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Congressional Silence and the Supreme Court

NOTES

CONGRESSIONAL SILENCE AND THE SUPREME COURT

"It is certainly true of the Supreme Court that almost every case has a statute at its heart or near it."[1] Mr. Justice Frankfurter's statement demonstrates the important role statutory interpretation plays in the Supreme Court today.[2] Our tripartite form of government imposes certain restraints on the Court in construing statutes which are not present in cases concerning the Constitution or common law. One of the most desirable attributes of the common law has been its capacity for growth. As ideas have changed and the social order has readjusted to changing needs, the courts have responded by devising new common law concepts and, when necessary, by rejecting the old.[3] This same process manifests itself in judicial treatment of our Constitution. The difficulty of amendment has imposed upon the Court the duty of injecting new meaning into the Constitution in order to meet the needs of a dynamic society.[4] But the doctrine of separation of powers restricts the Court's discretion in statutory interpretation, because that doctrine requires the Court to apply statutes according to Congressional "intent."[5] The wide

1. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947).

2. *Ibid.* Justice Frankfurter demonstrates this historical growth by pointing to the increase in the percentage of cases involving statutes. Of course, every case which is based on a statute does not necessarily present a problem of statutory construction. But an examination of the Court's business in the 1945 through 1949 terms revealed that the outcome of 148 cases *depended* on statutory construction.

3. CARDOZO, THE GROWTH OF THE LAW (1924); HOLMES, THE COMMON LAW (1881); Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX. L. REV. 247 (1947); Levi, *An Introduction to Legal Reasoning,* 15 U. OF CHI. L. REV. 501 (1948). "This flexibility and capacity for growth and adaptation is the peculiar boast of the common law." Hurtado v. United States, 110 U.S. 516, 530 (1884). For a discussion of many of the pertinent cases in this area decided by the Supreme Court, see DOUGLAS, STARE DECISIS (1949).

4. The judicial development of the commerce clause is illustrative of the Court's function in constitutional cases. For an excellent discussion of this development, see Stern, *The Commerce Clause and the National Economy,* 1933-1946, 59 HARV. L. REV. 645, 883 (1946); Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX. L. REV. 247, 278 (1947).

5. The word "intent" is used advisedly since some writers have objected to its use. In *Some Reflections on the Reading of Statutes, supra* note 1, at 538, Frankfurter asserts that the word implies a *subjective* connotation and, therefore, is objectionable. On the other hand, Radin criticizes the term because it carries an *objective* connotation: "The use of the term [intent] . . . generally implies that bloodless and sinewless fiction of interpreters, the imaginary 'legislator' . . . own cousin to the 'economic man'." *A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot,* 33 CALIF. L. REV. 218, 222 (1945). Actually, Congressional "intent" is a mixture of objectivity and subjectivity, although there are those who would restrict the search to solely objective standards. Jackson, *Problems of Statutory Interpretation,* 8 F.R.D. 12 (1949). See Frank, *Words and Music: Some Remarks on Statutory Interpretation,* 47 COL. L. REV. 1259 (1947).

No doubt the ideal would be to find Congressional "intent" in the subjective sense. Since this is impossible, resort to objective criteria is necessary. But in any event "intent" is used in both senses in this note. See Horack, *The Disintegration of Statutory Construction,* 24 IND. L.J. 335, 340 (1949).

significance of judicial interpretation serves to emphasize the need for a consistent and realistic policy by the Court in reconciling the concept of separation of powers with the practical function of determining statutory meaning.

This clash between the restrictive influence of separation of powers and the practical need for judicial discretion is presented most dramatically in cases concerning Congressional "silence." Can failure on the part of Congress to change a prior judicial interpretation of a statute, either through nonaction or by reenactment of the statute without change, *require* the Court to assume Congressional approval of that interpretation? In cases involving Congressional "silence" the Court has frequently indulged in a twofold presumption of fact—that Congress was aware of the Court's interpretation, and that Congress approved that interpretation by not changing the statute when it was reenacted.[6] Typical is *Hecht v. Malley*[7] where the Court asserted that "[i]n adopting the language used in the earlier act, Congress must be considered to have adopted also the construction given by the Court to such language, and made it a part of the enactment."[8] A functional criticism of this line of cases is that the presumption is clearly fictional. What Congress "had in mind" at any particular time is often incapable of ascertainment.[9] Congressmen and Senators vote for or against proposed legislation for a variety of reasons. Therefore, to presume *as a fact* that nonaction means Congressional approval of prior interpretation is erroneous.[10] On the other

