Introduction

Articles of Confederation

- US operated under Articles after Revolution
- Essentially a treaty among separate "nations." No law could be made except unanimously. This system wasn't working well.

Constitution (1789)

- States do not derive power from Constitution
- Driving force behind Creation: Hamilton and Madison. Perception was that obstacles to trade among the states needed to be removed. Goals of the Constitutional Convention was to create and preserve a national commerce and defense system
- Ratification only required 9 states *(ignored restriction in Articles of Confederation requiring unanimous vote).*
- The People are the sovereign. *(Why would they create constitutional restrictions? Avoid crimes/laws "of passion" created in times of chaos and to protect minority rights).*

Politics in the Early US

- *Federalists*: Pro Constitution. Claimed states would retain sovereignty under Constitution, although, in reality, they were very much for a strong central govt.
- *Anti-Federalists*: Realized states were giving up more power than they realized. Proponents of state autonomy and the driving force behind the Bill of Rights.

Justice Holmes: The Path of the Law

- "Bad man" theory of the law
- Bad man just wants to stay out of trouble
- Law predicts what courts will do if certain actions are committed.
- Morality is a separate issue

Justice Brennan: The Constitution of the US: Contemporary Ratification

- Not possible to find original intent of framers (and arrogant to try) *(Graglia: What can reading and interpreting mean EXCEPT to try and gauge intention of writer)*
- Judges do what they want *(Graglia: Can't call it unConstitutional if can't find it in Constitution)*
- Shouldn't be ruled by the "dead hand of the past" *(Graglia: Why are we under a Constitution then?)*

Graglia: Brennan has made more decisions affecting our lives than any other individual in the past few decades. He has led many Supreme Court decisions making many policy decisions (and overruling others) for our country. Justices shouldn't have this kind of power when they are not elected by the people.

Federalism: The Founder's Design

Federalism

De-centralized power separated between nation and states. Benefits of integration while maintaining decentralized govt. and local autonomy: keeps power dispersed and close to the people (which gives them more influence over their govt.), avoids tyranny, and frustrates fewer people. *(The U.S. Govt. has been largely unsuccessful in this – today power is centralized in the Congress.)*

Note:
Democracy: Rule By the People
Constitutional Right: A limitation on the power of self-government
Republicanism: Representative self-government

Originalism

Federalism, like all other issues, should be decided by determining and implementing the Framers' intent

Objections

- We shouldn't be governed by the dead hand of the past
  - *This argument is invalid when made to justify creation of novel restrictions in the name of the Constitution*
  - *It is valid when made to justify judicial refusal to intervene in political change*
- The Framers' intent is often unworkable.
  - *If it isn't known with assurance that the Framers precluded a particular policy choice, then that choice is not precluded.*

Divided Sovereignty as Fiction

The idea of two co-existing sovereigns is a contradiction. Conflicts between two sovereigns will be resolved in favor of the superior political government - the federal government.

- The result is that the only practical basis for the continuance of a degree of local autonomy is the forbearance of the central government.

The Constitution is not a serious effort to create such a regime.

- I.e. Broad federal powers that are not clearly defined.

The 10th Amendment omits the word "expressly," making the provision a tautology; that which was not granted was reserved. Marshall said in McCulloch that omission of "expressly" is evidence that broad powers were intended.

Judicial Review

Constitutional law is the product of judicial review, the power of judges to nullify the acts of other government officials on the ground that they are unconstitutional.
(Judicial activism: Holding things unconstitutional when they aren't)

Where does Judicial Review come from?

The Constitution does not explicitly provide for judicial review.

- Judicial review unknown to English law – Parliament can do anything
- There is a danger in this great power. One would think such power would be spelled out with detail.
- First exercised in Marbury v. Madison

Marbury v. Madison (1803)

1) **History behind the case**
   - Election of 1800 knocked federalists out of power for the first time when Thomas Jefferson elected president.
   - Federalists seeking to retain some degree of political control. They took several actions:
     - Circuit Court Act of 1801 – created courts of appeal. Adams could appoint 16 new judges.
     - Lowered number of Supreme Court justices (Jefferson would not be able to appoint a replacement when the first justice retired)
     - Adams appointed his Secretary of State, John Marshall, as Chief Justice
     - Justice of the Peace statute – created 42 justices of the peace in DC. Unfortunately, all commissions not delivered by midnight on Inauguration Day. Jefferson refused to honor the outstanding commissions.
   - Reaction of non-Federalists
     - Circuit Court Act repealed
     - Changed dates for term of Supreme Court. Court did not meet in 1802, met again in Feb. 1803. Issues awaited them in the meantime:
       - Can Circuit Court Act be repealed?
       - Must Jefferson honor commissions? (Marbury v. Madison)
   - Issues for the Supreme Court
     - Difficulty: any order to Jefferson would be ignored
     - Why did Marshall not recuse himself? As Sec. Of State, he sealed commissions in dispute
     - Why was case discussed on merits before dismissing?

2) The court **first decided THE MERITS**:
   - Does Marbury have a right to the commission? Yes, because it was signed and sealed (citing no law whatsoever).
     (But, traditionally, a transaction was not considered completed until delivery – e.g. signed, sealed and delivered; or consider land rights; transfer of title complete on delivery)
   - Does Marbury have a remedy? Yes, for every right there must be a remedy; Marbury's remedy is mandamus

Judicial Review (cont'd)

Marbury v. Madison (cont'd)

3) Then the court decided **that it lacked JURISDICTION** to hear the case.
   - Jurisdiction originates in Constitution and statutes passed by Congress
     - ➢ *Constitution: (Origninal and appellate jurisdiction defined: Fed. Law, diversity, ambassadors, etc.)*
     - ➢ *Judiciary Act of 1789: (Created federal court system §13 confers original jurisdiction on Supreme Court in this instance, according to Marshall)*
   - Marshall concocted a statute giving the Court original jurisdiction; then concocted grounds to hold it unconstitutional
   - Marshall's reasoning
     - ➢ The Judiciary Act adds to the original jurisdiction of the court. *(Graglia: no it does not. Marshall quotes a few words of the Act out of context - - language authorizing the Court to issue writs of mandamus. But this language is part of a sentence describing the courts appellate jurisdiction)*
     - ➢ The Constitution spells out the original jurisdiction of the court
     - ➢ This affirmative spelling out of the Court's jurisdiction implies a negative - - that the court doesn't have original jurisdiction over what is not affirmatively spelled out - - otherwise, the words have no effect and are mere surplusage.
       - *The Constitution does not say that Congress can not add to the Court's jurisdiction*
       - *Normally statutes are interpreted to avoid constitutional questions, but this interpretation creates one*
       - *Maybe the language is surplusage - - Const. was written by a committee*
       - *The same people who wrote the Constitution also wrote the judiciary act - - they must have known what they meant*
       - *It could mean that Congress can not SUBTRACT from the Court's jurisdiction (Constitution only lists minimum req'ts)*
     - ➢ The Judiciary Act is unconstitutional and can not give the Court the power to hear this case. *(Note: In later case, Marshall ruled that it was OK to add appellate to original jurisdiction)*

4) The court then decided that **it had the power of JUDICIAL REVIEW**
   - Article VI: Supremacy Clause: The Constitution is the Law of the Land
   - If a law is contrary to the Constitution, the Constitution must be given effect, and the other law must not be given effect
   - Otherwise, there would be no point to having a written Constitution.
   - *(BUT. . . . Van Alstyne article: Other countries have written constitutions and no judicial review)*
     - ➢ *Less likely legislative will do unconstitutional thing – they took an oath to uphold Constitution*
     - ➢ *If they do transgress, people will see and elect someone else*
     - ➢ *Effective argument for opposing a bill*

Judicial Review (cont'd)

<u>Marbury v. Madison</u> (cont'd)

Graglia: This argument does not say who has the authority to decide if a law is unconstitutional. Marshall just begs the question by assuming that the court has that authority.

