend is shown in the *Dennis* case [51] when the previously liberal position which the Court had taken in the *Terminiello* [52] case was modified by acceptance of Circuit Judge Hand's rule of "clear and probable danger."

A third ramification of the liberal view of the Court is discernible in those cases which involve statutes which make distinctions as to race. Because race distinctions are odious to a free people, such statutes while not presumed unconstitutional, are immediately viewed with suspicion, and only pressing public necessity can justify their enactment. The constitutional prohibition applicable to such statutes may be found in the "equal protection clause" of the Fourteenth Amendment.[53] In reviewing the statute which would make distinctions the Court first determines whether or not a reasonable basis exists for the classification made,[54] and then whether or not it has reasonable relation or is reasonably adopted to the end sought.[55]

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[50] *Terminiello v. Chicago,* 337 U. S. 1 (1949).

[51] *Dennis v. United States,* 341 U. S. 494 (1951), affirming 183 F. 2d 201, 212 (2nd Cir. 1950), "In each case courts must ask whether the gravity of the "evil" discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

[52] See note 50 *supra.*

[53] U. S. Const., Amend. XIV, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[54] The rules by which the equal protection contention must be tested have stated as follows: "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon an reasonable basis, but is essentially arbitrary."—Van Devanter, J., in *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79 (1911).

[55] "In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state and must bear a delation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible."—Brandeis, J., in *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389, 406 (1928), where he dissented on the merits.

In cases involving personal rights, such as the right to work,[56] and the right to a jury chosen without discrimination as to race,[57] the Supreme Court has given little if any weight to the usual presumption of validity. An extension is noticeable in *Hirabayshi v. United States.*[58] The Court presumed racial equality was part of American tradition and stated that:

> . . . because racial discriminations are in circumstances irrelevant, and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense . . . [59]

The inference to be drawn from the language of the Court is that except for the fact that an emergency existed, the burden of proving the reasonableness of the military order in question would have been upon its proponents.

Shortly thereafter the Court in more conclusive terms with Mr. Justice Black announcing the majority opinion, cast real doubt on the validity of racial statutes.[60] He stated:

> . . . it should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is to Congress and the Executive are wholly precluded from taking into account say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can . . . [61]

Thus the Court made it quite clear that in cases where the civil rights of a racial group are curtailed, it would not only completely refuse to apply the presumption of constitutionality, but would in fact, require the party who invoked the support of the statute to show its operation was reasonable and justified by pressing public necessity. In a more or less circuitous manner the Court's "rigid scrutiny" had given rise to a presumption of invalidity, no matter how slight.

CONCLUSION

Three basic views as to statutes and their presumed validity have been promulgated. The first school of thought with its silence as to presumptions evaluates the statute from a purely analytical viewpoint. It considers the statute in question with no regard for normative factors. Such a formula makes for mechanical jurisprudence. It is a stereotyped approach which operates in a sphere wholly devoid of any ethical standard which may serve as a guide in judgment. Thus interpreted the law is neither dynamic or all pervading in its approach to the myriad of problems it must govern in future application.

The last two schools of thought with their opposing views, have been explained by Professor Chaffee as different facets of the Holmes Tradition or Philosophy of Law.[61]

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[56] *Takahashi v. Fish and Game Commission,* 334 U. S. 410 (1948); *Truax v. Raich,* 239 U. S. 33 (1915).
[57] *Patton v. Mississippi,* 332 U. S. 463 (1947).
[58] 320 U. S. 81 (1943).
[59] *Ibid.* p. 100.
[60] *Korematsu v. United States,* 323 U. S. 214 (1944).
[61] *Ibid.* p. 216.

The school which advocates that a real presumption of validity attaches to every legislative act is based on the Holmes theory that the legislature is the only competent body to regulate society and its relations. It must be necessarily presumed that the legislature has obeyed all constitutional commands and prohibitions. To recognize these enactments as mandatory they must be placed above the slightest suspicion.

The second facet holds that, often, Justices who advocate broad governmental control over business are usually the same men who want to invalidate any wide legislative control over discussion. Justices who fall into such a category know that legislation to be sound, fair and effective must be preceded by full discussion, both oral and printed. Statutes which would limit discussion would necessarily limit the legislative function because they are similar to rigid constitutional limitations on lawmaking. Thus a critical judicial spirit which gives the legislature a wide scope in limiting property rights will also tend to allow speakers and writers wide scope in arguing against such legislative invasion of these rights. Thus, while Holmes advocated judicial restraint so as not to abrogate the legislative function, he indicated in the *Lochner* [63] and *Abrams* [64] cases that liberty of discussion belongs side by side with legislative liberty.

Professor Carl B. Swisher reconciles this conflict on the basis that a self governed democracy should not be permitted to deprive itself of its own power of self government by indirection, namely self expression and education.[65] In other words no tenable principles of political liberty will permit a political body to decree its own self execution.

No matter which interpretation of the theory is accepted, in its entirety the philosophy of the view is subject to a twofold criticism. First, it fails to accord the proper authority to the doctrine of judicial supremacy which in turn deprives the individual of the court's protection, except in those cases where the arbitrary character of the statute palpably requires the court to break the bonds of its own restraint. Second, the over-emphasis on the government and its social policies is based on a material and transient standard in apparent disregard for the paramount position which the individual should occupy. Hence, the mere presence of a statute demands that it be presumed sanctioned.

This premise is basically sound, but it does not operate in all cases. In the realm of the metaphysical there is a fundamental difference between property rights and rights of personality. Rights of personality may also be further ramified into those which are accorded a sacred position because they are

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[62] Chaffee, *Free Speech in the United States* (1941), p. 360-61.
[63] *Lochner v. State of New York,* 198 U. S. 45 (1905); See Holmes dissenting at page 74.
[64] *Abrams v. United States,* 250 U. S. 616 (1919).
[65] Swisher, *The Growth of Constitutional Power in United States* (1946), p. 161.

synonymous with the concept of liberty in its fundamental sense. The basic difference (i.e. between rights of property and rights of person) is rudimentary in jurisprudence. The second distinction (i.e. among personal rights as related to the concept of liberty) though self evident, finds recognition in the Bill of Rights.[66] In its entirety the Constitution embodies a comprehensive system of checks and balances and of separation and delegation of powers, which is carefully calculated to afford a maximum protection to human freedom. It represents a self imposed obligation to uphold basic liberty and requires infringements thereof to be subject to the most rigid scrutiny. The resulting presumption is that the desired infringement is without legal justification, for that liberty is inviolate in all but the exceptional case.[67]

It is submitted that if true vitality is to be given to the *prohibitive nature* of the First Amendment the freedoms it protects will more likely be accorded their proper recognition. While it is realized that limitation on individual freedom may at times seem extremely desirable from a social standpoint, nevertheless in the long run a liberal attitude in vindication of due process of law will best serve the ultimate needs of freedom.

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[66] E. g., The First Amendment embodies fundamental liberty which is by its nature more precious than trial by jury or protection from double jeopardy.

[67] Freedom of thought and belief are absolute, but when manifested in acts inimical to public welfare such acts may be proscribed. *Compare*: *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Board of Education v. Barnette, supra,* note 41 *with Davis v. Beason,* 133 U. S. 333 (1890).