6. Shapiro v. United States, 335 U.S. 1 (1948); Francis v. Southern Pac. R.R., 333 U.S. 445 (1948); Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17 (1947); Helvering v. Griffiths, 318 U.S. 371 (1943); Brooks v. Dewar, 313 U.S. 354 (1940); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Rasquin v. Humphreys, 308 U.S. 54 (1939); Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939); United States v. Elgin, J. & E. R.R., 298 U.S. 492 (1936). See Merritt, *Two Federal Legislatures?*, 30 A.B.A.J. 379 (1944); Thompson, *Judicial and Legislative Functions*, 38 ILL. BAR J. 104 (1949).

The Court, however, has not consistently applied this theory. In Helvering v. Hallock, 309 U.S. 106, 119 (1940), Mr. Justice Frankfurter asserted, "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrine." See also Girouard v. United States, 328 U.S. 61 (1945), 22 IND. L.J. 94 (1946). This very inconsistency points up the need for re-examination of Congressional silence. *Cf.* Winder, *The Interpretation of Statutes Subject to Case Law*, 58 JURID. REV. 93 (1946); Freund, *Interpretation of Statutes*, 65 U. OF PA. L. REV. 207, 213 (1917).

7. 265 U.S. 144 (1924).

8. *Id.* at 153.

9. See discussion of "intent" *supra* note 5; de Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. OF PA. L. REV. 527 (1940).

10. Mr. Justice Rutledge, concurring in Cleveland v. United States, 329 U.S. 14, 22 (1946), pointed out that "there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business." He, together with a majority of the Court, expressed the same feeling in Girouard v. United States, 328 U.S. 61 (1946). See Nathanson, *Statutory Interpretation and Mr. Justice Rutledge*, 25 IND. L.J. 462, 476 (1950).

hand, in some cases examination of legislative materials will reveal Congressional "intent" with some degree of certainty.[11] And if such analysis shows actual adoption of previous interpretation the Court's task is simply to apply that meaning, and no presumption is necessary.

The hard case is the more usual one; where Congressional "intent" is vague or ambiguous.[12] Here a presumption is obviously not rooted in fact or experience but reflects a judicial policy judgment and is merely a technique utilized to reflect that policy. It is not that the Court thinks Congress *actually* approved a prior interpretation of a statute, but rather that as a matter of policy the Court proceeds *as if* Congress had approved the former interpretation. *Cleveland v. United States*[13] illustrates this attitude. The Mann Act outlaws the transportation of any woman across state lines for "prostitution, debauchery, or any other immoral purpose."[14] In the *Caminetti* case[15] the Court

11. In United States v. South Buffalo Ry., 333 U.S. 771 (1948), the Court was urged to reverse its interpretation of the "commodities clause" of the Interstate Commerce Act as propounded in United States v. Elgin, J. & E. R.R., 298 U.S. 492 (1936). The majority refused to overrule the *Elgin* case because Congress had specifically considered that case and refused to change it.

In Darr v. Burford, 339 U.S. 200 (1950), as a prerequisite to granting habeus corpus to a state prisoner in a lower federal court, the Court examined legislative materials in order to ascertain what was meant by "exhaustion of state remedies" as prescribed in § 2254 of the Judicial Code. Previously, in *Ex parte* Hawk, 321 U.S. 144 (1944), the Court had said, "an application for habeas corpus . . . will be entertained by a federal court only after all state remedies available including . . . remedies . . . in this Court by appeal or writ of certiorari, have been exhausted." The revisor's notes cited Ex parte *Hawk* with approval and stated that § 2254 was only to codify existing law. Two days before Congress enacted § 2254 the Court decided, in Wade v. Mayo, 334 U.S. 672 (1948), that a petition for certiorari was not essential to the exhaustion of state remedies. Yet, in the *Darr* case the Court overruled *Wade* v. *Mayo,* relying on the explicit Congressional approval of Ex parte *Hawk.*

Certainly this factual approach is no panacea for although Congress has specifically considered the problem the Court may disagree as to its meaning. For example, in the *South Buffalo* case the dissenting opinion found the Congressional "intent" to be diametrically opposed to that found by the majority.