Graglia: Perhaps it is more appropriate that Congress or the Executive decides the constitutionality of a law.
Marshall: That is absurd because if the lawmaker decides the constitutionality of the laws then a written constitution can not limit the lawmaker and there is no purpose served by having a constitution.
Graglia: That is not so! A constitution could be a guide for the legislature and executive, and a guide for the people to know when the government exceeds its powers. The people can enforce the Constitution by voting out those who violate it.

Marshall: The Constitution explicitly provides for judicial review: "The Judicial Power shall extend to all cases and controversies arising under this Constitution" (Art. 3 §2)
Graglia: Does this include the power to void acts of Congress? No!

Marshall: Judges take an oath to support the Constitution
Graglia: So does the recorder of deeds and every other officer.

Was <u>Marbury</u> a usurpation of power?

- No! It was expected/anticipated
  - The court had previously considered the Constitutionality of acts of Congress, assuming it had the power to do so
  - Judicial Review was discussed at the Convention. There was a form of Judicial Review under the charters of the original colonies.
  - Federalist No 78 explicitly mentions and defends Judicial Review
  - Art. VI: judges are bound by the Constitution, any law or state constitution notwithstanding
- §25 of the Judiciary Act supports Judicial Review

What is the Nature and Scope of this power?

Graglia: It purports to be the striking down of laws that are clearly unconstitutional. If this were true, Judicial Review would be of little significance. The Constitution limits very little, and the little that is limited is rarely violated – politicians can read the Constitution and don't really want to violate it. What it really is is Judicial Activism - - the Court holding unconstitutional laws that are not clearly prohibited by the Constitution

Hamilton: The Court is the least dangerous branch. It has no power, only judgment.

Graglia: Not so. The Court's judgments are routinely enforced by those who control the purse and the sword. The Court is the most powerful govt. institution on social policy in the last 40 years.

Judicial Review (cont'd)

What are the Limits on the Court's power?

1. Constitutional Amendment process
   - *Not an effective limit because it is too difficult to pass an amendment and takes too long. Also, the Court interprets the amendment*
2. Impeachment
   - *Also too difficult to be effective*
3. Congress can control the court's jurisdiction
   - *But see <u>McCardle</u> (the court held that the Act limiting its jurisdiction was unconstitutional. Thus the court can only be limited if it agrees to be limited)*
4. Congress can shut the Court down by controlling the term like they did in 1802, add to the number of Justices, appoint Justices with their philosophies *(But last 10 appointments by Republican presidents – all supposed conservatives – have not managed to overrule even 1 Warren court (liberal) decision)*
5. The Court is limited to deciding cases and controversies - - it can not just issue a decree
   - *Not really, if there is any conceivable case, it will be brought before the court*
6. They have to write opinions to explain their decisions
   - *This is no limit; there is no sanction if they don't, they often don't, and when they do, the explanation is not very good.*
7. Death. Old justices eventually die off and new ones are appointed.
   - *Not an effective limit. Nixon got 4 appointments but could not undo the liberal program of the Warren Court.*

Is Constitutional Interpretation an Exclusively Judicial Function?
(Is the Court the Ultimate Arbiter?)

<u>Marbury</u>: The court just decides the case (is not the ultimate arbiter)

Jefferson: They decide for them, I'll decide for me (Each branch can make it's own decision)

Graglia: The Court has the last word when it comes to enforcement - - as a practical matter, the court is the ultimate arbiter

Judicial Review (cont'd)

Congressional Power to Limit the Jurisdiction of Federal Courts

Article III gives the court appellate jurisdiction with such exceptions as the Congress shall make. *Some argue that appellate jurisdiction can only be removed by adding to original jurisdiction, but Marbury holds that original jurisdiction can not be added to.*

Ex Parte McCardle: South wanted Court to rule on constitutionality of military rule in South following Civil War. Court not in a good position to make a controversial decision following Dred Scott and the Civil War. Congress passed an act limiting the Court's jurisdiction. Court rules that it can not proceed without jurisdiction.

- Demonstrates that Congress can not limit the Court's jurisdiction unless the Court agrees to the limit (Court reviewed legitimacy).

Is Deprivement of Jurisdiction a Real Judicial Control?

- Wouldn't overturn precedents
- Any law depriving Court of jurisdiction will ITSELF be considered (Court could refuse to uphold)

Modern Framework of Judicial Review

In 1920, the Court was given the power to decide which cases it would decide

- Litigants must file a petition for certiorari
- To get to the Court from the state court:
  - The appeal must be from a final judgment in the highest court in the state in which a judgment may be had
  - Must involve a federal question without adequate state ground for the decision. (If the case has adequate independent state ground, review of the federal law will not affect the result. Such review would render an advisory opinion, which the court can not do)

Michigan v. Long If Court is not clear about to what degree state court relied on state (vs. federal) grounds, it will assume that there are not adequate independent state grounds. Court ruled other possibilities were not practical.

- Send back to state court, ask how decision was made *(waste of time)*
- Investigate state law themselves *(out of jurisdiction)*
- Assume that there are adequate state grounds *(Why not this one?)*
- Assume that there are not adequate state grounds *(used here – really court just wants to ensure that states will not be ruling on important federal issues when Court does not retain right to review)*

Factors in favor of certiorari

- Important federal question
- Conflicts in the circuits or states on federal question
- The Court only decides about 150 cases with argument and opinions.

National Powers – Local Activities

McCulloch v. Maryland

1. Can Congress charter a bank?

Jefferson: Slippery slope problem. Need to stick precisely to Constitution. Once passed clear boundary lines, the whole field of power is open to central govt.

Hamilton: Implied as well as express powers in Constitution. Natural relation to a power is close enough (absolute necessity is not req'd)

Maryland: No.

- Congress has only those powers enumerated in the Constitution.
  - The affirmative implies the negative. Art I, §8 enumerates powers, which implies that the govt. is limited to those powers.
  - 10th Amendment "powers not delegated are reserved to the states" This amendment confirms limitations on govt. that have already been implied.
- The power to charter a bank is not enumerated
- Congress does not have the power to charter a bank

Government: Yes

- There are implied powers - - "all other powers necessary and proper"
- The power to charter a bank is such an implied power

Maryland:

- Govt. does not have power to provide for general welfare; can only use implied powers that are "necessary and proper." Bank is not necessary, just convenient.
- A national bank is not necessary because there are state chartered banks in every state

The question turns on the meaning of necessary. Wittgenstein: meaning is use. Marshall determines from its use that necessary means convenient. For this he offers 5 textual arguments:

- *"Absolutely"* modifies necessary in Art I, §10. This implies that necessary alone does not mean absolutely necessary.
- The Articles of Confederation had a provision like the 10th amendment that reserved those powers not EXPRESSLY granted, but "expressly" does not appear in the 10th amendment. *(Ironically, the Amendment meant to limit powers is being used to broaden powers)*
- *"And Proper"* weakens the absoluteness of "necessary." If absolutely necessary, propriety would be assumed.
- The phrase is among the powers of Congress, not among the limitations of those powers (Article I, §8)
- Other limits in the Constitution (Art. I, §9 and the Bill of Rights) would be unnecessary if "necessary" only expressly stated powers could be used.

National Powers – Local Activities (cont'd)

<u>McCulloch v. Maryland</u> (cont'd)

1. Can Congress charter a bank? (cont'd)

Then Marshall says that the meaning of "necessary and proper" is irrelevant anyway because, regardless, Congress may choose any means to effect its enumerated powers. *(So long as Congress does not, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the govt.)*

Marshall also argues that this is a Constitution, not a legal code. Should be construed broadly.

2. Can Maryland Tax the Bank?

Maryland: Yes.

- The States have sovereignty and can legislate as they see fit so long as they are not prohibited by the Constitution.
  (Federal law must be authorized and not prohibited; the only limit the Constitution places on state law is that it not be prohibited)

Government: No.

- If Congress has the power to create, it has the power to preserve
- The power to tax is the power to destroy
- Maryland can't tax the bank

Marshall: Maryland not expressly prohibited from taxing bank, but would be opposed to principles interwoven throughout Constitution. Operations tax is unconstitutional, but property tax is not

Graglia:

- *But taxes don't necessarily destroy. Only the abuse of the power destroys. There are few arguments weaker against the existence of a power, than that it may be abused - - any power may be abused.*
- *If Congress wants to create and preserve the bank, it can enact legislation to protect it. The tax doesn't have to be unconstitutional.*

The Commerce Power

Is there a dormant commerce power?

Gibbons v. Ogden (1824)

The Dormant commerce clause: to leave "as-is" is a form of regulation; for the state to regulate what Congress has left alone disturbs the regulating power. *(Note: The idea that Congress has regulated by doing nothing is counter-intuitive because they can't think of everything!)*

- Congress has the power to regulate commerce among the states
- NY is prohibited from regulating interstate commerce

  - *Among the states* means commerce which concerns more states than one; commerce not purely internal to one state
  - *Commerce* is not limited to buying and selling; "all commercial intercourse"
  - *Regulation* means prescribing the rules
  - These definitions do not restrict the commerce power at all. The sole restraint on the commerce power is the political process.

Counter-argument: This has not been regulated by Congress because Congress has not considered regulating it - - thus, if the state has an interest in regulating, it may.

Marshall decided that Congress had regulated by enacting a licensing statute (he made this up) and that the NY statute conflicted with a federal statute and is thus unconstitutional under the Supremacy Clause. *(Marshall: The grant is exclusive!)*

- Federal law has authorized Gibbons to operate (made-up)
- Federal law is supreme
- NY can not restrict Gibbons from operating

** Dormant commerce clause question was left undecided

Johnson's dissent: Commerce clause, by it's own force (without federal statute) denies states the power (positive restriction). Commerce was the whole point of establishing the federal government!

Wilson v. Blackbird Creek Marsh Co. (1829)

Rejects the Dormant Commerce power discussed in Gibbons.

States may sometimes affect interstate commerce as an incidental consequence of exercising police power.

The commerce clause places no prohibitions on states absent an act of Congress. Unless Congress speaks directly to it, no constitutional prohibition on interstate commerce.

The Commerce Power (cont'd)

Is there a dormant commerce power? *(cont'd)*

Consider The License Cases (1847): Chief Justice Taney: No constitutional prohibition on interstate commerce -commerce clause is a *grant* of power to federal govt., not a restriction on state power.

Cooley v. Board of Wardens of the Port of Philadelphia (1851)

Held there is a dormant commerce power: Some powers by their nature must be necessarily exclusive.

- States may regulate subjects that require diversity (focus is on the subject matter being regulated)
- States may not regulate subjects that require exclusive control by Congress for national uniformity.
- (Result: States can regulate interstate commerce, but not too much. Doesn't accept either the Marshall or the Taney position)

Justice Scalia: Would abolish the Dormant Commerce power except for state laws that discriminate against out-of-state business. States may not take protectionist measures; otherwise, OK.

What is Interstate Commerce?

The Daniel Ball (1870) was a steamship that operated only in one state, but carried goods that went on to other states. Held: the ship was an "instrument of interstate commerce;" it affects commerce of another state. Congress can regulate because of need to protect interstate commerce; if something goes wrong, interstate commerce will be impeded/affected. Definition of inter/intrastate is no longer tied to geography; don't want to allow people to do an "end run" around federal power.

Kidd v. Pearson (1888) Held: Iowa can forbid the manufacture of liquor. Manufacturing is not commerce, it is pre-commerce.

U.S. v. E.C. Knight. (1895) E.C. Knight had control of 98% of the American sugar (manufacturing) market. This did not violate the Sherman Anti-Trust Act preventing monopolies. Held: the commerce clause does not reach into manufacturing. Mining, manufacturing and agriculture are not commerce. (Commerce is what takes place after the product is made.)

- Uses Kidd's notion that manufacturing is not commerce
- In Kidd, distinction was used to say that states could regulate, but in Knight, distinction being used to say that federal govt can not regulate!
- Monopoly will have an impact on interstate commerce, but impact is only "indirect." If can regulate manufacturing, what branch of industry would Congress not be able to regulate?

Graglia: This distinction sucks! It is impossible to distinguish the bringing of goods to market from the buying/selling of goods. The direct/indirect distinction is impossible.

The Commerce Power (cont'd)

Can Congress Regulate Intrastate Commerce?

The Shreveport Rate Case (1913) Texas Railroad rates discriminated against interstate commerce. Held: Congress can regulate INTRAstate commerce when it has such a "close and substantial relation" to interstate commerce that control is essential or appropriate to foster and protect interstate commerce

- What is "close and substantial?"
- In the real world, Congress can not regulate interstate commerce without regulating INTRAstate commerce.
- Don't want Congress to have to lower INTERstate rates to compete with INTRAstate rates because this would, in effect, be allowing states to control and determine what INTERstate rates are. THEREFORE, Congress can regulate rates.

Theories of Interstate Commerce Regulation

1. The "Affects" Theory of Interstate Commerce

Congress can regulate INTRAstate commerce when it affects INTERstate commerce. *(Note: When doesn't INTRAstate commerce affect INTERstate commerce?)* See The Shreveport Case.

2. The "Stream of Commerce" Theory

Swift & Co. v. U.S. (1905) Held: Congress can regulate local Chicago meat packers because they were in the "current of commerce." The cattle came from out-of-state and will go out-of-state again. The transaction may be local, but it takes place in a current of interstate commerce, of which the local transaction is "part and incident."

- Not like EC Knight where affect was remote/accidental.
- Where the only interruption required is to find a purchaser at the stockyard, there is a current of commerce among the states. Commerce among states is not a technical legal one, but a practical one.
- The presence of cattle in a stock-yard in a particular state was really only a temporary "way station" in the interstate stream of commerce and could therefore be regulated under commerce clause.
- "In" Commerce as opposed to "impacting" Commerce – Shreveport Rate Case

Stafford v. Wallace (1922) Congress can regulate those things that in its judgment affect interstate commerce, court won't interfere unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

The Commerce Power (cont'd)

Theories of Interstate Commerce Regulation *(Cont'd)*

2. The "Stream of Commerce" Theory (cont'd)

McDermott v. Wisconsin (1913) & U.S. v. Sullivan (1948) Though transaction (label/pharmacist) seems local in nature, Congress can restrict the use of items following their transportation in interstate commerce.

- McDermott v. Wisconsin – federal label required on orig. package after interstate commerce ended, even if contrary to state law.
- Upheld labeling requirements after shipment to assure that later sale did not undermine congressional policies (*effectuates congressional regulations*).
- Later, Supreme Court rejects "original package" limit on Commerce clause power. Label required even in a new package: U.S. v. Sullivan: pharmacist has to label pillbox. So regulations can't be avoided by quick subsequent sale.
- ➢ *Note: No real basis in any of 3 theories for these 2 holdings, but upheld anyway. Effect: can regulate if goods once crossed state line.*

Stream of commerce theory and affects theory differ only academically; there is no practical difference.