12. "Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of the judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point that was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." GRAY, THE NATURE AND SOURCES OF THE LAW 172-3 (2d ed. 1921).

13. 329 U.S. 14 (1946).

14. 36 STAT. 825, 18 U.S.C. § 398 (1940) (The White Slave Traffic Act).

15. Caminetti v. United States, 242 U.S. 470 (1916). The Court refused to look to the legislative history of the act to discover whether it was meant to apply only to "commercialized vice," since the statute was "plain" on its face. "If the words are plain, they give meaning to the Act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 490. For a critical appraisal of this position see Horack, *The Disintegration of Statutory Construction,* 24

had determined that the act was not restricted to commercialized vice. This interpretation had never been changed by Congress, and the *Cleveland* case, almost thirty years later, one basis for applying the act to polygamous marriages was Congressional silence.[16] What impelled the Court to apply this presumption without question, thereby refusing to reconsider the *Caminetti* doctrine? The Court was not explicit, but Professor Levi in a recent article, "An Introduction To Legal Reasoning,"[17] defends the decision by resort to the traditional view that the doctrine of separation of powers contains an inherent limitation upon judicial discretion in dealing with statutes. He argues that Congress "makes" the laws and the Court can only "interpret" them, and that once the Court has "set the direction"[18] of a statute it would be usurping the legislative function to later change that direction. As Professor Horack, who had previously advocated essentially the same theory, has phrased it, "If the doctrine of separation of powers is valid . . . then legislative supremacy in matters of legislative policy is . . . necessary. Otherwise . . . the Court in fact dominates the legislative function."[19] This rationale tacitly admits that the *first* case interpreting a particular section of a statute does involve a decision as to Congressional policy, for this case "sets the direction" of the statute by choosing one rather than another possible meaning. But at this point, so it is argued, judicial discretion ceases. And having interpreted a particular portion of a statute it then becomes the responsibility[20] of Congress to disapprove that interpretation if it is to be changed. Thus, this theory might be termed the "one chance" doctrine.

This one chance doctrine represents a retreat from the classical theory of separation of powers. The framers of the Constitution, influenced by Montesquieu,[21] assumed that there must be a separation of powers, and that

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IND. L.J. 335 (1949); Frankfurter, *supra* note 1. The dissenting opinion examined the legislative materials and found cogent evidence that the act was directed only at commercialized vice.

16. Mr. Justice Douglas, speaking for the Court stated, "[w]e do not stop to reexamine the Caminetti Case to determine whether the Act was properly applied to the facts there presented. But we adhere to its holding, . . ."

17. 15 U. OF CHI. L. REV. 501 (1948).

18. *Id.* at 523.

19. Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX. L. REV. 247 (1947). Horack's view, while essentially the same as Levi's, is not advanced as a rule completely without exception. He says, *"in case of doubt* the Court should not reverse a prior decision interpreting a Congressional enactment." (Emphasis added.) This would seem to leave room for the Court to find that Congress had indicated disapproval of a prior interpretation, even though no affirmative action had been taken.

20. The great emphasis underlying the one chance doctrine is legislative responsibility. Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX. L. REV. 247, 249 (1947); Levi *supra* note 3, at 523. Of course the rationale underlying this argument is posited on the doctrine of separation of powers.

21. See 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Prichard's ed. 1906), where it is asserted, "[a]gain, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of

one of the recognized functions of the judiciary was to "interpret" statutes.[22] But their definition of "interpret" was very restrictive. The framers were imbued with an eighteenth century conception of the law, based on the proposition that law existed *prior* to judicial decision, as a creature of Nature,[23] or by virtue of sovereign authority as "declared" by the legislature.[24] Under this dogma, "interpretation" could be no more than a mechanical application of a pre-existing body of law as enunciated in a statute, and theoretically the Court was not even given one chance to inject a judicial policy judgment.[25] Consequently the one chance doctrine is necessarily a recognition that this classical view does not coincide with the more modern notion that a statute cannot be completely unambiguous. This fallacy in the classical theory of separation of powers is now generally recognized, and even Levi concedes that "It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended in a specific case."[26] Since every statute

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the subject would be exposed to arbitrary control; for the judge would be then the legislator."

The colonists believed that there must be a separation of powers comparable to that between King, Lords and Commons and "readily accepted Montesquieu's theory of separation of powers as the best guaranty of liberty." GETTEL, HISTORY OF AMERICAN POLITICAL THOUGHT 92 (1938); Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 113 (1928); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. OF CHI. L. REV. 385 (1935).

Logically, under a strict separation theory, the legislature itself would resolve doubts or ambiguities in statutes. This practice was actually established under the Roman Empire, and to a lesser extent in France, but was found to be unworkable. CLARK, PRACTICAL JURISPRUDENCE, A COMMENT ON AUSTIN 231 (1883). For as pointed out by Pollack: ". . . law without interpretation is but a skeleton without life, and interpretation makes it a living body." FIRST BOOK OF JURISPRUDENCE 231 (1883). Therefore, no one doubts that the courts must "interpret"; the controversy is over the proper definition of the word.

22. Hamilton cited Montesquieu's work with approval, and discussed at length the functions of the three departments of government in relation to each other. THE FEDERALIST 484 (Lodge's ed. 1923). In all the various proposals made at the Constitutional Convention it was assumed that there would be the three separate branches of government. MADISON, JOURNAL OF THE FEDERAL CONVENTION 72, 444, 449, 462 (Scott's ed. 1893).

23. Hobbes and Rousseau were leading advocates of the natural law theory at this time, but the idea stems from Plato and Aristotle. See HALL, READINGS IN JURISPRUDENCE 3-86 (1938).

24. 2 AUSTIN, LECTURES ON JURISPRUDENCE 655 (1911). Austin felt that "law" must emanate from the legislature, as representative of the "sovereign." He labeled the process of filling in statutory "gaps" as "spurious interpretation." Lenhoff, *On Interpretative Theories: A Comparative Study in Legislation*, 27 TEX. L. REV. 312, 318 (1949); see also GRAY, THE NATURE AND SOURCES OF THE LAW 65, 85 (2d ed. 1921).

25. Pound, *Courts and Legislation*, 77 CENT. L.J. 219, 220 (1913), states that "[a]ccording to the beautifully simple theory of separation of powers three wholly distinct departments have for their several and exclusive functions to make the laws, to execute the laws, to apply the laws to controversies calling for judicial decision . . . the theory itself, so far as it confines the judicial function to mere application of a rule formulated in advance by an extra-judicial agency, proceeds on an eighteenth century conception of the law and of law-making which we cannot accept today."

26. Levi *supra* note 3, at 505. See FRANK, LAW AND THE MODERN MIND (1930).

contains ambiguities, or "gaps,"[27] the one chance doctrine allows the Court to fill those gaps in the *first* case arising under a particular portion of a statute. As a result the one chance doctrine is nothing more than the classical definition of separation of powers once removed. Does this partial departure represent a more workable theory than the original doctrine of separation of powers, or does the one chance doctrine merely compound error upon error? Observe that this theory goes beyond modern stare decisis in that the Court is entirely precluded from reexamining its prior interpretation of a statute.[28]

Uncompromising application of the one chance doctrine would certainly produce unjust results in particular cases.[29] Even Levi admits, "[t]he doctrine which is suggested here is a hard one. In many controversial situations, legislative revision cannot be expected. It often appears that the only hope lies

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27. Stammler, *Legislation and Judicial Decision,* 23 MICH. L. REV. 362, 369 (1925). Another writer states that "[l]anguage, at any rate in legal documents, does not fix meaning. It circumscribes meaning." Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407, 426 (1950).

28. The appeal of stare decisis has traditionally been its apparent promotion of certainty in the law. However, this concept has never been an inexorable command. DOUGLAS, STARE DECISIS (1949). A recent note, 49 MICH. L. REV. 404 (1951), discusses the problem of Congressional silence in the tax field in terms of stare decisis without referring to the doctrine of separation of powers, which is really the basic problem in these cases.

29. On occasion, resort has been made to the Constitution in order to avoid the harsh consequences of the one chance doctrine. In Erie R.R. v. Tompkins, 304 U.S. 64, 77 (1938), the Court overruled Swift v. Tyson, 16 Pet. 1 (U.S. 1843), which had "set the direction" of the Judiciary Act ninety-five years before. Justice Brandeis stated that "[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the *unconstitutional course pursued* has now been made clear and compels us to do so." (Emphasis added.) But Justice Reed, concurring, did not agree that there was a constitutional question involved, saying, "[i]t seems preferable to overturn an established construction of an Act of Congress rather than, in the circumstances of this case, to interpret the Constitution." *Id.* at 91. This is perhaps the most striking case where the Court has avoided the Congressional silence argument by resort to the Constitution.