3. The "Bar" Theory of Interstate Commerce

Bar Theory: The power to prohibit shipment of things in interstate commerce; regulation through prohibition of activities that aren't commerce.

The Lottery Case (1903) (*Graglia: this case changes the structure of our govt. This case broke the dam and led to federal regulation of everything. Milestone in the decline of federalism!)*

Can Congress exclude lottery tickets from interstate commerce?

- Congress does not have the General Welfare/Police power. But Congress can regulate interstate commerce and ban interstate sales of lottery tickets.

Are lottery tickets subjects of commerce?

Court:

- Yes. They are carried across state lines and are bought and sold. Have value because people pay for them. Carried for a price.
- If Congress can prohibit diseased cattle, they can prohibit the "widespread pestilence of lotteries." *(Note: what is the relevance? Would it be any less a regulation if goods were "moral?")?*

Dissent:

- No. The ticket is just a receipt. What is bought is a chance. Like a K, which is shipped, it is not commerce, only evidence of a legal relationship.
- Whole point of commerce power was to move impediments and facilitate commerce! What is being done here is counter-intuitive.

The Commerce Power (cont'd)

Theories of Interstate Commerce Regulation *(cont'd)*

3. The "Bar" Theory of Interstate Commerce (cont'd)

The Lottery Case

> *Graglia: Lottery tickets are clean in themselves. Sick cattle were a danger to other commerce (cattle), unlike lottery tickets.*

Thus, Congress can regulate commerce AS A PRETEXT so as to suppress lotteries. After The Lottery Case, Congress can do anything (i.e. police power not delegated to it in Constitution) as long as they put it in the form of an interstate commerce regulation. What limitation could possibly be imposed?

After The Lottery Case, Congress passed the Pure Food and Drug Act (barring interstate shipment) to protect our health – uh! – regulate commerce (Wink. Wink.) Then they passed the White Slave Act (barring the interstate shipment of women for immoral purposes) – just regulating commerce!! Also consider federal anti-kidnapping statute.

The Child Labor Case (Hammer v. Dagenhart, 1918)

Congress can't regulate production of products by child labor by barring shipment of goods. So Congress bars the interstate shipment of goods made by child labor. Held: that is a PRETEXT USE of the commerce power and is unconstitutional. (Furniture shipped is intrinsically harmless!)

Why weren't Lottery, Pure Food/Drug Act, and White Slave Act held to be pretext uses?

Court:

- The child labor goods are intrinsically harmless, unlike lottery tickets, rotten meat, or prostitutes. (*But Lottery tickets are harmless!! Court is trying to draw a distinction rather than explicitly overruling Lottery, A lot of federal statutes are based on the Lottery ruling and would have to be overruled.)*
- It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.
- If Congress can thus regulate these matters, all freedom of commerce will be at an end and the power of states over local matters will be eliminated, and thus our system of government will be practically destroyed.

(Holmes) *Dissent:*

- The harmlessness of the goods is irrelevant to the issue of whether the statute is a regulation of interstate commerce. It is. And the pretext test is no good. How can judges determine the honesty of legislators?
- As long as within Congress' power, they can have whatever ulterior motives they want. Congress is clearly regulating that which it has the power to do (prohibiting shipment); no big deal if it has another affect.

The New Deal and the Commerce Power

Schechter Poultry (1935) National Industrial Recovery Act of 1933 (NIRA) dictated a minimum wage. Held unconstitutional - - the chickens are not in interstate commerce; the flow of commerce has ended in NY; thus, the NIRA as applied to Schechter is not a regulation of interstate commerce.

> *Affects Theory* argued to the court, which unanimously held unconstitutional:
> - Wages affect prices, which affect interstate commerce. The court said this argument proves too much. If this is true, everything affects interstate commerce. This is an "indirect" effect on commerce
> - Would override states authority to deal with domestic problems arising from labor conditions in their internal commerce.
> - Cardoza: to find "directness" here would be to find it almost everywhere.

Carter v. Carter Coal Co (1936) Bituminous Coal Act controlled the wages of miners. The Act was held unconstitutional because production (mining) is a purely local activity.

> *Affects Theory* was argued. The miners' wages affects interstate commerce because the workers may strike and affect the supply of coal. The court rejected this argument because the effect was not direct.
> - Stream of commerce hasn't begun yet (reverse of Schechter). Federal power does not attach until flow of commerce has begun.
> - What is the difference between direct & indirect?? It is just a distinction the court dreamed up so as not to allow the govt to control everything.

THEN CAME THE COURT PACKING PLAN PROPOSED BY FDR! THE COURT HAD A CHANGE OF HEART. . . . .

NLRB v. Jones & Laughlin (1937) J&L (producer of steel) discriminatorily discharged employees in violation of a statute for their participation in union activities. E.C. Knight, Schechter, and Carter held that production is not commerce. Court states that Carter and Schechter are not ruling here (no further explanation). Held: the statute is a regulation of commerce because workers' wages have a direct effect on commerce (the effect of a strike may be immediate and catastrophic). "*Labor dispute theory"*

NLRB v. Harry Marks (1937) Court applies NLRB v. Jones despite the fact that this industry is smaller and the company is smaller. Still "affects" commerce. *(Note: No application of the NLRA has ever been held unconstitutional.)*

Wickard v. Filburn (1942) The Agricultural Adjustment Act imposed quotas on a small farmer's wheat crop for home consumption.

- Substantial economic effect theory: even if it is local, not commerce, and indirect, it can still be regulated if it has a substantial economic effect on interstate commerce.
- Homegrown wheat reduces mkt demand; therefore, Congress can regulate.
- "Aggregate Effects" – Although one's own contribution to the demand for X (wheat) may be trivial by itself, it is not enough to remove him from the scope of federal regulation where, taken together w/ many others similarly situated, it's far from trivial

The New Deal and the Commerce Power

U.S. v. Darby (1941) Fair Labor Standards Act prescribed a minimum wage and maximum hours for workers.

§1 prohibits interstate shipment of goods produced in violation of the act
§2 prohibits the employment of workers in the production of goods for interstate shipment at other than prescribed wages and hours.

1) It was argued that §1 was a use of the commerce power as a PRETEXT to regulate labor policy. The court rejected the pretext argument – whatever the motive, if the regulation is not prohibited by the Constitution, then it is within the plenary power of Congress.

2) §2 was justified by the "Bootstrap" theory:
   - Congress can bar the INTERstate shipment of anything
   - Congress can bar the INTRAstate production to facilitate the interstate bar.
   - Therefore, §2 is constitutional because it affects the enforcement of §1. (Legitimate method of effectuating the bar.)

§ 2 can also be justified on the ground that production for interstate commerce is likely to affect commerce.

> Darby said the Congress can bar the interstate shipment of anything, but that was not what it held.
>
> *Hypo: Congress bars interstate shipment of goods made by polygamists*.
>
> The prohibition of interstate shipment of goods not made in compliance with labor standards significantly affects commerce by preventing unfair competition. Because of that competition (without standards), shipment of those goods will spread the evil of poor working conditions. "SPREAD THE EVIL" theory justifies Darby and Lottery.
>
> But the shipment of goods made by polygamists will not amount to unfair competition, or spread the evil of polygamy to other states. Therefore, the ban is unconstitutional despite the dicta of Darby.

Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Furthermore, these purposes and motives of regulating interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control. Also, the power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce as to make such regulation appropriate means to the attainment of legitimate ends.

The Commerce Power and Crime

Perez v. U.S. (1971) Federal loan-shark statute is justified under the Commerce Power
(Exercising police power under affects theory – usually bar theory used)

Commerce Clause reaches three categories of crimes

- Interstate shipment of banned goods
- Protection of the instrumentalities of interstate commerce
- Those activities AFFECTING commerce

The loan-shark statute falls under (3) because Congress has found that loan-sharking supports organized crime, and organized crime AFFECTS interstate commerce.