In Girouard v. United States, 328 U.S. 61 (1946), an applicant for citizenship refused to "promise to bear arms" because of religious beliefs. According to three previous decisions this refusal would disqualify him from citizenship. However, the Court overturned the previous decisions, although the issue was one of statutory interpretation, by relying on the religious freedom granted by the Constitution. See Horack, *Congressional Silence: A Tool of Judicial Supremacy,* 25 TEX. L. REV. 247, 256 (1947). In a dissenting opinion, Chief Justice Stone emphasized that the case was one of statutory interpretation and should have been affirmed solely because of Congressional silence.

It is interesting to note that Justice Frankfurter joined in Chief Justice Stone's dissent in the *Girouard* case, *supra,* although he had previously rejected Congressional silence in Helvering v. Hallock, 309 U.S. 106 (1940), and that in his dissent in Commissioner of Int. Rev. v. Church, 335 U.S. 632, 637 (1949), he again relied upon Congressional silence. This apparent inconsistency disappears when Frankfurter's reliance on legislative materials is considered. In the *Girouard* and *Church* cases he felt that legislative materials showed actual Congressional acquiescence in the Court's previous interpretation, while in the *Hallock* case he felt that no such Congressional approval was shown, and, therefore, rather than rely spuriously on the Constitution, he would reject the one chance doctrine. 335 U.S. at 686.

with the courts."[30] Professor Levi illustrates this "hard" doctrine by reference to the Mann Act. Once the *Caminetti* case had particularized the words of the statute, sound public policy suggests construing criminal statutes consistently and strictly. It is also true that when a case has been in effect for almost thirty years the Court has good reason to hesitate before overruling it. But these arguments are no justification for the one chance doctrine. The effect of that theory was to preclude the Court in *Cleveland v. United States* from reexamining the logic of the *Caminetti* case and developments since that decision. The defendants in the *Cleveland* case were convicted of violating the Mann Act, when clearly the framers of the act never contemplated polygamous marriages as coming within its scope.[31]

The encouragement of legislative responsibility is advanced as a justification for this "hard" doctrine.[32] It is asserted that were the Court to change a prior statutory interpretation, Congress, upon whose shoulders policy-making should fall, would shirk its duty. This argument envisages Congressional policy-making as being explicit to the last detail, while at the same time admitting that this is impossible. To make the one chance doctrine function successfully would not only be "hard" for the individual litigant, but also would put upon Congress the burden of determining the application of statutes in each of the many unforeseen and variable situations which subsequently arise. This would be an intolerable task for an already over-burdened Congress, and one which both Levi and Horack indicate Congress would never accept.[33] Correspondingly the Court would be unable to reverse a prior decision interpreting a statute and would have to assume Congressional approval of the decision, knowing that Congress had never considered it, even though subsequent developments reveal that the case was not wisely decided.[34]

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30. Levi, *supra* note 3, at 523. Horack also recognizes that the doctrine may cause hardship, but says that "so long as policy determination is [Congressional] responsibility, it is their privilege to act wisely or unwisely or not to act at all." Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 253 (1947).

31. Mr. Justice Murphy's dissent in the *Cleveland* case, 329 U.S. 14, 25 (1946) and Mr. Justice McKenna's dissent in the *Caminetti* case, 242 U.S. 470, 472 (1916), by referring to the legislative materials, present a convincing case that Congress "intended" the act *only* to apply to commercialized vice.

32. Note 20 *supra*. See also Mr. Chief Justice Stone's dissent in Girouard v. United States, 328 U.S. 61, 70 (1946).

33. Levi, *supra* note 3, at 523; Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 253 (1947).

34. Horack, *supra* note 33 at 258, argues that for the Court to decide that a prior interpretation of a statute was unwise still does not justify the Court in reversing that decision. This argument is posited on the ground that even though Congressional policy is "unwise," so long as it is constitutional it must be applied by the Court. However, when the Court reverses a previous interpretation of a statute it is not changing *Congressional* policy, but rather the Court's previous *interpretation* of that policy which subsequent events have shown to be inconsistent with the underlying policy of the statute. Horack's argument can only be valid if it is assumed that a judicial decision operates to *amend* a

The very fortuitous manner in which cases come before the Court demonstrates that most cases are not a proper vehicle for "setting the direction" of a statute. The Court can no more prognosticate future developments than can Congress. It is for this reason that the Court often feels it necessary to reexamine prior cases in light of the actual results which have flowed from them.[35] Certainly the "legislative responsibility" engendered by separation of powers need not require the complete rigidity necessitated by the one chance doctrine.

Testing the doctrine by reference to the Sherman Act, for example, aptly illustrates that historically Congressional policy-making has been construed to leave the Court some leeway in making necessary adjustments. The Sherman Act made no attempt to particularize possible violations; rather Congress enunciated a broad, underlying policy proscribing "every contract, combination . . . or conspiracy in restraint of trade"[36] and "monopolies or attempts to monopolize."[37] Since the results of the act in operation could not be foreseen, rigidity and inflexibility of application were impossible. This is born out by the history of the act which reveals a case-by-case development[38] analogous to the common law method. Dean Pound has described this method as follows: "The tentative results of a priori reasoning are corrected continually by experience. A cautious advance is made at some point. If just results follow, the advance goes forward. . . . If the results are not just, a new line is taken, and so on until the best line is discovered. With all its defects, this method has stood the test of time better than any other."[39] By using this method the Court was endeavoring to carry out the basic policy of the Sherman Act in accordance with the dictates of experience. It can not be said that the Court would be following "Congressional policy" more closely had it refused to reverse certain interpretations which later proved to be impediments in carrying out that policy. There is a valid distinction between this basic policy and particular applications of the Act. The history of the Act shows that the underlying objectives have remained the same even

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statute. Actually, the Court's interpretation is not an amendment at all but an application of the statute in order to facilitate the legislative purpose. Viewed in this light, the Court is the logical choice to correct an unwise decision.

35. See note 29 *supra*.

36. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1940).

37. 26 STAT. 210 (1890), 15 U.S.C. § 2 (1940).

38. "To the extent that the Congressional purpose was obscure, the responsibility of selection devolved upon the courts." HANDLER, A STUDY IN THE CONSTRUCTION AND ENFORCEMENT OF THE ANTITRUST LAWS 8 (TNEC Monograph 38, 1940); *compare* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) *with* United States v. American Tobacco Co., 221 U.S. 106 (1911); and United States v. E. C. Knight Co., 156 U.S. 1 (1895) *with* Northern Securities Co. v. United States, 193 U.S. 197 (1904); HAMILTON & TILL, ANTITRUST IN ACTION 10 (TNEC Monograph 16, 1940); STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 516 (1951).

39. Pound, *Courts and Legislation*, 77 CENT. L. J. 219, 228 (1913).

though particular cases have been discarded when experience revealed that they were inconsistent with the basic policy of the statute.[40]

Even code compilations, which purport to state the "whole" law, recognize the practical necessity of a certain degree of judicial discretion.[41] It is recognized that even with a highly integrated statute new situations will develop which were unforeseen at the time of enactment. The Negotiable Instruments Law, for example, contains a sweeping provision empowering the courts to decide new situations according to the "law merchant."[42] The legislatures do not anticipate making piecemeal changes in such a statute.[43] Of *necessity* the courts must cope with novel situations by using the case-by-case method[44] which has proved its usefulness in the field of common law and Constitutional law. All of these problems arise because of the original fallacy in the classical theory of separation of powers; the notion that the Court needs no discretion when dealing with statutes. Once it is recognized that the Court *must* use discretion, the adjustment must be such that the underlying purpose of the separation of powers concept will be retained and at the same time be productive of desirable results in practice. This, the one chance doctrine fails to accomplish.

Legislative responsibility as secured by separation of powers does not demand the abnegation of judicial discretion to the extent advocated by the proponents of the one chance doctrine. The ultimate power to initiate legislation in the first instance remains in Congress. The separation of powers concept, without the one chance doctrine, would still compel the Court to adhere to the underlying policy of a statute until repealed by Congress.[45] A narrowly

40. Note 38 *supra*. Certainly the broad objective, to foster competition by eliminating "trusts" and monopolies, has remained the same. See Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153 (1947).