- However, the Court said, "we do not infer that Congress must make particularized findings

Perez argued that he was too small to affect interstate commerce. But the Court rejected that argument because the aggregate effect of loan-sharking affects interstate commerce; and if a CLASS OF ACTIVITY affects commerce, Congress may act against any member of that class (see Wickard).

Perez could have argued that he was not in organized crime, thus his loan sharking was not affecting interstate commerce (only organized crime loan sharks do); therefore, he, Perez, was not a member of this class.

- An answer to this would be that it is difficult to determine who is in organized crime. Therefore, to prevent the evil of loan-sharking, all loan sharks can be prohibited.
- *Dissent*; All crime constitutes a national problem; Congress can not deal with crime as it does not have a police power.

U.S. v. Bass Statute: Felons can't possess firearms. The Court read the statute to apply only to interstate firearms.

Scarborough v. U.S. Conviction under the Bass statute affirmed because the firearm had once moved in commerce.

Modern Uses of the AFFECTS COMMERCE Theory

Maryland v. Wirtz (1968) Extended Fair Labor Standards Act of 1938 (FLSA) to employees not in interstate commerce but whose fellow employees were covered. The court rejected both a "trivial impacts" defense, and a "state autonomy" defense and upheld the statute on 2 AFFECTS commerce grounds:

- Unfair competition (Darby) theory. The interstate goods of that enterprise will have a competitive advantage because the enterprise saves money on its production of INTRAstate goods.
- Labor dispute (Jones & Laughlin) theory. If the INTRAstate workers aren't paid the minimum wage they may strike and close the plant – then the interstate workers can't produce.

The 1968 amendment to the FLSA extended coverage to state employees in schools and hospitals on an AFFECTS commerce rationale: if the workers strike, they will close the schools/hospitals and they won't buy pencils, bandages, etc. *(Dissent: can't regulate state entities – govt immunity)*

Court should have used Scarborough and Sullivan rationale – once travels across a state line, can be regulated.

National League of Cities v. Usury Later overruled Maryland v. Wirtz re: hospitals and schools based on state sovereignty, not substantial effect or rational basis test.

Garcia v. San Antonio MTA Later overruled Usury. Court can not protect states from federal govt.

Hodel v. VA Surface Mining (1981) A strip mining statute was enacted to protect the aesthetic beauty of the land. It was upheld on AFFECTS commerce grounds: if the land is not restored, it will be less useful and may cause environmental hazards that will AFFECT commerce. *(How does impairing the beauty of the land, quality of life, etc. affect interstate commerce? Graglia: This gives away the game!)*

Rehnquist: This case stretches powers of Congress to "nth" degree. *(So, where are the limits?)*

The Commerce Power and Racial Discrimination

13th Amendment (1865)
"Neither slavery nor involuntary servitude". . . ."Congress shall have power to enforce. . . .by appropriate legislation"

Civil Rights Act of 1866
Passed based on 13th amendment, attempting to overcome black codes in South. Vetoed by Johnson (13th amendment didn't justify) veto overridden, but fear that Johnson was right.

14th Amendment (1868)
Passed to overcome Constitutional question. Constitutionalize 1866 Civil Rights Act

Civil Rights Act of 1875
Prohibited discrimination by private restaurants, hotels, etc. based on the 14th amend. Held unconstitutional because the 14th amendment only prohibits state action.

Elections of 1877
Question regarding outcome. Apparently, Democrats gave Republicans the election if Republicans called off Reconstruction measures. (military occupancy of South)

Civil Rights Act of 1964
Provided injunctive relief against discrimination in public accommodations. First major Civil Rights Act since 1875. There was a big debate over whether to base it on the 14th amendment or the Commerce Power. It was based on the Commerce Power (and partially on the spending power). It prohibits:

- *(WHAT?)* Discrimination based on race, color, religion, or national origin (Title 7, also based on sex)
- *(WHERE?)* Lodgings (unless less than 6 rooms and proprietor lives there), restaurant, gas station, movie theaters, concert halls, sports arenas, stadiums, places of exhibition or entertainment, establishment located within premises of one of the above locations or, if such an establishment is within premises, or it serves patrons of covered establishment.
- *(IF)* Affects commerce or supported by state action

<u>Heart of Atlanta Motel v. U.S.</u> (1964) Challenged the Act. The Court upheld the Act and rejected the PRETEXT argument. The fact that this is a regulation of moral evil (a PRETEXT use) does not matter - - that does not preclude Congress from exercising its Commerce Power. The Court justified the Act under the Commerce Power because of the burdens racial discrimination place on interstate commerce (prevent Blacks from traveling interstate – disruptive, harmful affect on interstate commerce).

The Commerce Power and Racial Discrimination (Cont'd)

Katzenbach v. McClung (1964) Ollie's B-B-Q challenged the Act. Held: If substantial portion of food traveled in commerce, Congress can regulate because (it had a rational basis for finding that) the regulated activity (discrimination) AFFECTS commerce (Blacks travel less and spend less on food. Business in general suffers; less food bought) (Although not cited, relying on Sullivan analysis)

> *Graglia: Does this prove too much? What if lousy cooking is an impediment to business? Or ineffective policing? Can Congress mandate cooking classes or police training?*

Other possible grounds (not given by the Court) - - BAR + BOOTSRAP THEORY

- Prohibits interstate shipment of goods to discriminators
- Prohibit receivers of food from discriminating to enforce the bar on shipment.

Aggregate Effects Theory – although effects of one instance are minimal, they add up. Have to regulate all or none.

Rational Basis Test – doesn't have to affect commerce, but merely:

- Supreme Court determines only that Congress had a rational basis for finding that "x" activity affects interstate commerce
- If there is a rational basis, are the means selected to eliminate "x evil" reasonable and appropriate?
- If any arguable connection between the regulation and commerce, S.C. is not the proper entity to review a reasonable economic decision of the legislature. Congress deserves deference on economic matters. Moral ends can not justify or invalidate a regulation of commerce. *(Easy test, basically impossible to fail)*

Hypo: Armenian restaurant owner challenges the Civil Rights Act that prevents him from discriminating against Turks.

Could Congress have a rational basis for believing that the Armenian-Turk discrimination affects interstate commerce? Yes*. (But, Graglia – No!)*

> Does the aggregate class of regulated conduct affect commerce? (What is the class? Armenian-Turk discrimination? National origin discrimination?)
>
> - *Graglia: Neither AFFECTS commerce. Upholding the Act as applied to Ollie's B-B-Q is based in reality (the situation of Blacks in the South) & is honest. To apply it to the Armenian is based on fiction and pretense and should be unconstitutional (but would be upheld anyway). The same would be true applying the law to a restaurant in the North that refused to serve Blacks – no impact on commerce. Civil Rights Act was addressing a real problem at the time, but doesn't exist today (would be bad for business). Needed to break deadlock – deadlock was bad for business and good for no one. Once broken, problem will not recreate self.*

The Taxing Power

Article 1 §8:
"Congress shall have the power to lay and collect taxes for the general welfare"

McCray v. U.S. (1903) 10 cents per lb. tax on yellow oleomargarine (compared to 1/4 cent per lb. tax on white oleomargarine); "pretext" tax was not knocked down. Court ruled that it was not its place to overrule legislative branch. Must assume that it is a tax to raise revenue *(although this tax could not possibly raise any money!)*

U.S. v. Doremus Tax on drug dealers upheld. Incidental motives do not invalidate. Look at primary purpose of tax and whether measures will serve that purpose.