41. The codes of the Continental countries, while purporting to be complete, always leave room for judicial discretion. Stammler, *Legislation and Judicial Decision*, 23 MICH. L. REV. 362, 369 (1925); Lenhoff, *On Interpretive Theories: A Comparative Study in Legislation*, 27 TEX. L. REV. 312 (1949); de La Morandiere, *The Reform of the French Civil Code*, 97 U. OF PA. L. REV. 1 (1948); ALLEN, LAW IN THE MAKING 75, 112, 200 (1927).

42. NEGOTIABLE INSTRUMENTS LAW § 196.

43. The purpose of codification in the United States is to achieve certainty and nation-wide uniformity. BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 19 (1943). Were the legislatures of the several states to make piecemeal changes, the purpose of the statute would be substantially impaired. See Corbin, *The Uniform Commercial Code—Sales: Should It Be Enacted?* 59 YALE L.J. 821 (1950).

44. Referring to the NIL Britton states that "codification of a common law subject is only one phase of its history." BRITTON, *op. cit. supra* note 43, at 19. As Holmes has put it, "[h]owever much we may codify the law into a series of seemingly self-sufficient propositions, these propositions will be but a phase in a continuous growth." HOLMES, THE COMMON LAW 27 (1881).

45. One writer has advocated going one step further, and allowing the Court to apply a statute in accordance with what the present Congress, or even a future Congress might "intend." Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 415

drawn statute will restrict judicial discretion within a smaller area than a broad statute like the Sherman Act. But regardless of the type of statute, a decision interpreting that statute in the first instance need not be considered an *amendment* to the statute by virtue of the theory of separation of powers.[46] The feeling that the Court might usurp the legislative authority becomes a phantom when it is considered that Congress is free to overrule any decision of the Court if it is so desired.[47] Concomitantly, the practical hardships upon the individual litigant and on Congress itself are minimized by this modification. The one chance doctrine would coerce consistency regardless of knowledge gleaned through experience. Justice Frankfurter's words are peculiarly apt: "Wisdom too often never comes and so one ought to reject it merely because it comes late."[48]—The Court must be given a "second chance."

JUDICIAL REVIEW OF REMOVALS OF MUNICIPAL POLICEMEN AND FIREMEN IN INDIANA

An intermittent controversy regarding the proper function of the courts in reviewing dismissals of municipal policemen and firemen was renewed by the Indiana Appellate Court in *Bishop v. City of Fort Wayne*.[1] Judicial concern is invoked by legislation which prohibits the removal of such personnel except for cause, other than political considerations, after notice and oppor-

(1950). This extreme position completely saps the vitality of the separation of powers concept. It is here that separation of powers should apply and demand that a statute be applied as "intended" until affirmative action by Congress indicates otherwise.

46. See note 34 *supra*.

47. The most striking illustration of this is the Congressional reversal of May v. Heiner, 281 U.S. 238 (1930), and three cases, Burnet v. Northern Trust Co., 283 U.S. 782 (1931); Morsman v. Commissioner, 283 U.S. 783 (1931); McCormick v. Burnet, 283 U.S. 784 (1931) decided on the authority of that case. Two days after these cases were decided Congress overruled them. Joint Resolution of March 3, 1951, c. 454, 46 STAT. 1516; GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 168 (2d ed. 1946).

48. Henslee v. Union Planters National Bank & Trust Co., 335 U.S. 595, 600 (1949) (Dissenting opinion.).

1. 91 N.E.2d 368 (Ind. App. 1950). Marie Bishop, a policewoman for the city of Fort Wayne, was discharged for misconduct, after a hearing by the Board of Public Safety. She appealed pursuant to IND. ANN. STAT. § 48-6105 (Burns Repl. 1950), to the Allen Circuit Court where, over the objection of the city of Fort Wayne, the case was tried anew on the merits and the decision of the board reversed, and reinstatement ordered. On appeal, the Appellate Court was unanimous in support of the circuit court's interpretation of the statute as to reviewing procedure, but felt that contra ruling precedents of the Indiana Supreme Court were controlling. Therefore, the case was transferred to the higher court with accompanying reasons for the differing interpretation. The Supreme Court in affirming found it unnecessary to reconsider its former position. Instead the court chose to dispose of cause upon grounds that the board had failed to comply with the statutory requirement that charges sufficiently specific as to time, place, and nature of the offenses, are to be entered formally on the record of the board. Therefore, since no lawful charges were filed, the court held the removal proceedings to be arbitrary and void. City of Fort Wayne v. Bishop, 92 N.E.2d 544 (Ind. 1950).