Bailey v. Drexel Furniture (The Child Labor Tax Case) (1922) Congress tried to use the bar theory to prevent child labor by preventing interstate shipment of child-labor-made-goods, but the court held that the measure was unconstitutional in Hammer v. Dagenhart. So Congress put a tax on the use of child labor to suppress it. Held: This so-called tax is not really a tax, but an unconstitutional regulation of child labor.

- *Tax:* Revenue raising measure for government
- *Penalty:* Financial extraction that deters certain type of activity.

*All taxes affect conduct, so are also penalties. Penalties raise revenue, so also a tax.

How can we tell a tax from a regulation?

The court looks to the purpose of the measure. If the primary purpose is to raise revenue it is a tax. If the primary purpose is to sanction conduct, it is a regulation.

> *Graglia: Why should the court look to the purpose? The purpose is just the objective effects of the measure. If purpose is a subjective mental state, why should that be relevant? How could it be determined?*

Court: Does not contradict U.S. v. Doremus. Incidental regulatory motives can be tolerated, but there is some point at which the penalizing features have been extended so far that the so-called tax loses its character as such and becomes a mere penalty with characteristics of legislation and punishment.

How did the Court determine the purpose of the Child Labor Tax?

NOT by looking at the legislative history. That would be futile – Congress could just pass the same law against and create a more favorable legislative history.

On the face of the statute:

- The tax is not proportionate to the use of child labor
- Knowledge requirement is normally a requirement of a criminal statute
- The statute authorizes the Secretary of Labor to inspect factories
- It provides a heavy exaction for a departure from a detailed and specified course of conduct in business.
- Therefore, this is an unconstitutional pretext use of the taxing power to regulate child labor.

The Taxing Power (cont'd)

AFTER THE CHILD LABOR TAX CASE. . . . .THE COURT STARTS UPHOLDING PRETEXT TAXES AGAIN!

Nigro v. US (1928) Same statute in question as in Doremus, but tax has been raised from $1/year to $3/year. Held: if there were any doubts about the motive of the tax before, they have been removed by this amendment which makes this more than just a nominal tax.

U.S. v. Kahriger (1953) Upheld tax on professional gamblers, requiring them to register with the IRS. Force criminals to register so state police can find them – addresses published in post office.

> *Court:* All taxes discourage behavior. Taxes can't be held invalid just because taxes collected may be negligible. Power to tax is extensive
>
> *Dissent:* The context of public furor over illegal gambling under which this law was enacted show that it is not a tax, but a pretext use of the taxing power to regulate gambling. Violation of 5th amendment rights.
>
> *Graglia: The powers of Congress do not depend on circumstance of public furor. Anyway, it is clear that a tax must raise revenue. This measure raised no revenue.*

McCray , Kahriger, Nigro, and Doremus were taxes but the Child Labor Tax was not a tax. That is ridiculous!! McCray and Kahriger were more obviously regulations than was the Child Labor Tax. Only distinction is that they did not involve a heavy exaction for a departure from a detailed course of business. *Graglia: Not a legitimate distinction.*

Why more doubts about validity of (regulation via) taxes?

- Fritters away confidence and good will of people when taxed for questionable reasons. (Concurring opinion, Kahriger)
- Easier to define what is a tax than it is to define interstate commerce

The Spending Power

What limits are there on Congress' power to spend?

U.S. v. Butler (1936) Two part plan: tax and payments to farmers. No constitutional objection to tax itself, but federal payments to farmers inducing them not to grow crops, held unconstitutional.

1. *Standing to Sue*

Frothingham v. Mellon (1923) **Federal taxpayers have no standing to challenge federal spending.** Their interest is too minute and indeterminable. Taxpayers in a municipality have a more direct and immediate interest, but the relation of a taxpayer to the federal govt is insignificant.

- P's interest is not different than anyone else's. She is not being treated differently from anyone else. The court only intervenes when an individual is being specifically harmed by the govt.
- Court would have to have general review power over acts of Congress to take this case, as P's claim is too minute and indirect.
- ➢ *Note: this case foreclosed huge potential field of litigation.*

In Butler, the farmer has standing to sue, because the funds were "earmarked" for cotton farmers, separating him from the general public interest.

2. *What are the limits on the spending power?*

- Spending must be for "**General Welfare**"
  - ➢ But when something is for the general welfare is for Congress to say; thus, no limit.

- Madison Theory & Hamilton Theory
  - ➢ *Madison Theory:* The power to spend is limited to spending in the exercise of an enumerated power. Congress can only spend where it can regulate.
  - ➢ *Hamilton Theory:* The powers to tax and spend are separate enumerated powers that are only restricted by the "General Welfare" provision.

The Butler court says it adopts the Hamilton Theory, but then holds the measure unconstitutional on the ground that "Congress cannot obtain by purchase what it is powerless to command." **This is exactly the Madison Theory.**

- The Measure is coercive
  - ➢ This is largely irrelevant. This measure was not coercive; it was voluntary and increased farmers' choices. Farmers were better off whether they took the payoff or not.

The Spending Power (cont'd)

2. What are the limits on the spending power? (cont'd)

Steward Machine Co. v. Davis: (1937) Upheld a Social Security tax that took money from the State unless the State enacts an unemployment program approved by the federal government. This was coercive. Unlike Butler, it reduced the States' choices – yet it was upheld.

Helvering v. Davis (1937) Social Security old age benefit payments were upheld. What is "for the General Welfare" is for Congress to determine.

Is the power to spend all power?

If Congress can spend for anything that is for the general welfare, Congress has all power. This subverts the whole scheme of limited enumerated powers.

No. This is just the power to spend, not the power to command.

- *BUT*, the govt can take all the money through the tax power and only give money back to those who do what they say. Unlimited control of resources makes the spending power all power.
- *No.* There are political limits on the govt.'s control of resources - - taxes meet political resistance. For practical purposes, taxing power not infinite.

South Dakota v. Dole (1987) 5% of highway money withheld unless states raise the drinking age to 21.

Limits on the spending power:

- General welfare
- If federal funds are conditional, it must be clear and unambiguous so the state can make a cognizant choice.
- Relatedness - - the condition can not be unrelated to the federal interest in the grant project *(This is related to the safety of highways. Varying age limits cause teenagers to drive to the border and drink)*
- The condition can not violate other independent provisions of the Constitution. *(This exercise of the spending power does not violate the 21st amendment – repeal of prohibition)*

The Bill of Rights and Due Process

Does the Bill of Rights apply to State and municipal government?

1. Pre-Civil War: NO

Barron v. Baltimore (1833) Barron sued the city for just compensation for a 5th amendment taking of his wharf. Held: the 5th amendment (& Bill of Rights) applies only to the national government.

- History: The Bill of Rights was not intended to restrict state and local governments
- The ratifiers (States) feared tyranny from the central government, not themselves. They had NO REASON to want to limit themselves. States are limited by state constitutions.
- Textual: General provisions of the Constitution are meant to apply only to the national government. Where the Constitution does limit states, it expressly and explicitly says so; e.g. Art I §9 prohibits ex post facto law, and Art I §10 prohibits states from passing ex post facto laws.
- ➢ Support from Marshall is tied in also: "If framers intended Bill of Rights to be a limitation on powers of states, then they would have expressed that intention in plain and intelligible language."

2. Post Civil War: Still NO

Slaughterhouse Cases (1872) White butchers challenged a LA zoning law that put them out of business. The challenge was based on the 13th and 14th amendments.

- The court rejected the 13th amendment claim that the law subjects the butchers to involuntary servitude
- The butchers allege that the law deprives them of property without just compensation and deprives them of equal protection of the laws.

The Court's examination of the history of the post Civil War Amendments revealed that the PERVADING PURPOSE of the 13th, 14th and 15th amendments was to protect the Black race.

> After the 13th amendment freed the slaves, southern states enacted Black codes denying Blacks the most basic civil rights. Congress passed the 1866 Civil Rights Act to protect the basic civil rights of Blacks. The 14th amendment was proposed and (improperly) ratified to constitutionalize the 1866 Act (as well as to keep the rebels out of office).

The Bill of Rights and Due Process (cont'd)

Does the Bill of Rights apply to State and municipal government? (cont'd)

3. Privileges and Immunities of Citizens of the United States. What Are They?

The fundamental rights which belong to the citizens of all free governments (e.g. protection by the govt, to acquire and possess property of every kind, to pursue and obtain happiness).

- This interpretation covers all civil rights. If this great restriction is placed on the states, the Court would become a perpetual censor upon all legislation of the states.

- - OR - -

The privileges and immunities clause protects what the rest of the Constitution protects. I.e. adds NOTHING and makes it redundant!

- This so-called interpretation reads the clause out of the Constitution.

Faced with this all or nothing choice, the Court chooses nothing, so as to avoid becoming a perpetual censor upon the state legislatures. Court rejected the butchers' taking and Equal Protection Claim, stating the clause only applies to discrimination based on race.

4. Due Process Incorporation

What does due process of law mean?

Words have meaning only because they are used by humans attempting to communicate. They have no intrinsic meaning. "Due process of law" has an ancient and well-known meaning.

Due Process is just a substitution for "law of the land" which was the phrase used in the Magna Carta. "Law of the land" meant that govt officials could not act against an individual except pursuant to established law (established procedures). *The law restrains govt officials but does not restrain the lawmaker in his law-making capacity.*

Murray v. Hoboken Land and Improvement Company (1855) Due process = Law of the land. BUT the clause is a restraint on the legislature. The legislature is restrained by:

- The other clauses of the Constitution
  (Then due process adds nothing & is trivial)
- The common law of England
  (How can it make sense to bind the legislature to 18th century law?)

The Bill of Rights and Due Process (cont'd)

Does the Bill of Rights apply to State and municipal government? (cont'd)

4. Due Process Incorporation (cont'd)

English Common Law?

Powell v. Alabama Due process requires that ignorant criminal defendants be given a competent lawyer in capital cases. *This was not part of English common law; under common law, D's were not allowed to have lawyers. Where did this come from?* ***The Court made it up!***

Hurtado Criminal prosecution without a grand jury indictment meets due process requirements even though the common law did require a grand jury indictment.

Due Process requires only that the principles of liberty and justice are preserved. *(What does this mean? They're making stuff up again!)*

Selective Incorporation

Palko v. Connecticut (1937) Can Connecticut try Palko a second time when the first trial had error?

- Palko argued that Due Process incorporated the 5th amendment. That the Bill of Rights are the "principles of liberty and justice" meant by Hurtado.
- Held: Connecticut can try Palko again without violating Due Process. Due Process incorporates some of the Bill of Rights, but not all, and not the 5th. **Due Process requires those things that are of the very essence of a scheme of ordered liberty**. Is this form of double jeopardy so shocking that our polity will not endure it? No! *(Graglia: What could be?)*

Adamson v. California (1947) State prosecutor pointed out that D. didn't testify. This would violate D's 5th amendment rights in a federal trial. But under Palko, not all of the Bill of Rights are incorporated under Due Process and applied to the states, and the 5th amendment is not.

The DP std: "the canons of decency and fairness of English speaking people"

Justice Black, dissent: History reveals that Due Process was meant to apply the first 8 amendments to the states. (Total Incorporation). The majority's "canons of decency and fairness" is not a standard, but natural law talk.

Justice Frankfurter: Black is wrong about total incorporation

- If the 14th amendment were meant to apply 1 – 8 to the states it is a very funny way to say it. *(Black: "privileges and immunities" clause says it is OK)*
- Due Process is already in the 5th amendment. If Due Process incorporates 1 – 8 that's redundant.
- Due Process means the canons of decency and fairness of English speaking people. *(Black: that's no standard)*

The Bill of Rights and Due Process (cont'd)

Does the Bill of Rights apply to State and municipal government? (cont'd)

4. Due Process Incorporation (cont'd)

Duncan v. Louisiana (1968)

- Due Process = fundamental fairness - Palko, Adamson. The standard is whether a jury trial is fundamental to the Anglo-American scheme of justice.
- Jury trials are required by fundamental fairness.
- Therefore, A 6th amendment jury trial is required

Justice Fortas: Due Process may require a jury trial, but does it necessarily require a 6th amendment jury trial (i.e. a jury of 12 and a unanimous verdict)? NO, that doesn't follow. The courts conclusion should be that a jury trial is required, but not a 6th amendment jury.

Williams v. Florida (1970) Does a jury of 6 violate Due Process? Held: No. The 6th amendment does not require a jury of 12, a jury of 6 will do.

- But in 1791, "jury" meant jury of 12. Now the court is diluting the 6th amendment because they have applied it to the states and shouldn't restrict the states too much. But that weakens the 6th amendment for federal cases. Now federal trials can have juries of only 6 as well.
- Why did the court interpret the 6th amendment? Why not just say a jury of 6 passes the "fundamental fairness" test of Palko and Adamson?

Apodaca v. Oregon (1971) Does Due Process require unanimous jury verdicts?

8 Justices say Due Process = 6th amendment. 4 yes, 4 no
1 Justice says Due Process = "fundamental fairness." No.
5 say No. Due Process does not require unanimous juries.

U.S. v. Lopez

Pre-Lopez Rumblings of Discontent

National League of Cities v. Usery Court invalidates the application of the FLSA to state employees, not on commerce grounds, but because it impermissibly interfered with integral governmental functions of the state (intergovernmental immunity)

Garcia v. San Antonio MTA Explicitly overruled Usery.

U.S. v. Lopez: Commerce Clause Act is Held Unconstitutional

United States v. Lopez (1995) Congress enacted the Gun-Free School Zones Act, which made it a federal offense for any individual to knowingly possess a firearm at a place that the individual knows or has reasonable cause to believe is a school zone. Lopez was convicted for violating this Act and, in his appeal, the Court, after almost 60 years, invalidated a law as exceeding the Commerce Clause.

Rehnquist's opinion for the Court

1) Three broad categories of activity that fall under commerce power:
   - The use of channels for interstate commerce
   - The instrumentalities of interstate commerce
   - Those activities that substantially affect interstate commerce
   - ➢ *No mention was made of a rational basis test*
2) The statute fell under the 3rd category. The Act has nothing to do with commerce or any sort of commercial enterprise. Even Wickard, as far reaching as it was, involved economic activity in a way possession of a gun in a school zone does not.
   - ➢ *The court suggests a substantiality limit on the affects doctrine, but made no attempt to explain how this is to be determined. Labeling the regulated activity as non-commercial is irrelevant to Commerce Clause analysis under Wickard*
3) No jurisdictional element. The statute did not expressly make some connection with interstate commerce an element of the crime, and there were no legislative findings with regard to any affect upon interstate commerce. Though findings are not necessary, they help.
   - ➢ *Congress probably assumed that the source of its power was no longer a matter of concern. Under previous decisions, it would have made a difference if Congress had simply asserted a "finding" that guns near school zones affect interstate commerce. Congress didn't "play the game" here.*
4) Government arguments on the affects doctrine
   - Guns ➙ handicaps education ➙ less productive citizenry
   - Guns ➙ violent crime ➙ insurance ➙ costs are spread
   - Guns ➙ violent crime ➙ deters people from moving to those areas
5) Under the government's reasoning, Congress could regulate any activity it found was related to economic productivity of individual citizens (ex: family law, education). The result "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."
   - ➢ *But the Court has permitted Congress to exercise a general police power under the bar doctrine (Lottery) and the affects doctrine (Hodel)*

U.S. v. Lopez (cont'd)

Rehnquist's opinion for the Court (cont'd)

6) The court gave no indication that its new-found interest in challenging questionable uses of the affects doctrine extends to challenging equally questionable uses of the bar doctrine. It never cited Sullivan or Scarborough.
   - Problems with invalidating a statute that prohibits interstate transportation on the ground that it is a police power rather than a commerce measure is that a statute can be, and often is, both
     - A ban on interstate shipment of child-made (low cost) goods will impact the interstate market for goods of that type
     - It was not fictional to find that racial discrimination in places of public accommodation in the South impeded interstate travel by blacks
   - The bar doctrine is now the basis of so many important and entrenched federal statutes as to make its rejection almost inconceivable. Once it is understood that the effect of the bar doctrine is to give Congress the police power by what is essentially a trick, there seems to be little point in requiring that the trick actually be performed.

   So what is to be gained by objecting to uses of the affects doctrine as fictional when the bar doctrine is little more than an invitation to indirection and pretense? The only alternative realistically available to the Court is to totally and candidly disassociate itself from Congress' use of either doctrine.

Kennedy's Concurrence (with O'Connor)

1) Kennedy qualifies his opinion by advising great restraint on the part of the Court and reassuring that earlier Commerce Clause decisions are not called into question. He warns of the definitional approach of E.C. Knight and of disturbing established principles of commerce power. But he voices concern over encroachment into areas of traditional state concern.
   - *Like Rehnquist, Kennedy fails to acknowledge that the bar doctrine had already given Congress the power he warned against.*
2) Kennedy takes an apologetic position for the Court's taking any role in protecting federalism even though he acknowledges that the role primarily belongs to Congress and involves a substantial amount of political judgment. However, he says that in no other case did the Court hold that the commerce power may reach so far as would be required to uphold the Gun-Free School Zones Act.
   - *It would probably be enough for Kennedy if the statute required, as in the Scarborough statute, that some person or thing involved in regulated activity once crossed a state line. Congress just simply has to make some "finding" that the regulated activity affects interstate commerce. Kennedy's opinion is therefore very limited.*

U.S. v. Lopez (cont'd)

Thomas's Concurrence

1) While the Court sought to limit the scope of the affects doctrine with a requirement of substantiality, Thomas argued for rejecting it entirely. He took an originalist approach and undertook to determine the Framers' intent behind the Commerce Clause. *(Graglia: doesn't seem possible to abolish affects doctrine entirely. Need a definition for what is and isn't commerce)*
   - If an effect on commerce is sufficient to justify federal regulation of an activity, several of Congress' enumerated powers would be superfluous
   - Gibbons has been fundamentally misunderstood. Marshall took great pains to make clear that Congress could not regulate intrastate commerce and took this to mean that Congress could not regulate many matters that affect commerce. *(Not the most natural reading given Marshall's strong nationalism & extremely broad definition of fed. power in McCulloch, as well as other statements in Gibbons that the only limits on the commerce power may be political.)*
   - Thomas urged a return to the definitional approach stated in E.C. Knight and Carter. *(This would render the commerce power largely ineffective. But effective national control over interstate commerce was the principal motivation of the Constitutional Convention. The intended scope of the commerce power is uncertainty, & uncertainty is not a proper basis for judicial invalidation of legislative action.)*
2) Thomas objected to the affects doctrine because it appears to grant Congress a general police power. When combined with the aggregation principle, the doctrine would permit Congress to prohibit weapons possession generally even though Congress could not single out gun possession.
   - ➢ *But Congress has singled out gun possession for prohibition based on the bar doctrine without any need of either the affects doctrine or the aggregation principle (Scarborough) Thomas doesn't even mention the bar theory, which could have been used here.*

Steven's Dissent

- Stevens apparently took the view that the statute was valid under both the bar doctrine and the affects doctrine, but did not undertake to explain how this analysis could fail to make virtually any regulation valid under the Commerce Clause.

Souter's Dissent

- Souter rejected the pre-1937 restrictive view of the commerce power, noting that the Court's invalidations of Commerce Clause measures were, like the substantive due process decisions, based on notions of liberty and property characteristic of laissez-faire economics.
- Rational basis means that the challenged law will not be subjected to judicial policy judgments. This type of review in Commerce Clause cases is appropriate because: *Nothing in the Clause compels judicial activism; and * Nothing about the judiciary as an institution made it a superior source of policy on the subject. *(But Souter, in his brief career on the Court, has already established himself as a judicial activist. Graglia thinks he is an idiot!)*

U.S. v. Lopez (cont'd)

Souter's Dissent (cont'd)

- The Gun-Free School Zones Act passes rationality review beyond a doubt because the commercial prospects of an illiterate State or Nation are not rosy.
  (To say that Congress can regulate education because of its commercial impact is obviously to say that the commerce power is effectively all power)

Breyer's Dissent

1) The Gun-Free School Zones Act is well within the scope of the commerce power. Guns significantly affect education, which is intertwined with the Nation's economy.
   (If Congress can regulate guns near schools because they affect education which affects commerce, then it can regulate education itself, making nonsense of the idea of enumerated powers. Breyer is just lying when he says that this could be upheld while still maintaining a distinction between commerce and non-commerce. Not possible.)
2) Three problems with the Court's decision:
   - It is inconsistent with precedent
     The Gun Free School Zones Act is distinguishable from statutes upheld in other cases on the grounds that it does not even refer to commerce – trivial as this is.
   - It relies on an irrelevant commercial-noncommercial distinction
     The regulated activity in this case did seem peculiarly noncommercial
   - It threatens legal uncertainty
     The only legal certainty unsettled by the decision is the certainty that everything may be regulated under the guise of the Commerce power, a conclusion that can not be correct

Note: Graglia: Court should do what dissenters want to do, but do it openly. Dissenters advocating "pretend" review. Court should just abandon pretense of reviewing. Pretense worse than no review. Each expects other to review, validates the other, neither actually reviews. Real review by the court is not feasible, realistic or appropriate.

U.S. v. Lopez (cont'd)

The Role of Courts in Commerce Clause (Federalism) Review – Post Lopez

Lopez seems to indicate the Court's intention to undertake serious judicial review of Commerce Clause measures by limiting the affects doctrine. But a serious attempt to limit national legislative authority would be a serious mistake; the Court can not do it, and the country neither needs it or seems to want it.

- Judicial review on the federalism issue is fundamentally different than review to protect individual rights. Protection of individual rights is an ordinary function of judges, determining the proper allocation of political power is not. Federalism review is better undertaken by elected federal representatives than judges
- It is unrealistic to think the Court can place real limits on the commerce power by tightening the affects doctrine, when this would induce greater reliance by Congress on the bar doctrine
- Judicial review of exercises of the commerce power under the affects doctrine is inappropriate because the principled limits can not be defined. The question is unavoidably one of degree, and the Court is in no position to contradict congressional determination of the substantiality of the effect.

The Court's explicit withdrawal from Commerce Clause review would merely make *de jure* what is now *de facto* (despite Lopez). It would mean the end of the embarrassing and demeaning charade that is "rational basis" review. It might even aid in the ethical training of lawyers in that they would no longer have to be taught, as beginning law students, that constitutional federalism is largely a matter of tricks that they must learn to perform.

Making the Court's withdrawal from Commerce Clause review explicit would put responsibility for the expansion of federal power where it belongs, squarely on Congress.